

IN THE SUPREME COURT OF OHIO

EUGENE SANTOS,)	On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District
Appellant,)	
vs.)	
BUCKEYE 5, LLC,)	Court of Appeals Case No. 22 MA 0117
Appellee.)	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT EUGENE SANTOS

John N. Zomoida, Jr. (0072742)
Anthony & Zomoida, LLC
40 South Main Street
Poland, Ohio 44514
Tele: (330) 259-0043
Fax: (330) 259-9094
John@Anthony-Zomoida.com

COUNSEL FOR APPELLANT, EUGENE SANTOS

Charles E. Dunlap (0012827)
7330 Market Street
Youngstown, Ohio 44512
Tele: (330) 702-0033
Fax: (330) 758-8290
cedunlap76@charlesdunlaplaw.com

COUNSEL FOR APPELLEE, BUCKEYE 5, LLC

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

This case presents the following important issue for the future of Ohio consumers: whether Ohio's Home Solicitation Sales Act (the "HSSA") requires a seller to refund all payments made under a home solicitation sale when a buyer cancels the sale.

The decision of the court of appeals contravenes the clearly expressed intent of the General Assembly. The HSSA provides that a buyer may cancel a home solicitation sale any time prior to the seller providing the buyer with a written notice of the buyer's right to cancel the transaction within three (3) days and that, if the buyer cancels the contract, the seller "shall" refund "all payments made under the contract or sale." R.C. 1345.23(C) & (D)(4)(a). Although the language of the HSSA is unambiguous and conveys a clear and definite meaning that a seller must refund "all payments made under the contract or sale," the court of appeals concluded that a buyer is "only entitled to a refund of money paid for services **not yet rendered** * * *." (Emphasis added.) *Santos v. Buckeye 5, LLC*, 7th Dist. Mahoning No. 22 MA 0117, 2023-Ohio-3602, ¶49.

This case also presents this Court with the opportunity to resolve a conflict that has arisen between the lower appellate tribunals. Several appellate courts have correctly held that a buyer is entitled to a refund of all money paid to a seller under the parties' contract when a buyer cancels the contract, regardless of the amount of work performed by the buyer. *Clemens v. Duwel*, 100 Ohio App.3d 423, 654 N.E.2d 171 (1995); *Patterson v. Stockert*, 5th Dist. Tuscarawas No. 2000AP 01 0002, 2000 Ohio App. LEXIS 6004; and *Garber v. STS Concrete Co., LLC*, 8th Dist. Cuyahoga No. 99139, 2013-Ohio-2700, 991 N.E.2d 1225. Other appellate courts have agreed that a buyer is entitled to a refund of the full contract price when the buyer timely cancels the contract. However, these courts have

suggested that, if the seller can show that the buyer used the HSSA as a “sword” as opposed to a “shield,” a court may make an equitable determination of damages instead of ordering a refund of the full contract price. *Kamposek v. Johnson*, 11th Dist. Lake No. 2003-L-124, 2005-Ohio-344; *White v. Allstate Ins. Co.*, 8th Dist. Cuyahoga No. 92648, 2009-Ohio-5829; *McGill v. Image Scapes, LLC*, 9th Dist. Medina No. 10CA0043-M, 2010-Ohio-6246; and *Griffin Contr. & Restoration v. McIntyre*, 12 Dist. Clermont No. CA2017-11-058, 2018-Ohio-3121, 107 N.E.3d 22.

In this case, the decision of the court of appeals conflicts with the decision of every other appellate court that has had the opportunity to review the issue. As explained by the court of appeals:

Thus, to the extent other courts have held that [the HSSA] affords the homeowner a refund of all money paid under a HSSA contract, regardless of work satisfactorily performed, we disagree. While the *Kamposek* Court contrasted [the HSSA and Consumer Sales Practice Act], it did not read them together in an effort to find harmony and equity. *Kamposek* likewise did not consider the technical meaning of the words “cancellation” or “refund,” which concern future obligations and the return of money for overpayment. Thus, we disagree and reject the analysis of *Kamposek* and its progeny.

Santos at ¶45.

In continuing, the court of appeals stated:

Because we reach the merits of the parties’ argument based on the statutory language, we need not delve into the sword/shield dichotomy employed by certain courts, and repeated by the trial court here, in order to achieve an equitable result. It appears courts have adopted this shield/sword analysis to circumvent an apparent misreading of the statute that leads to wholly equitable results. To the extent the trial court used this sword analysis, we find error. However, we affirm the decision of the trial court, albeit for different reasons.

Id. at ¶54.

The implications of the decision of the court of appeals affect the lives of every resident in the state, which clearly makes this case one of great public interest. The HSSA is a remedial law designed to protect consumers. *Garber, supra*, at ¶14. As such, it should be accorded a liberal construction in favor of consumer. R.C. 1.11; see also, *Einhom v. Ford Motor Co.*, 48 Ohio St.2d 27, 548 N.E.2d 933 (1990). While the HSSA may result in harsh consequences to a supplier, the General Assembly passed the HSSA to protect the residents of Ohio. As explained by the Second District:

The Home Solicitation Sales Act is clear that a consumer has the right to cancel a contract until midnight of the third business day after receiving notice of the right to cancel, and, if notice of the right is not given, the right does not expire. In order to ensure that, upon cancellation, both parties can be returned to their original positions as if the contract had not been made, the Act provides that “where a home solicitation sale requires a seller to provide services, he shall not commence performance of such services during the time in which the buyer may cancel.” “This legislative pronouncement is clearly intended to put the risk on the home improvement contractor who begins performance before giving the consumer proper notice of the right to cancel.” In [*R. Bauer & Sons Roofing & Siding v. Kinderman*, 83 Ohio App.3d 53, 61, 613 N.E.2d 1083, 1088, (1992)], where the home improvement contractor had fully completed performance, we held that the contractor could not rely on completion of performance to avoid compliance with the notification requirement.

(Citations omitted.) *Clemens, supra*, at 177.

Furthermore, the court of appeals’ decision establishes an illogical rule of law that conflicts with the clear and unambiguous language of the HSSA. By its ruling, the court of appeals undermines the legislative intent to protect Ohio residents and infringes upon the legislative branch’s constitutional authority to make laws. If allowed to stand, the decision of the court of appeals would gut the HSSA because contractors would have no practical incentive to comply with it.

Finally, the decision of the court of appeals conflicts with the law in other appellate districts. As matters stand now, a consumer in some appellate districts can cancel a home solicitation sales contract and receive a refund of the full contract price. In other certain districts, a consumer is entitled to a refund of the full contract price unless the contractor can show that the consumer used the HSSA as a “sword.” But in the Seventh District, a consumer is only entitled to a refund of money paid for services not yet rendered. This Court should take this opportunity to resolve this dichotomy.

STATEMENT OF THE CASE AND FACTS

Mr. Santos and his wife, Evelyn, have lived at 3460 Almerinda Drive in Austintown Township, Ohio since 1975. Mr. Santos wanted to remodel his home as a gift to his wife for their 50th wedding anniversary. Consequently, he contacted Appellee to obtain an estimate. After Appellee went to Mr. Santos’ residence, it provided Mr. Santos with multiple estimates for the work totaling \$44,766.79. After Appellee began to work on Mr. Santos’ home, Mr. Santos asked Appellee to perform work that was not covered by the initial estimates. In all, Mr. Santos paid \$48,219.92 to Appellee.

Unfortunately, disputes and disagreements arose resulting in the parties ending their relationship. On May 13, 2019, Appellee filed a mechanic’s lien against Mr. Santos’ home in the amount of \$6,908.00 for money allegedly still owed by Mr. Santos for work performed by Appellee. There is no dispute that Appellee did not give Mr. Santos a written agreement that contained a statement of Mr. Santos’ right to cancel the parties’ contract within three (3) business days. On February 3, 2020, Mr. Santos gave written notification to Appellee of Mr. Santos’ desire to cancel the parties’ contract and requesting a refund of the \$48,219.92 paid by Mr. Santos.

When Appellee failed to refund the money, Mr. Santos filed this action in the Common Pleas Court for Mahoning County, Ohio on August 13, 2020. In the complaint, Mr. Santos prayed for judgment in his favor in the amount of \$48,219.92 for refund of all payments made by Mr. Santos to Appellee because of Appellee's violation of the HSSA.

The matter proceeded to trial before the magistrate on November 17, 2021. The magistrate issued his decision on April 29, 2022. In the decision, the magistrate found that Appellee violated the HSSA by not giving Mr. Santos notice of his right to cancel the transaction within three (3) business days. However, the magistrate found that Mr. Santos used the HSSA as a "sword" instead of a "shield." Consequently, the magistrate made an equitable determination of damages and only awarded Mr. Santos \$6,908.00. The magistrate then credited this amount against the balance that Mr. Santos allegedly still owed to Appellee. This resulted in a net judgment to Mr. Santos in the amount of \$0.00. The magistrate further ordered Appellee to release its mechanic's lien against Mr. Santos' residence.

Both parties filed objections to the Magistrate's Decision, and the trial court conducted a hearing on the parties' objections on September 8, 2022. On October 13, 2022, the trial court issued a judgment entry wherein it adopted the Magistrate's Decision, in part, and modified the Magistrate's Decision, in part. Specifically, the trial court adopted the magistrate's findings that the HSSA was applicable to the parties' contract, that Appellee violated the HSSA by failing to properly notify Mr. Santos of his right to cancel the parties' contract within three (3) business days, and that Mr. Santos effectively cancelled the contract. However, the trial court rejected the magistrate's award of damages to Mr. Santos in the amount of \$6,908.00. Instead, the trial court entered judgment in favor of Mr. Santos in the amount of \$0.00. The trial court also overruled

the magistrate's decision to the extent it found that Mr. Santos still owed Appellee any money and ordering the cancellation of Appellee's mechanic's lien because the trial court concluded there was insufficient evidence to support whether Mr. Santos still owed Appellee any money.

Mr. Santos timely appealed the trial court's decision to the Mahoning County Court of Appeals. The court of appeals affirmed the judgment of the court of common pleas, albeit for different reasons, and found that: (i) Appellee violated the HSSA; and (ii) the HSSA only entitled Mr. Santos to a refund of money paid for services not yet rendered by Appellee.

Mr. Santos is appealing to the Court because the court of appeals erred in ruling that the HSSA only entitles a buyer to a refund of money paid for services not yet rendered by the seller. In support of his position, Mr. Santos presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law: The HSSA requires a seller to refund all payments made by a buyer under the contract when the buyer cancels the contract prior to the time that the seller provides the buyer with a written notice of the buyer's right to cancel the contract within three (3) days.

The General Assembly has the authority to make laws within the state while the judicial branch is responsible for interpreting laws promulgated by the General Assembly. When a court considers the meaning of a statute, its first step is to determine whether the statute is "plain and unambiguous." *State v. Hurd*, 89 Ohio St.3d 616, 618, 2000-Ohio-2, 734 N.E.2d 365. If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the

syllabus. Ambiguity means that a statutory provision is “capable of bearing more than one meaning.” *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶16. Without “an initial finding” of ambiguity, “inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate.” *Id.*; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486, 28 N.E.3d 81, ¶10. Courts “do not have the authority” to dig deeper than the plain meaning of an unambiguous statute “under the guise of either statutory interpretation or liberal construction.” *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 1994-Ohio-380, 626 N.E.2d 939.

In addition to being a consumer protection statute that must be liberally construed in favor of the consumer, the language of the HSSA is “plain and unambiguous.” It applies to “a sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer * * *.” R.C. 1345.21(A). “Consumer goods or services” means goods or services purchased, leased, or rented primarily for personal, family, or household purposes * * *.” R.C. 1345.21(E). The HSSA applies to home remodeling contracts. *Camardo v. Reeder*, 8th Dist. Cuyahoga No. 80443, 2002-Ohio-3099, ¶14; see also, *Knight v. Colazzo*, 9th Dist. No. 24110, 2008-Ohio-6613, ¶14.

Under the HSSA, each home solicitation sale must be evidenced by a written agreement and include a statement of the buyer’s right to cancel the contract until midnight of the third business day after the day on which the buyer signs the contract. R.C. 1345.22 and R.C. 1345.23. The cancellation notice must appear in bold by the signature line and state: **“You, the buyer, may cancel this transaction at any time**

prior to midnight on the third business day after the date of this transaction.

See the attached notice of cancellation for an explanation of this right.” R.C. 1345.23(B)(1). The notice of cancellation must also be accompanied by an attached form providing notice of a right to cancellation. R.C. 1345.23(B)(2).

When the seller fails to comply with the HSSA three-day cancellation notice requirement, the buyer may cancel the contract. R.C. 1345.23(C). “Until the seller has complied with [§§ 1345.23(A) and 1345.23(B) of the Ohio Revised Code] the buyer may cancel the home solicitation sale by delivering to the seller * * * written notice to the seller of the buyer's intention to cancel.” R.C. 1345.23(C). If the buyer decides to cancel the sale, the seller must refund all payments made under the contract to the buyer within ten (10) business days. R.C. 1345.23(D)(4)(a).

Furthermore, the seller under a home solicitation sales contract is not permitted to begin performance of the contract until the three-day period for the buyer to cancel has expired. R.C. 1345.22. “This provision has been interpreted to put the risk of loss on the seller if performance is begun prior to expiration of the buyer's right to cancel.” *Kamposek, supra*, at ¶25. The HSSA does not contain a “substantial performance” exception and, thus, does not require payments returned to the buyer to be offset by the benefit conferred upon the buyer under an unjust enrichment or quantum meruit theory. *Id.* at ¶31.

The court of appeals held that a buyer is only entitled to a refund of money paid for services not yet rendered by the seller. In reaching its decision, the court of appeals focused on the words “cancellation” and “refund” in the HSSA. According to the court of appeals, “one cannot cancel a contract for services after completion” because

“[c]ancellation does not affect prior conduct, but merely ends executory obligations.”

Santos at ¶47. With respect to the use of “refund,” the court of appeals stated:

“[R]efund” is defined as: “1. The return of money to a person who overpaid, such as a taxpayer who overestimated tax liability or whose employer withheld too much tax from earnings. 2. The money returned to a person who overpaid.” Black’s Law Dictionary (11th ed. 2019). Both of these “refund” definitions include the concept of overpayment, such as when payment is made for services not yet performed.”

Id. at ¶48.

The court of appeals incorrectly interprets the “cancellation” and “refund” as used in the HSSA. The HSSA specifically states that “no seller shall fail or refuse to honor any valid notice of cancellation by a buyer and within ten business days after receipt of such notice to [r]efund **all payments made under the contract or sale.**” (Emphasis added.) R.C. 1345.23(D)(4)(a). It does not limit the refund to money for services not yet rendered by the seller. Such a restrictive interpretation conflicts with the requirement liberally construe the HSSA in favor of the buyer.

Additionally, the court of appeals’ decision rejects the analysis of every other appellate that has reviewed this issue and expanded the already existing conflict of law among the appellate districts. This conflict of law among the appellate districts leaves the bench and the bar with uncertainty as to the correct interpretation of the HSSA. This Court now has the opportunity to establish a uniform interpretation of the HSSA in Ohio and give Ohio residents the consumer protections intended by the General Assembly.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Mr. Santos respectfully requests that this Court accept jurisdiction in this case so that the important issues presented can be reviewed on the merits.

Respectfully submitted,

ANTHONY & ZOMOIDA, LLC

/s/ John N. Zomoida, Jr.

John N. Zomoida, Jr. (0072742)

Town One Square

40 South Main Street

Poland, Ohio 44514

Tele: (330) 259-0043 Fax: (330) 259-9094

John@Anthony-Zomoida.com

Attorney for Appellant, Eugene Santos

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by electronic mail on the 9th day of November, 2023 to Charles E. Dunlap, Counsel for Appellee, at cedunlap76@charlesdunlaplaw.com.

/s/ John N. Zomoida, Jr.

John N. Zomoida, Jr. (0072742)

Counsel for Appellant, Eugene Santos