Supreme Court of Ohio Clerk of Court - Filed April 15, 2024 - Case No. 2023-1588

IN THE SUPREME COURT OF OHIO

ASHLAND GLOBAL HOLDINGS, INC., *et al.*,

Appellees,

vs.

SUPERASH REMAINDERMAN LIMITED PARTNERSHIP,

Appellant.

Case No. 2023-1588

On Appeal from the Tenth District Court of Appeals, Franklin County

Court of Appeals Case No. 22AP000638

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANT

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I. STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Amicus curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at Buckeye accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policy solutions, and promoting those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a non-partisan, non-profit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission. As it relates to this case, The Buckeye Institute advocates for following the U.S. and Ohio Constitutions and following the rule of law.

II. STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Facts and Case set forth in Appellant's Memorandum in Support of Jurisdiction.

III. ARGUMENT AND LAW

A. The freedom of contract includes the freedom from unwarranted intrusion by the courts.

Since this Nation's founding, the freedom to make and enforce contracts has been fundamental to advancing personal and business endeavors. Both the Nation's Founders and those establishing the state of Ohio prohibited the state from interfering with this right. U.S. Constitution, Article I, Section 10, cl. 1; Ohio Constitution, Article VIII, Section 4 (1802). In support of a constitutional provision prohibiting the states from impairing the obligations of contract, James Madison explained that "laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist No. 44, at 254 (James Madison) (Fall River Press ed.2021). Madison went on to note that such a

provision is necessary to "give a regular course to the business of society." *Id.* The role of the courts is to act as "detached umpires or referees, doing no more than to see that the rules of the game were observed and refusing to intervene affirmatively to see that justice or anything of that sort was done." Grant Gilmore, *The Death of Contract* 15 (1974).

"The Ohio Constitution also protects the freedom of contract." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 10. And "the Ohio Constitutional protection of contracts is coextensive with that of the federal Constitution." *Id*. "In Ohio, parties 'have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced.' 'This freedom is as fundamental to our society as the right to speak without restraint.'" (Internal quotation marks omitted.) *Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 172 Ohio St.3d 160, 2023-Ohio-3398, 222 N.E.3d 621, ¶ 14, quoting *Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St.3d 32, 36, 514 N.E.2d 702 (1987).

> Under well-established contract law, we recognize that contracts entered into freely and fairly made will be held valid and enforced in the courts. * * * The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint. The freedom to contract is a deep-seated right that is given deference by the courts.

(Internal citations and quotation marks omitted.) *Cincinnati City School Dist. Bd. of Edn. v. Conners*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, ¶ 15.

One commentator identified two primary reasons we value the freedom to contract: "First, when parties freely agree to do something, there is a presumption that the agreement reflects a choice that benefits both of them. * * * Second, a restriction on freedom of contract may be

inconsistent with autonomy; it denies people the right to control an important aspect of their lives." David A. Strauss, *Why Was Lochner Wrong?*, 70 U.Chi.L.Rev. 373, 383 (2003). Indeed, "[t]he parties have the comparative advantage over the court in deciding on what terms a voluntary transaction is value-maximizing; that is a premise of a free-enterprise system." *Goldstick v. ICM Realty*, 788 F.2d 456, 461 (7th Cir.1986) (Posner, J.). "[I]f parties make contracts where there is no fraud, upon contingencies uncertain to both, with equal means of information, the courts cannot undertake to set them aside." *Gavinzel v. Crump*, 89 U.S. 308, 321 (1874). Thus, "courts should support the market by leaving it alone as much as possible." Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 Stan.L.Rev. 812, 814 (1961).

When courts do step in, they do so because something prevented true freedom of contract. But these are exceptions to the general rule of enforceability. For instance, the law can step in to address fraud, "incapacity (as with children) or coercion. Incapacity undermines the premise, necessary to sustaining the argument for freedom of contract, that an individual's choices reflect his or her own best interests. Coercion does the same." *Strauss*, *supra*, at 383, citing *McLean v. Arkansas*, 211 US 539, 547–48 (1909); *Muller v. Oregon*, 208 US 412, 421 (1908). Similarly, courts will modify—or not enforce—contracts of adhesion because the parties are grossly unequal in their bargaining power. Contracts of adhesion are offered by a party with controlling power

> on essentially [a] "take it or leave it" basis without affording [a] consumer [a] realistic opportunity to bargain and under such conditions that [a] consumer cannot obtain [the] desired product or services except by acquiescing in form contract. [A] [d]istinctive feature of [an] adhesion contract is that [the] weaker party has no realistic choice as to its terms.

Sekeres v. Arbaugh, 31 Ohio St.3d 24, 31, 508 N.E.2d 941 (1987), quoting *Black's Law Dictionary*

38 (5th ed.1979). Adhesion contracts undermine the argument that an individual's choices reflect his or her own best interests. Justice Story recognized these exceptions to the general rule on judicial non-interference with contracts when he noted that

> *every person who is not from his peculiar condition or circumstances under disability* is entitled to dispose of his property in such a manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable or otherwise, are considerations not for courts of justice but for the party himself to deliberate upon.

(Emphasis added.) 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 337 (14th ed.1918).

The exceptions to the enforceability of contracts are based on established public policy. The question is "whether the essential nature of the contract, drawn from the import of its provisions, runs contrary to the established public policy of this state and, thereby, renders the contract unenforceable" *J.F. v. D.B.*, 116 Ohio St.3d 363, 2007-Ohio-6750, 879 N.E.2d 740, ¶ 10 (Cupp, J., dissenting).

Ground leases typically do not merit court intervention to override the parties' contract. There are no children who are incapable of making decisions in their best interests. and there is no issue of coercion. Ground leases typically involve sophisticated businesses with access to legal counsel, both at the time of contract formation and at the renewal time. This case illustrates that pattern. The parties to the ground lease were sophisticated businesses that had entered into several ground lease contracts. Ashland Global certainly had the legal and financial capacity and the business savvy to pursue the terms in its best interest and to fulfill the required notices. It was Ashland Global's responsibility to fulfill its contractual duties, but it simply failed to do so.

Despite the clear Ohio Supreme Court directives, *e.g., Wildcat Drilling, L.L.C.*, 172 Ohio St. 3d 160, 2023-Ohio-3398, 222 N.E.3d 621, at ¶ 14, the doctrinal underpinnings of contractual freedom, *e.g.,* Strauss, *supra*, at 383, and the lack of typical policy exceptions, the Tenth District broadly held that "equity can relieve a lessee from the consequences of a failure to give the notice required as a condition precedent to the renewal of a lease 'where such failure result[ed] from * * * [a] honest mistake, and has not prejudiced the lessor.'" *Ashland Glob. Holdings Inc. v. SuperAsh Remainderman Ltd. P'ship*, 2023-Ohio-3556, 225 N.E.3d 1177, ¶ 35 (10th Dist.), *motion to certify and appeal allowed*, 172 Ohio St.3d 1474, 2024-Ohio-202, 225 N.E.3d 1048, quoting *Ward v. Washington Distributors, Inc.*, 67 Ohio App.2d 49, 53, 425 N.E.2d 420 (6th Dist.1980). This brings to five (of twelve) Ohio courts of appeal districts embracing this errant view. *See id.* at ¶ 34–37 (listing cases from the Sixth, Eighth, Tenth, and Eleventh Districts).

In *Warminster Equities, LLC v. Warminster Com., LLC*, 497 F.App'x 187 (3d Cir.2012), the Third Circuit recognized that the failure to timely exercise a commercial lease renewal ends the contract. The facts of *Warminster* are strikingly similar to the facts here. The lessor and lessee entered into a long-term ground lease agreement, which was renewable for specific periods of time upon timely notice. The lessee was well aware of the renewal requirements, as it had timely renewed the lease in the past. Yet, as here, the lessee failed to provide timely notice for a subsequent renewal. In *Warminster*, the lessee maintained that it gave oral notice on several occasions when one of its principals expressed an intention "to remain on the Property 'forever' and had expressed its interest in purchasing [the lessor's] interest in the land on a number of occasions." *Id.* at 192. But that does not satisfy the notice requirement that the lessee is exercising its option to extend.

Regardless of whether SuperAsh believed that Ashland would want to renew the lease, SuperAsh never received a timely affirmative notice from Ashland. Neither the oral expressions

of intent to renew in *Warminster* nor a belief by SuperAsh here satisfies the negotiated notice requirement. Indeed, if a ground lessor's belief that the lessee intends to extend a lease is adequate to excuse non-performance of the lessee's notice requirement and, therefore, bind the lessor to an extended lease term, then the converse would be true—the lessor's belief that the lessee intended to extend the lease would bind the lessee to an additional term of the lease even though the lessee never actually executed the required paperwork to extend the lease. However, in the world of contract law, intentions are not actions, and beliefs do not bind parties.

B. Judicial meddling in contracts increases risk and uncertainty, undermining the parties' economic decisions.

Professor Anthony Kronman and Judge Richard Posner "have identified three broad economic functions of contract law: to enforce agreed allocations of risk; to provide default rules that will decrease the costs of exchange; and to discourage carelessness and other inefficient behavior in the process of exchange." Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 Md.L.Rev. 253, 297 (1991), fn. 199, citing Anthony Kronman & Richard Posner, *The Economics of Contract Law* 4–5 (1979). Critically, the lower courts' decisions here undercut each of these functions.

The courts' modification of an unambiguous, fairly, and freely entered-into contract—in a manner that the parties themselves did not agree to—violates the fundamental principles of contract law. Further, "[i]f contractual provisions are illusory, people will be reluctant to make contracts." *Selmer Co. v. Blakeslee-Midwest Co*., 704 F.2d 924, 927 (7th Cir. 1983) (Posner, J.). "It is a detriment, not a benefit, to one's long-run interests not to be able to make a binding commitment." *Id.* at 928. And,

> [i]t undermines the institution of contract to allow a contract party to use the threat of [litigation] to get the contract modified in his favor not because anything has

> happened to require modification in the mutual interest of the parties but simply because the other party, unless he knuckles under to the threat, will incur costs for which he will have no adequate legal remedy.

Id.

1. Contracts allocate risk and uncertainty.

Risk and uncertainty are cornerstone concepts guiding economic decision-making by individuals, businesses, courts, and governments. In economics, "uncertainty" refers to an unknown future, while "risk" measures known probability outcomes and often reflects types of behavior given those known probabilities.

Consequently, riskier decisions and investments demand higher compensation. A classic example of this is the lending of money to finance a purchase. Borrowers over-encumbered in debt or with poor repayment histories are considered riskier investments because they are less likely to repay loans. Thus, they pay higher interest rates to lenders for automobile loans, mortgages, and private student loans to compensate for the riskier investment. Similarly, given that stocks are riskier investments than bonds, investors demand "risk premiums"—or additional expected rates of return in excess of the risk-free rate—to compensate them for the increased risk that specific companies will decline in value. Fernando Duarte & Carlo Rosa, *The Equity Risk Premium: A Review of Models*, 2 Econ. Pol'y Rev. 39, 39 (2015).

Uncertainty—a concept similar to risk—delays and decreases business investments and affects transaction pricing. Sechan Oh *et al.*, *Impact of cost uncertainty on pricing decisions under risk aversion*, 253 European J. Operational Rsch. 144 (2016). As it relates to ground lease contracts like those in this case, the parties can face legal uncertainty—that is, uncertainty caused by the law—more than risk. Real property lawyers surely are aware that certain Ohio courts of appeals might apply the honest mistake doctrine to a ground lease. But, given the ad hoc nature of the

doctrine, the probability of enforcing a renewal notice provision becomes a guessing game rather than a solid rule of law. Because it is unclear when the facts would support applying the "honest mistake" doctrine, when asked whether their ground lease contract will be enforced by its terms, attorneys must give their clients the very unhelpful answer: "it depends." But that answer will vary not based on the letter of the law but on which appellate district has venue and which common pleas judge is drawn. Lawyers drafting leases change from advisors to gamblers, and their clients change from businessmen to speculators. The law should not create such unnecessary legal uncertainty.

2. Default rules decrease transaction costs.

The default rule that courts will enforce contracts as written, *Cincinnati City School Dist. Bd. of Edn.*, 132 Ohio St.3d 468, 2012-Ohio-2447, 974 N.E.2d 78, at ¶ 15, facilitates low transaction/contracting costs.

> [E]nforcement of bargains as made protects the reasonable expectations of the parties that promises will be performed and contributes to certainty and stability in the marketplace. "It is a presupposition of the whole economic order that promises will be kept. Indeed, the whole matter goes deeper. The social order rests upon stability and predictability of conduct, of which keeping promises is a large item." 3 Roscoe Pound, *Jurisprudence* 162–63 (1959). Thus, the bargain contract is the manifestation of liberty in the marketplace and the vehicle to facilitate the most efficient allocation of resources in the economic order. "Contract thus became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way." Friedrich Kessler, *Contracts of Adhesion - Some Thought About Freedom of Contract*, 43 Colum.L.Rev. 629, 629 (1943).

(Citations cleaned up.) Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for*

Individual Parties: The Tug of War Continues, 77 UMKC L.Rev. 647, 654–55 (2009).

The "honest mistake" doctrine, if adopted, would undermine the economics of ground lease contracts. Lessors entering the contracts would likely demand higher prices to compensate for the uncertainty of whether a court may someday determine that the lessee intentionally failed to give notice and later decided to renew the lease or if it made "an honest mistake." As has been seen in this case, lessors would also face delayed recuperation of their investments as they wait for the courts to sort out the "equity" of an unambiguous, freely-entered contract. Some may not enter into a lease with certain parties at all because of uncertainty. It is possible that the uncertainty caused by the Ohio courts of appeals that adhere to the honest mistake doctrine has already resulted in increased prices and reduced contract opportunities.

3. Contracts discourage carelessness and require accountability.

"Oops! Another error, misunderstanding, misapprehension, misstatement, miscalculation, misconception, oversight, fallacy, blunder, gaffe, goof, slip-up, lapse, blooper, booboo, flub, botch, blunder, bungle, misprint, typo, erratum-or as lawyers commonly put it-another mistake." E. Allan Farnsworth, *Oops! The Waxing of Alleviating Mistakes*, 30 Ohio N.U.L.Rev. 167, 167 (2004). Mistakes happen. Mistakes are an unfortunate part of life, but mistakes have consequences. Contracts require the parties to be careful in their fulfillment of their obligations and to be vigilant in compliance and assign the blame for mistakes in fulfillment.

Ohio Courts have long rejected unilateral mistakes—carelessness—as grounds for contract modification. *See Heinrichsdorf v. Stengel*, 22 Ohio Dec. 667 (C.P.1911). And this court has insisted that lawyers follow its rules with exactness. Appellants must file notices of appeal with this court "within forty-five days from the entry of the judgment being appealed." S.Ct.Prac.R. 7.01. The court does not have an "honest mistake" exception for advocates who had an "oops." Rules have purpose; they guide expectations, and they force accountability. Contractual rules are

no different. Even Ohio's statute of frauds recognizes the importance of certainty by requiring contracts, such as leases, to be written so that all parties have clear notice of what is required of them. *See* R.C. 1335.05.

Businessmen and women sometimes screw up. And we may sympathize with them. But sympathy is not a legal construct; it is an emotional one. There is a truism: "Poor planning on your part does not necessitate an emergency on mine." A corollary is also true: "Carelessness on your part does not merit absolution on mine." Businessmen and women have a duty to do their jobs—failure to do so does not merit judicial intervention.

Contracts, including leases, have value. That value stems from their terms. Judicial meddling in contractual terms results in unpredictability and undermines the value of those leases. One might well say that when one party's blunder allows courts to cease to enforce contracts—no matter how "honest"—the contracts are no longer worth the paper they are written on.

C. Even if equity applies, it does not favor sophisticated parties such as Ashland Global.

The court below portended to apply equity to excuse the ground lessee's non-compliance. Equity should not be used to excuse contractual non-compliance, except in the very limited applications mentioned above. The lower court ignored this court's broad pronouncement that "the court will not rewrite the contract to achieve a more equitable result." *Dugan & Meyers Constr. Co. v. Ohio Dep't of Adm. Servs*., 113 Ohio St.3d 226, 2007-Ohio-1687, 864 N.E.2d 68, ¶ 39. The lower court tried to distinguish the case but cited no Ohio Supreme Court case supporting the lower court's equitable argument. Indeed, it admitted that "the Supreme Court has never addressed whether equity may relieve a tenant from their failure to timely exercise an option to renew a lease." *Ashland Glob. Holdings Inc.*, 2023-Ohio-3556, 225 N.E.3d 1177, at ¶ 40. The court could cite no historical equitable principle to support the "honest mistake" doctrine. The best it could do

was to reject the equitable doctrine that "he who seeks equity must do equity, and that he must come into court with clean hands." *Id.* at ¶57. The Court allowed that this did not apply because the lessee's hands were not sufficiently dirty but failed to explain how the lessee had "do[ne] equity."

In any event, even if the court were to apply equity, equity and the law do not favor sophisticated parties such as Ashland Global. One of the longstanding maxims of equity is that equity aids the vigilant, not the indolent. Raighne Delaney & Juanita Ferguson, *The Equitable Maxims A Primer*, 48 Sum Brief 44, 46 (2019). "'[E]quity will not aid the tardy optionee' when the optionee's failure to exercise the option by the prescribed deadline is due solely to his or her own negligence. 'This principle applies even in the absence of detriment to the optionor.'" *Warminster Equities, LLC*, 497 F.App'x at 191, quoting *Finkle v. Gulf & W. Mfg. Co.*, 744 F.2d 1015, 1019–20 (3d Cir.1984). And "the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so." *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 957 (7th Cir.1982) (Posner, J.).

Ashland Global had the opportunity to avoid its claimed loss by simply sending the required notice. Ashland knew the date on which it must send the notice but was negligent in failing to do so. "[T]he responsibility of the courts to protect those who [are] weak and vulnerable [does] not extend to parties who suffered hardships simply because they failed to protect themselves." Edwards, *supra*, at 657. Equity does not support the honest mistake doctrine—at least not in this type of situation.

IV. CONCLUSION

"[T]he amount of care that a person ought to take is a function of the probability and magnitude of the harm that may occur if he does not take care." *Evra Corp.* at 958 (Posner, J.), citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir.1947) (L. Hand, J.). However,

one cannot properly take care in contracting where the courts create legal uncertainty. "Unless [contracts] are enforced according to their terms, the institution of contract, with all the advantages private negotiation and agreement brings, is jeopardized." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) (Easterbrook, J.), citing *Travelers Insurance Co. v. Budget Rent–A–Car Systems, Inc.*, 901 F.2d 765 (9th Cir.1990). For the foregoing reasons, the court should reverse the lower court's decision and reject the "honest mistake" doctrine where sophisticated parties enter into a ground lease contract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Amicus Curiae* Brief of The Buckeye Institute in Support of Appellant was on this 15th day of April 2024 served via e-mail transmission to:

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