No. 2016-0585

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY, OHIO
CASE NOS. 2013-MA-00074, 133

CHRISTINE LUCARELL,
Plaintiff-Appellee,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE OHIO ALLIANCE FOR CIVIL JUSTICE, OHIO CHAMBER OF COMMERCE, AND OHIO MANUFACTURERS' ASSOCIATION

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I. Combined statement of interest of amici curiae and why this case is of public and great general interest

The Ohio Alliance for Civil Justice (OACJ) is a group of small and large businesses, trade and professional associations, professionals, nonprofit organizations, local government associations, and others.[1] OACJ members support a balanced civil justice system that awards fair compensation to injured persons, but also imposes sufficient safeguards so that defendants are not unjustly penalized and plaintiffs are not unjustly enriched. OACJ also supports stability and predictability in the civil justice system so that Ohio's businesses and professionals may know what risks they assume as they carry on commerce in this state.

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse business advocacy organization. The Ohio Chamber of Commerce represents members of virtually every industry throughout Ohio, including retail, transportation, manufacturing, healthcare, and others. The Ohio Chamber of Commerce works to promote and protect the interests of its more than 8,000 business members—and the thousands of Ohioans these business members employ—while advocating for a business climate in Ohio that ultimately benefits not only Ohio businesses but the employees of those businesses. As an independent point of contact for government and business leaders, the Ohio Chamber of Commerce is a respected participant in the public policy arena.

The Ohio Manufacturers' Association (OMA) is a statewide nonprofit trade association whose membership consists of over 1,400 manufacturing companies employing

[1] The OACJ leadership includes members from the National Federation of Independent Business Ohio, the Ohio Chamber of Commerce, the Ohio Association of Certified Public Accountants, the Ohio Hospital Association, the Ohio Medical Association, the Ohio Manufacturers' Association, and other organizations.

approximately 660,000 Ohioans. The OMA works to enhance the competitiveness of manufacturers and improve living standards of Ohioans by shaping a legislative and regulatory environment conducive to economic growth in Ohio.

These amici are all deeply committed to fostering and sustaining a strong economic climate for Ohio businesses, which benefits not only the economic growth of Ohio as a state, but the economic prosperity of all Ohioans. The judgment of the Seventh Appellate District in this case threatens that economic prosperity in two ways. First, Ohio businesses depend on stability in Ohio law. It is only from a stable legal environment that businesses can determine the risks and benefits of pursuing a particular business course. That stability is shaken when well-established Ohio contract law crumbles as it did in this case. By finding that a plaintiff can recover punitive damages for claims based on breach of contract, the Seventh District created new law that this Court specifically rejected almost 100 years ago in *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922), paragraph two of the syllabus, and more recently in *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St.3d 36, 45-46, 540 N.E.2d 1358 (1989), citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854).

Second, stability in Ohio law is also upended when businesses cannot depend on the law of release in resolving issues between them and other parties. Ohio law has long favored settling differences without court involvement and the use of a release of liability is well-engrained in that sound public policy. Up until the Seventh District's judgment in this case, that law has been stable. By conflating a plaintiff's "prevention of performance" defense to one contract—a loan agreement—with a release provision contained in two separate contracts, the Seventh District has turned release law on its head. If the decision is allowed to stand, businesses across Ohio will no longer be able to rely on the finality of a

release when resolving disputes—and there will be little incentive to resolve disputes because of the lack of certainty. These unintended consequences will likely increase a business's litigation costs, further burden the courts, and work toward creating an unfavorable business climate in Ohio because of the likely increases in the costs of doing business in Ohio.

Ohio has sustained steady economic growth in part because of the fair and steady legal environment. Amici here have a strong interest in seeing that growth and stability continue. They urge, on behalf of all their collective members, that the Court accept jurisdiction so that this stability is not thwarted by a rogue decision that disrupts the economic growth of the state of Ohio.

II. Statement of the case and facts

Amici concurs in the Statement of the Case and Facts set forth in the Memorandum of Jurisdiction of Appellant Nationwide Mutual Insurance Company. The following facts are critical for the issues before this Court under the first two propositions of law of interest to Amici here:

- Appellee Christine Lucarell was enrolled in Nationwide's Agency Executive (AE) Program—a three-year program intended to establish Lucarell as a Nationwide insurance sales agent. As part of this program, Lucarell entered an Agency Executive Performance Agreement and an Agent's Agreement, and also took out a $290,000 loan from Nationwide Federal Credit Union (NFCU) to start her business as a Nationwide insurance agent. She opened her agency in January 2006. *Lucarell v. Nationwide Mut. Ins. Co.*, 2015-Ohio-5286, 44 N.E.3d 319, ¶ 2-4, 6, 8 (7th Dist.)

- A year or so later, Nationwide offered Lucarell a Memorandum of Understanding, which addressed various aspects of the parties' contractual relationship. The Memorandum of Understanding also contained a provision releasing Nationwide from any claims against it. Lucarell signed the Memorandum of Understanding. *Id*. at ¶ 9-10.

- Another year later, Nationwide offered Lucarell a Modified AE Agreement, which again addressed various aspects of the parties' contractual relationship. The Modified AE Agreement also contained a provision releasing any claims against Nationwide. Lucarell signed the Modified AE Agreement too. *Id*. at ¶ 12-13.

- Lucarell left the AE Program in July 2009 and ultimately sued Nationwide for breach of the AE Performance Agreement, the Agent's Agreement, and the Memorandum of Understanding. She also asserted claims for fraudulent misrepresentation and invasion of privacy. *Id*. at ¶ 18-19.

- Nationwide counterclaimed for default of the NFCU loan agreement, which had been assigned to Nationwide. *Id*. at ¶ 10. Lucarell asserted prevention of performance as a defense to Nationwide's counterclaim, claiming that she was prevented from performing the loan agreement. She also amended her complaint to add various claims, including breach of the Modified AE Agreement. *Id*. at ¶ 21. She claimed that she executed this document and the Memorandum of Understanding under duress.

- Lucarell ultimately prevailed on her breach of contract claims and was awarded millions of dollars as compensatory damages. She also prevailed on her claim for invasion of privacy and Nationwide's counterclaim. The trial court, however, directed a verdict on her claim for fraudulent misrepresentation. *Id*. at ¶ 22.

- On appeal, the Seventh District, acknowledging likely error in the instruction for duress (*id*. at ¶ 80), nonetheless applied the prevention-of-performance defense Lucarell asserted to Nationwide's counterclaim to the release provisions contained in the Memorandum of Understanding and Modified AE Agreement to find the release provisions unenforceable (*id*. at ¶ 82). Lucarell never asserted this defense to her claim for breach of these agreements.

- The Seventh District also found that Lucarell's fraudulent-misrepresentation claim should have gone to the jury (*id*. at ¶ 178) and that it was error not to allow the jury "to determine if punitive damages were warranted on Lucarell's breach of contract claims." *Id*. at ¶ 184. According to the Seventh District, punitive damages could be awarded on Lucarell's breach-of-contract claims if Lucarell prevails on her fraud claim. *Id*. at ¶ 191.

- Because the Seventh District's judgment is a departure from well-established contract and release law, Nationwide applied for reconsideration and moved to certify a conflict. Both were ultimately denied.

The Seventh District's decision, if allowed to stand, disrupts the certainty that Ohio businesses have come to rely upon in managing the expectations of their businesses, customers, agents, and employees. Now, fully executed releases can be avoided based on a never-before-recognized prevention-of-performance defense. And punitive damages, instead of being capped by statute for tort actions, will be awarded without the very statutory limitations the General Assembly saw as necessary to restore balance and fairness to both the interests of business owners and injured parties alike. Accepting this appeal will clarify the appropriate analytical framework for resolving these important issues, and will restore predictability and stability to Ohio law.

III. Argument

Proposition of Law No. 1.

An award of punitive damages is not available for breach of contract and is instead limited to independent claims based on tort.

It is hornbook law that punitive damages are not recoverable for breach of contract absent an independent tort for which punitive damages are recoverable. *See* 3 Restatement of the Law 2d, Contracts, Section 355, at 154 (1981). The seminal case of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854), "has won universal acceptance in the common law world and remains the leading case" for this principle and on contract damages in general. 11 Perillo, *Corbin on Contracts*, Section 56.2, at 83 (Rev. 2004); *see also* 3 Farnsworth, *Farnsworth on Contracts*, Section 12.14, at 255 (3d Ed. 2004) (*Hadley* "laid down the general principles that are still honored today").

Ohio is no exception. Although this engrained rule of law was first announced by this Court in *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922), it was more recently reaffirmed in *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St.3d 36, 540 N.E.2d 1358 (1989). Relying on *Hadley v. Baxendale* and recognizing "this nearly universal rule for some time," this Court made clear that "[n]o matter how willful the breach," punitive damages simply "are not recoverable in an action for breach of contract." *Digital & Analog*, 44 Ohio St.3d at 46, 540 N.E.2d 1358.

The Seventh District here strayed from this "universal rule" by transforming the rule into something it is not. Relying on *Mabry-Wright v. Zlotnik*, 165 Ohio App.3d 1, 2005-Ohio-5619, 844 N.E.2d 858 (3d Dist.), and *Goldfarb v. The Robb Report, Inc.*, 101 Ohio App.3d 134, 655 N.E.2d 211 (10th Dist.1995), the Seventh District found liability for an independent tort like fraud would allow the jury "to award[] punitive damages *on the breach of contract claims*." (Emphasis added.) *Lucarell*, 2015-Ohio-5286, 44 N.E.3d 319, ¶ 178; *see also id*. at ¶ 184 ("Because the trial court should have allowed Lucarell's fraud claim to go [to] the jury, it should have also allowed the jury to determine *if punitive damages were warranted on Lucarell's breach of contract claims* in the event the jury returned a verdict in Lucarell's favor on her fraud claim.") (emphasis added); ¶ 191 (remanding for a new trial on Lucarell's "fraud claim and punitive damage *on her breach of contract claims*") (emphasis added).

But neither *Mabry-Wright* nor *Goldfarb* support an award of punitive damages for breach of contract. Instead, both courts in those cases recognized that there must be an *independent tort* from which punitive damages are recoverable. In *Mabry-Wright*, the independent tort alleged was interference with an employment relationship involving

malicious conduct. *Mabry-Wright*, 165 Ohio App.3d 1, 2005-Ohio-5619, 844 N.E.2d 858, ¶ 19. Because the plaintiff in that case was unable to prove actual damages on her tort claims, the Third Appellate District ultimately found that "recovery under the [independent tort] exception" was not available. *Id*. at ¶ 21. Although framed as an "exception," the Third District made clear that this "exception" only "permits punitive damages not for the breach of contract, but for the tortious conduct." *Id*. at ¶ 20.

The Tenth Appellate District in *Goldfarb* likewise made this distinction, albeit with the same inartful "exception" language. Even so, it made clear that punitive damages are not recoverable unless the party seeking punitive damages presents "evidence of conduct constituting a connected, but independent tort * * *." *Goldfarb*, 101 Ohio App.3d at 141, 655 N.E.2d 211. Because the plaintiff in that case failed to present evidence on her tortious-interference-with-business-relationships claim, an instruction charging the jury on punitive damages was error. *Id*. at 143.

Labeling the independent-tort requirement as an "exception" to the rule of law that punitive damages are not recoverable for breach of contract has created the confusion that punitive damages are available—not for the independent tort—but for the breach of contract. This is not the law in Ohio. And apart from the inartful use of "exception" used by the courts in *Mabry-Wright* and *Goldfarb*, neither court held as much. The Seventh District here, however, unjustifiably extended the law of punitive damages beyond what neither court in those cases held.

Nor is the Seventh District's unjustifiable extension of the law supported by this Court's decisional law on this issue. Indeed, the very case reaffirming that punitive damages are not recoverable for a breach of contract—*Digital & Analog Design*—addressed

punitive damages in light of the *independent* tort claims also brought in that case. In doing so, this Court analyzed the tort claims independently with respect to the recovery of punitive damages, not as an "exception" to the no-recovery general rule for the breach-of-contract claims also brought in that case. 44 Ohio St.3d at 45-46, 540 N.E.2d 1358.

This Court's recent decision in *Sivit v. Village Green of Beachwood, L.P.*, 143 Ohio St.3d 168, 2015-Ohio-1193, 35 N.E.3d 508, reaffirms the independence of tort claims even when brought along with claims for breach of contract. There, the Court acknowledged that "injurious conduct arising between parties to a contract does not always sound in tort, but it can," as it did in that case. *Id*. at ¶ 5. And when it does, the availability of punitive damages is analyzed with respect to the conduct giving rise to the tort, not the breach of contract, and is decided on the *tort* claim, not the claim for breach of contract. As the Court made clear, any resulting award of punitive damages for the independent tort is entitled to the statutory protections and limitations on damages afforded to tort actions under R.C. 2315.21, including the caps on noneconomic damages. *Id*. at ¶ 12.

If the Seventh District's decision is allowed to stand, Nationwide and any other like defendant would not be able to invoke these tort-related statutory protections because any resulting award of punitive damages would be on the claim for breach of contract, not on any independent tort claim. Because a claim for breach of contract is not a tort action, the caps on noneconomic damages would not apply. *See* R.C. 2315.21(A) (excluding from the definition of "tort action" a civil action "for breach of contract or another agreement between persons").

This unjustified expansion of the law of punitive damages is inconsistent with longstanding common law and this Court's own jurisprudence. The recovery of punitive

damages is, always has been, and should continue to be, based on and awarded for an independent tort, not breach of contract. Accepting jurisdiction of this case will ensure consistency and predictability for courts and litigants alike.

Proposition of Law No. 2.

> **Prevention of performance is not an available defense to a fully executed release absent some other nonperformance-related contract defense that would make the release unenforceable.**

Ohio law has long favored compromise and settlement as an alternative to litigation. *State ex rel. Wright v. Weyandt*, 50 Ohio St.2d 194, 363 N.E.2d 1387 (1977), syllabus. The use of a release of liability towards that end is a necessary part of that sound public policy and is a regularly used tool in both commercial and private contexts. *See, e.g., id*. at 197.

So too here. There is no dispute here that both the Memorandum of Understanding and the Modified AE Agreement contained releases of liability, the scope of which is equally undisputed. And it is also undisputed that Lucarell executed both documents—indeed, she sought damages for breach of both. Yet she claimed the release provisions, and the release provisions alone, were unenforceable because she executed these documents under duress.

Aside from the illogic of invalidating only part of a contract that she claims entitles her to damages for that contract's breach, Lucarell never claimed she could not "perform" the release—as the Seventh District held here—nor could she. Indeed, a release is effective upon execution, subject to the occurrence of any conditions. 2 Restatement of the Law 2d, Contracts, Section 284, at 392 (1981). Lucarell here acknowledged she executed both documents containing the release provisions. Thus, there was nothing left to "perform" that would give rise to a prevention-of-performance defense as a viable option for avoiding the effect of the releases. *See id*. at Section 284(2) ("The release takes effect on delivery * * *.").

Instead, Lucarell raised prevention of performance as a defense to Nationwide's counterclaim for default of the loan agreement. It was with respect to that agreement that she claimed she was prevented from performing her loan repayment obligations. Yet the Seventh District took a defense asserted against this contract—the loan agreement—to find the prevention-of-performance instruction both appropriate and that it operated to invalidate release provisions in two separate contracts from which Lucarell sought damages for breach. And it did so under the imprimatur of the two-issue rule, which does not apply "where there is a charge on an issue upon which there should have been no charge." *Ricks v. Jackson*, 169 Ohio St. 254, 159 N.E.2d 225 (1959), paragraph four of the syllabus. Because prevention of performance is not a defense to a release, a prevention-of-performance instruction was inappropriate and the two-issue rule does not apply.

By manufacturing a defense that was never asserted and could not be asserted, the Seventh District wreaked havoc with the law of release in Ohio. Indeed, the parties to a release justifiably rely on the terms and effect of the release to manage their expectations, relationship, and course of conduct. To allow a releasing party to avoid the effect of a release under a manufactured, never-before-recognized defense disrupts the settlement of disputes between parties and creates uncertainty among businesses that rely on the predictability of these oft-used settlement tools.

This Court should accept jurisdiction to make clear that absent some nonperformance-related defense—duress, lack of capacity etc.—a fully executed release is not unenforceable for "prevention of performance." That defense is simply not available when a releasing party executes a release, admits to having done so, and thereafter releases—and receives the benefits of—the release. At that point, the release is fully

performed and no performance-related defense can apply. To allow otherwise, thwarts a released party's expectations and allows releasing parties to freely avoid the effect of a fully executed release by means of a nonexistent defense.

IV. Conclusion

The Seventh District's unprecedented decision that punitive damages are available for breach of contract disrupts what had been well-settled law in Ohio. Punitive damages have long been recoverable only for actions based on, and for, tort. That is how it has always been and how it should continue to be.

Its equally unprecedented decision that prevention of performance is a viable defense to a fully executed release also disrupts what had been well-settled release law. Without the predictability that disputes can be settled by a valid release, released parties across Ohio will be left with uncertainty as to whether the release is subject to challenge by asserting a never-before-recognized prevention-of-performance defense.

Accepting jurisdiction over this case will resolve these important issues and bring clarity and consistency to Ohio law so that Ohio businesses can continue to go about their business to bring economic growth to the state of Ohio.

Respectfully submitted,

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