

IN THE SUPREME COURT OF OHIO

ASHLAND GLOBAL HOLDINGS, INC., *et*) CASE NOS. 2023-1448
al.,) 2023-1588
)
Appellees,) On Appeal from the Franklin County Court
) of Appeals, Tenth Appellate District,
vs.) Case No. 22AP000638
)
SUPERASH REMAINDERMAN LIMITED)
PARTNERSHIP,)
)
Appellant.)

MERIT BRIEF OF APPELLEES ASHLAND GLOBAL HOLDINGS, INC. AND ASHLAND LLC

RICHARD M. GARNER (0061734)
Email: rgarner@cruglaw.com
COLLINS ROCHE UTLEY & GARNER LLC
655 Metro Place South, Suite 200
Dublin, Ohio 43017
Phone: (614) 901-9600

Counsel for Appellant SuperAsh Remainderman Ltd Partnership

BENJAMIN M. FLOWERS* (0095284)
Email: bflowers@ashbrookbk.com
JAMES S. KRESGE (0086370)
Email: jskresge@ashbrookbk.com
ASHBROOK BYRNE KRESGE LLC
P.O. Box 8248
Cincinnati, Ohio 45249
Phone: (312) 898-3932

Counsel for Amicus Curiae Networks USA I, LLC

JAMES E. ARNOLD (0037712)
Email: jarnold@arnlaw.com
MICHAEL L. DILLARD, JR. (0083907)
Email: mdillard@arnlaw.com
GERHARDT A. GOSNELL II (0064919)
Email: ggosnell@arnlaw.com
TIFFANY CARWILE (0082522)
Email: tcarwile@arnlaw.com
ARNOLD & CLIFFORD LLP
115 West Main Street, 4th Floor
Columbus, Ohio 43215
Phone: (614) 460-1600

Counsel for Appellees Ashland Global Holdings Inc., and Ashland LLC

JEREMY S. YOUNG (0082179)
Email: jyoung@ralaw.com
STEPHEN D. JONES (0018066)
Email: sjones@ralaw.com
ROETZEL & ANDRESS, LPA
41 South High Street, 21st Floor
Columbus, Ohio 43215
Phone: (614) 463-9770

Counsel for Appellee Speedway LLC

DAVID C. TRYON (0028954)
Email: d.tryon@buckeyeinstitute.org
Alex M. Certo (0102790)
Email: a.certo@buckeyeinstitute.org
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
Phone: (614) 224-4422

Counsel for Amicus Curiae
The Buckeye Institute

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

I. INTRODUCTION 1

II. STATEMENT OF THE FACTS AND CASE..... 2

 A. The agreements. 2

 B. The Speedway arbitration. 4

 C. The 2020 renewal for the 2021 lease year. 5

 D. SuperAsh devises a “gameplan” to leverage “murky” language in the
 2010 Ground Leases regarding renewal. 5

 E. The 2021 renewal for the 2022 lease year. 7

 F. Prejudice and hardships to the parties and the public. 9

 G. The parties enter into tolling agreements in attempt to resolve the dispute..... 10

 H. The declaratory judgment action. 11

 I. The Tenth District’s decision below affirmed. 12

III. ARGUMENT 13

 A. The honest mistake doctrine is narrow in scope and application..... 13

 1. The honest mistake doctrine is limited to the procedures for the renewal
 of leases and does not upend any substantive term of the parties’
 contractual agreement. 13

 2. The honest mistake doctrine is not a vague or uncertain rule left
 to the unpredictable whims of trial court judges on an ad hoc basis. 14

 3. The honest mistake doctrine does not create incentives for mischief
 by tenants; it prevents landlords from obtaining unearned and
 substantial windfalls..... 16

 4. The honest mistake doctrine is not extraordinary or unique in the
 law of contracts. 17

 B. Appellants’ proposition of law is extreme on its face, in its rationale, and
 in its potential ramifications..... 19

 C. The honest mistake doctrine is a well-established common law rule in
 Ohio and throughout the nation. 22

 1. *Ward* was not an outlier when decided (or now) but reflected a well-developed
 common law doctrine that had developed since at least the 1920s..... 22

 2. The honest mistake doctrine has been either expressly or implicitly
 adopted by every court of appeals in Ohio to have addressed the issue,
 except for one, the Second District’s decision in *Carroll Building*, which
 is an extreme outlier, even in its own district. 24

3. The honest mistake doctrine, in some form, is widely accepted by other states.	27
4. The honest mistake doctrine is widely recognized by the treatises and commentators.	30
D. The decision below was not dependent on a broad iteration of the honest mistake doctrine as adopted by the Connecticut Supreme Court in <i>F. B. Fountain</i> , and even if it were, the issue is not properly before this Court.	32
E. The honest mistake doctrine reduces transaction costs to contracting parties in Ohio.....	34
F. The honest mistake doctrine does not offend the Ohio Constitution’s contract clause, and Appellant did not properly preserve such an argument anyway.....	39
G. To the extent this Court adopts Appellants’ proposed proposition of law, the Court should do so only on a prospective basis.	41
H. To the extent this Court adopts Appellants’ proposed proposition of law to the contracts at issue in this case, the Court must remand the case to the Tenth District Court of Appeals to address the trial court’s alternative basis for its ruling in Appellees’ favor.	42
 IV. CONCLUSION.....	 43
CERTIFICATE OF SERVICE	44

TABLE OF AUTHORITIES

Cases

<i>33 Flavors Stores, Inc. v. Hoffman’s Candies, Inc.</i> , 296 S.C. 37 (App. 1988).....	29
<i>Acordia of Ohio, L.L.C. v. Fishel</i> , 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823	33
<i>Aickin v. Ocean View Invests. Co.</i> , 84 Haw. 447 (1997).....	29
<i>All-Tech Telecom, Inc. v. Amway Corp.</i> , 174 F.3d 862 (7th Cir. 1999).....	37
<i>Am. Oil Co. v. Rasar</i> , 203 Tenn. 37 (1957).....	29
<i>Ammar v. Cohen</i> , 96 W. Va. 550, (1924)	29
<i>Andrews v. Blake</i> , 205 Ariz. 236 (2003).....	29
<i>Austin v. Mid-Ohio Pipeline Servs., LLC</i> , 2023-Ohio-1958, 217 N.E.3d 122.....	17
<i>Ballard v. Miller</i> , 87 N.M. 86, ¶ 17 (1974).....	29
<i>Banks v. Haskie</i> , 45 Md. 207 (1876)	30
<i>Barr Hotel Co. v. Lloyd Mackeown Buick Co.</i> , 104 Ohio App. 69, 146 N.E.2d 879 (3d Dist. 1957).....	23
<i>Barton & Sons, Inc. v. Burbank Props., LLC</i> , 196 Wash.2d 199 (2020).....	29

<i>Baygold Assocs., Inc. v. Congregation Yetev Lev of Monsey, Inc.</i> , 19 N.Y.3d 223 (2012).....	29
<i>Beck v. Strong</i> , 572 S.W.2d 484 (Mo. App. 1978).....	29
<i>Bielat v. Bielat</i> , 87 Ohio St.3d 350 (2000)	40
<i>Blair v. McDonagh</i> , 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377	18
<i>Blenheim Homes, Inc. v. Mathews</i> , 1 19 Ohio App. 44, 196 N.E.2d 612 (10th Dist. 1963)	17
<i>Brazell v. Soucek</i> , 130 Okla. 204 (1928)	29
<i>Brown v. Johnston</i> , 2004 WY 17	29
<i>Burns v. Norcott</i> , 12th Dist. No. CA97-08-036, 1998 WL 142410 (Mar. 30, 1998).....	25
<i>Burt v. Harris</i> , 2004-Ohio-756 (10th Dist.)	41, 42
<i>Capuano v. Epic Properties</i> , 10th Dist. No. 93APE03-311, 1994 WL 505127, *2 (Sept. 15, 1994)	24, 26
<i>Chaplin v. Nationscredit Corp.</i> , 307 F.3d 368 (5th Cir. 2002).....	38
<i>Clarrington v. Althar</i> , 122 Ohio St. 608 (1930).....	41
<i>Conn. Light & Power Co. v. Lighthouse Landings, Inc.</i> , 279 Conn. 90 (2006)	29

<i>Convenient Food Mart, Inc. v. Atwell,</i> 2005-Ohio-704 (11th Dist.).....	24
<i>Convenient Food Mart, Inc.,</i> 2005-Ohio-704	25
<i>Delage v. Hazzard,</i> 16 Ala. 196, (1849)	29
<i>DiCenzo v. A Best Prods. Co.,</i> 120 Ohio St.3d 149, 2008-Ohio-5327.....	41
<i>Doe v. Ronan,</i> 127 Ohio St.3d 188, 2010-Ohio-5072.....	40
<i>Dugan v. Haige,</i> 54 So.2d 201 (Fla. 1951).....	29
<i>Duncan v. G.E.W., Inc.,</i> 526 A.2d 1358, (D.C. 1987).....	29
<i>Duncan v. TheraTx, Inc.,</i> 775 A.2d 1019 (Del. 2001)	37
<i>Eastwood Local School Dist. Bd. of Edn. v. Eastwood Edn. Assn.,</i> 172 Ohio App.3d 423, 2007-Ohio-3563, 875 N.E.2d 139 (6th Dist.)	20, 41
<i>Ensel v. Lumber Ins. Co.,</i> 88 Ohio St.269 (1913).....	19
<i>Evans v. Bauer,</i> 2nd Dist. No. 2445, 1989 WL 101132 (Aug. 31, 1989).....	24, 27
<i>F. B. Fountain Co. v. Stein,</i> 97 Conn. 619, 118 A. 47 (1922).....	33
<i>Fifth Third Bank W. Ohio v. Carroll Bldg. Co.,</i> 180 Ohio App.3d 490, 2009-Ohio-57 (2nd Dist.).....	27

<i>First Interstate Avon, Ltd. v. Cost Plus, Inc.</i> , No. 1:19 CV 2079, 2020 WL 6047360 (N.D. Ohio Oct. 13, 2020).....	25
<i>Fleming Cos. v. Equitable Life Ins. Co.</i> , 16 Kan. App. 2d 77 (1991)	29
<i>Fleming v. Fleming</i> , 264 U.S. 29 (1924).....	39
<i>Fletcher v. Frisbee</i> , 119 N.H. 555 (1979)	29
<i>Gardner v. HKT Realty Corp.</i> , 23 Ark. App. 148 (1988)	29
<i>Gehret v. Rismiller</i> , 2007-Ohio-1893 (2nd Dist.).....	24, 27
<i>Girolametti v. Michael Horton Assocs.</i> , 332 Conn. 67, 208 A.3d 1223 (2019).....	34, 36
<i>Harvest Pizzeria, LLC v. Rosemarie Keidel</i> , Case No. 19 CV 04684 (Oct. 5, 2023).....	27
<i>Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc.</i> , 8th Dist. Cuyahoga No. 84748, 2005-Ohio-1017	38
<i>Hecla Mining Co. v. Star-Morning Mining Co.</i> , 122 Idaho 778, (1992).....	29
<i>Herman v. Kennard Buick Co.</i> , 5 Wis. 2d 480, (1958).....	29
<i>Host Int'l v. Summa Corp.</i> , 94 Nev. 572 (1978)	29
<i>Kissinger v. Pavlus</i> , 2002-Ohio-3083 (10th Dist.)	39

<i>Koch v. H & S Dev. Co.</i> , 249 Miss. 590 (1964)	29
<i>Linn Corp. v. LaSalle Nat'l Bank</i> , 98 Ill. App. 3d 480 (1981).....	29
<i>Littlejohn v. Parrish</i> , 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49	18
<i>Lykins Ents. v. Felix</i> , 2007 Ky. Unpub. LEXIS 7 (Nov. 21, 2007)	29
<i>Medomak Canning Co. v. York</i> , 143 Me. 190 (1948).....	29
<i>Molnar v. Castle Bail Bonds</i> , 2005-Ohio-6643 (4th Dist.)	24, 25
<i>Moran v. Holman</i> , 501 P.2d 769 (Alaska 1972).....	29
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	39
<i>Ohio Dep't of Liquor Control v. FOE Aerie 0456</i> , 99 Ohio App. 3d 380 (10th Dist. 1994)	19
<i>Paterakis v. Est. of Tuma</i> , 66 Ohio App. 3d 373 (8th Dist. 1990)	25
<i>Quest Wellness Ohio, LLC v. Samuels</i> 7th Dist. No. 23 MA 0013, 2023-Ohio-4450.....	26
<i>Quest Wellness Ohio, LLC v. Samuels</i> 7th Dist. No. 23 MA 0013, 2024-Ohio-556.....	26, 27
<i>Rea v. Helsley</i> 86 Ohio App. 114, 90 N.E.2d 168 (10th Dist. 1949).....	23

<i>Richard v. Tarpon Oil Co.</i> , 269 So.2d 261 (La. App. 1972).....	29
<i>Riley v. Warner</i> , 217 Ark. 901, (1950).....	29
<i>Ross v. Farmers Ins. Grp. of Cos.</i> , 82 Ohio St.3d 281 (1998)	41
<i>SDG Macerich Props., LP v. Stanek Inc.</i> , 648 N.W.2d 581 (Iowa 2002).....	29
<i>Sentara Ents. v. CCP Assocs.</i> , 243 Va. 39 (1992).....	29
<i>Sosanie v. Pernetti Holding Corp.</i> , 115 N.J. Super. 409 (1971)	29
<i>State ex rel. Specht v. Oregon City Bd. of Educ.</i> , 66 Ohio St.2d 178 (1981)	41
<i>State ex rel. VanCleave v. Sch. Emples. Ret. Sys.</i> , 120 Ohio St.3d 261, 2008-Ohio-5377.....	41
<i>SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC</i> , Civil Action No. 22-XX-02 (Jefferson Ky. Cir. Ct., April 12, 2023).....	12
<i>SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC</i> , Civil Action No. 22-XX-03 (Harrison Ky. Cir. Ct., April 14, 2023)	12
<i>SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC</i> , Civil Action No. 22-XX-42 (Fayette Ky. Cir. Ct., Feb. 24, 2023).....	12
<i>SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC</i> , Nos. 2023-CA-0427-D, 2023-CA-0566-D, 2023-CA-0578-D (Ky. Ct. App. Sep. 6, 2023)	12
<i>SuperAsh Remainderman Limited Partnership v. Ashland LLC</i> , Fayette District Court, Civil Action No. 22-C-4161 (Fayette D. CT., Dec. 9, 2022)	12

<i>SuperAsh Remainderman Limited Partnership v. Ashland LLC</i> , Harrison District Court, Civil Action No. 22-C-00198 (Harrison D. Ct. KY, Dec. 1, 2022) ...	12
<i>SuperAsh Remainderman Limited Partnership v. Ashland LLC, Jefferson District Court</i> , Civil Action No. 22-C-008708 (Jefferson D. Ct. KY, Jan. 6, 2023)	12
<i>SuperAsh</i> , 2023-Ohio-3556	14, 15, 16
<i>Taylor Bldg. Corp. of Am. v. Benfield</i> , 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12	35
<i>Toledo City School Bd. of Educ. v. State Bd. of Educ. of Ohio</i> , 146 Ohio St.3d 356, 2016-Ohio-2806.....	40
<i>Trollen v. Wabasha</i> , 287 N.W.2d 645 (Minn. 1979).....	29
<i>Urology Services, Inc. v. Green</i> , 8th Dist. Cuyahoga App. No. 50205, 1986 WL 2937 (March 6, 1986).....	26
<i>Utah Coal & Lumber Rest. v. Outdoor Endeavors Unlimited</i> , 2001 UT 100	29
<i>Vivi Retail, Inc. v. E & A N.E. Ltd. Partnership</i> , 2008-Ohio-4705 (8th Dist.)	24
<i>W. Savs. Fund Soc. v. Southeastern Penn. Transp. Auth.</i> , 285 Pa. Super. 187 (1981).....	29
<i>W. Tire v. Skrede</i> , 207 N.W.2d 558 (N.D. 1981).....	29
<i>Ward v. Washington Distributors, Inc.</i> , 67 Ohio App.2 49 (6th Dist. 1980)	13, 21, 22, 23
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St.3d 216, 2003-Ohio-5849.....	39

<i>White v. Greenamyre</i> , 77 Colo. 33, (1925)	29
<i>Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.</i> , 172 Ohio St.3d 160, 2023-Ohio-3398, 222 N.E.3d 621	36
<i>Wilkins v. Evans</i> , 1 Del. Ch. 156 (1821)	29
<u>Other Authorities</u>	
1 Corbin on Ohio Contracts § 37.01 (2024)	31
15 Williston on Contracts § 46.12 (4th Ed.)	32
20 Ohio Real Prop. Law & Prac. § 20.04	30
25 Williston on Contracts § 67.24 (4th Ed.)	32
25 Williston on Contracts § 67:26 (4th Ed.)	32
49 Am. Jur. 2d § 154.....	31
65 Ohio Jur. 3d § 445.....	30
Circumstances Excusing Lessee’s Failure to Give Timely Notice of Exercise of Option to Renew or Extend Lease, 27 A.L.R. 4th 266.....	31
Michael Regan, <i>Notices to Renew Commercial Leases: Where Contract and Equity Collide</i> , 40 N.Y. Real Prop. L.J. 46, 46 (2012).....	32
Restatement (Second) of Contracts § 229.....	19, 31
Restatement (Second) of Prop.: Landlord & Tenant § 13.1	31
T. Rakoff, Comment, “Social Structure, Legal Structure, and Default Rules: A Comment,” 3 S. Cal. Interdisc. L.J. 19 (1993).....	34, 35
<u>Constitutional Provisions</u>	
Ohio Constitution, Art. II, § 28	40

I. INTRODUCTION

This is the perfect case with the perfect facts to confirm the long-standing power of the courts to exercise their inherent power to equitably relieve a party from the unintended and potentially drastic consequences of an honest mistake made by human beings trying to do their best. Indeed, the case is tailor made to illustrate each and every element of the honest mistake doctrine. This is the conclusion reached by the trial court after hearing all of the relevant evidence and then by the court of appeals, and that conclusion should be affirmed. Particularly given the factual record in this matter, affirming the continuing applicability and validity of the honest mistake doctrine would avoid the forfeiture (abhorrent to equity) of millions of dollars to a commercial lessor who, despite duties of good faith owed to its commercial lessee, deliberately planned for and waited to capitalize on the lessee's honest mistake in delivering the expected renewal notice so as to reap an unearned, material financial windfall.

Rather than acknowledging that equitable doctrines, such as the honest mistake doctrine, are almost universally accepted and applied throughout the country in the very circumstances presented in this case, Appellant SuperAsh Remainderman Limited Partnership ("Appellant" or "SuperAsh") and its amici seek to eliminate the honest mistake doctrine completely under all circumstances and regardless of the consequences. Their tool for doing so is the suggestion that the doctrine cannot apply in the face of universally accepted basic contract principles (*i.e.*, the importance of the freedom of contract generally and the importance of enforcing the express terms contained therein). But these basic contract principles have existed for centuries, and they have not stopped courts from exercising their equitable powers in deciding contract cases when warranted. Further, what Appellant and its amici fail to acknowledge is that, if their argument is successful, Ohio courts will be filled with parties seeking to undo countless other common law

equitable doctrines that contracting parties have relied upon for centuries in drafting and interpreting their contracts.

At the end of the day, no one is arguing that courts should have unfettered discretion to rewrite the terms of a contract based on some broad doctrine of “fairness.” Neither Ashland, Speedway, the Trial Court, nor the Tenth District has suggested otherwise. And the honest mistake doctrine does no such thing. Appellant and its amici’s “sky is falling” arguments to the contrary are pure hyperbole and should be seen for what they are -- a cynical effort to avoid the direct and clear application of a common law doctrine that is well established throughout the nation to the facts of this case based upon an overwrought and superficial appeal to general contract principles that no one questions.

II. STATEMENT OF THE FACTS AND CASE

SuperAsh’s rendition of the facts is misleading and incomplete. By withholding critical facts, SuperAsh obscures the rationale for the lower court’s decision, namely, that SuperAsh could not take advantage of its longtime business partner in breach of its duty of good faith and why the rule that permitted that result is so important.

A. The agreements.

This dispute relates to 24 Ground Leases for gas station properties in five states (Ohio, Kentucky, Minnesota, Wisconsin, and South Dakota), which have been subject to commercial leases between SuperAsh, Ashland, and others since 1990. (T.t. Day One, at 153-54; T.t. Day Two,

at 45-47; J-01¹ (the “1990 Lease”) [ASHSUPP00025-ASHSUPP00089]²; T.d. 284, Joint Statement Stipulated Facts at ¶ 2 [SUPP000091]).³ In 2010, U.S. Bank and SuperAsh entered into the current Ground Leases for each of the 24 properties. (T.t. Day One, p. 153; J-03⁴ (the “2010 Ground Lease” or “Ground Lease”) at 1 [SUPP000001]). All of the substantive terms of the 24 Ground Leases are identical, except for the Ground Leases’ choice-of-law clauses. (T.d. 284, at ¶¶ 2-6 [SUPP000091-93], 4; T.t. Day One, at 37; J-03 [SUPP000001-90]). In addition to the Ground Leases, U.S. Bank entered into a separate operating lease with Ashland covering the 24 properties (the “Operating Lease”), and Ashland subleased the properties to Appellee Speedway, LLC (“Speedway”). (T.d. 284, at ¶ 5 [SUPP000092]). In 2013, Ashland purchased U.S. Bank’s rights under the 2010 Ground Leases for \$13,770,000.00, including ownership rights to all the improvements located on the 24

¹ Ashland herein cites Joint Trial Exhibits, Plaintiff’s Trial Exhibits, and Defendant’s Trial Exhibits as J-##, P-##, and D-##, respectively.

² Ashland submits its own Supplement, which includes documents not filed as part of SuperAsh’s Supplement. Ashland uses “ASHSUPP” as the pagination for its Supplement, but also refers to SuperAsh’s Supplement herein referring to SuperAsh’s “SUPP” pagination when doing so.

³ SuperAsh repeatedly argues that Ashland drafted the leases in 1990. (*See* Appellant’s Br., *passim*). However, no reliable evidence was presented in the lower court with respect to who drafted the lease documents as the lease documents themselves are unclear. (T.t Day One, at 45-47, 72-73, 208-10). Accordingly, SuperAsh’s repeated unsupported statements have no legal significance and should be ignored.

⁴ SuperAsh attached a copy of Joint Exhibit 3 with a sticker reflecting “JX 01.” There are several instances of such misidentification with respect to many of the documents in the SuperAsh Supplement. While Ashland will refer to those documents by their true exhibit numbers as shown in the record, Ashland will also provide the corresponding SuperAsh SUPP pagination number to eliminate confusion.

leased properties, and continued to sublease the properties to Speedway. (J-04 (the “Purchase Agreement”) [ASHSUPP00090-ASHSUPP00115]).⁵

The Ground Leases’ original term was five years, which could be, and was, renewed for another five-year term in 2015. (T.d. 284, ¶ 6 [SUPP000092-93]). Thereafter, the Ground Leases allowed Ashland to renew for additional one-year terms by providing written notice to SuperAsh 120 days before the expiration of the prior term. (J-03, Lease at 9 [SUPP000014]). For both lease years 2021 and 2022, those dates fell on September 3, 2020 and 2021, respectively. (T.d., 284, ¶ 7 [SUPP000093]). The Ground Leases also provided Ashland an option to purchase the properties at the end of any applicable lease term. (J-03, Lease at § 4 [SUPP000017-20]).

B. The Speedway arbitration.

In 2020, Speedway initiated arbitration against Ashland, alleging Ashland was required to exercise its purchase option in the Ground Leases and convey the properties to Speedway. (T.d. 284, ¶ 22 [SUPP000094]). Ultimately, the Arbitrator ruled in Speedway’s favor and ordered Ashland to purchase the properties and convey them to Speedway upon expiration of the Leases. (*Id.* at ¶ 24). SuperAsh was fully aware of the arbitration and the issues at stake therein (*i.e.*, Ashland’s obligation to purchase the properties) by at least early September 2021. (T.t. Day Two, at 16-18 (SuperAsh principal Jay Woldenberg admits he was aware of the arbitration and understood the issue in early September and he was set to and did in fact testify in the arbitration

⁵ SuperAsh refers to Ashland and Speedway as multi-billion-dollar companies in a thinly veiled effort to suggest that Ashland held some superior bargaining position over SuperAsh. But there is no lack of sophistication or financial wherewithal on SuperAsh’s part. SuperAsh is a company that owns the land for twenty-four gas station properties in five states; an ownership interest valued by SuperAsh at nearly \$30 million. (T.t. Day One, at 164, 206). It is comprised of a small group of investors led by its Managing Partner Jay Woldenberg, a former Wall Street real estate investment banker. (T.t. Day One, at 152, 204-08; T.t. Day Two, at 106).

on November 4, 2021); Trial Court Opinion [APPX000039-42⁶]; *see also* T.d. 284, ¶ 23 [SUPP000094]).

C. The 2020 renewal for the 2021 lease year.

In 2020, Ashland renewed the Leases for another year. However, the written renewal notice was not provided to SuperAsh until November 23, 2020, over 11 weeks after the September 3, 2020 deadline, due in part to a dispute with a third party (Valvoline) over who was required to give the renewal notice. (T.t. Day One, at 41-43; J-05, T.t. Day Two, at 30-32; P-02 [ASHSUPP00129-ASHSUPP00132]; J-06 [ASHSUPP00116-ASHSUPP00117]; J-07 [ASHSUPP00118-ASHSUPP00120]; T.d. 284, ¶¶ 11-13 [SUPP000093]). SuperAsh accepted the November 23, 2020 notice and did not raise any objection, much less claim termination of the Leases, or communicate that it would require strict compliance with the notice requirements going forward. (T.t. Day One, at 43-45).

D. SuperAsh devises a “gameplan” to leverage “murky” language in the 2010 Ground Leases regarding renewal.

Following the 2020 renewal, SuperAsh’s executives began to devise a business strategy to lay low in the hopes Ashland might “belatedly” send its renewal notice again in 2021, and then use the Lease’s “somewhat murky language” concerning renewals to “declare defaults and file lawsuits” against Ashland “to achieve a positive result” for SuperAsh. (August 26, 2022 Order Compelling Discovery, and accompanying document production (the “Discovery Order”) [ASHSUPP00001-ASHSUPP00022]; P-04 [ASHSUPP00133-ASHSUPP00137]). SuperAsh posited its strategy could throw Ashland’s agreements with Speedway “into chaos” and create a

⁶ Ashland cites SuperAsh’s Appendix and has not filed its own duplicative Appendix.

“huge and expensive problem for Ashland and could be highly profitable for Super[A]sh.” (P-04 [ASHSUPP00133]).

On February 22, 2021, Woldenberg sent a memorandum (the “Gameplan Memo”) to the other members of SuperAsh outlining this strategy.⁷ (*See id.*). Ashland only discovered the Gameplan Memo after the Trial Court ruled SuperAsh improperly withheld it in discovery. (Discovery Order at 1 [ASHSUPP00001]).

The Gameplan Memo noted Ashland’s late-delivered 2020 renewal notice (for the 2021 lease year) and proposed to leverage any potential late notice in 2021 to SuperAsh’s business advantage. (P-04 [ASHSUPP00133-ASHSUPP00134]). The Gameplan Memo stated that SuperAsh would “continue to maintain a cordial line of dialogue with Ashland on a roughly 90 day basis” and avoid alerting Ashland to the notice issue. (*Id.* at 4 [ASHSUPP00136]). SuperAsh would then “declare defaults” and terminate the Ground Leases, which would allow SuperAsh to seize the millions of dollars in improvements to the properties, which Ashland and Speedway paid for and owned. (P-04 at 1 [ASHSUPP00133]; J-03, Ground Lease at §15.3 [SUPP000045]). Woldenberg recognized the strategy was “not a clear winner” and “pursuing it would be expensive and would poison our relationship with [Ashland].” (P-04 at 1 [ASHSUPP00133]). Despite these uncertainties, Woldenberg proposed SuperAsh could at least leverage the chaos “to try to make a deal with Ashland” to increase rent for the properties. (P-04 at 4 [ASHSUPP00136]).

Throughout this time, SuperAsh knew that Ashland fully intended to renew the Ground Leases. (Trial Court Decision [APPX000039-42]; T.t. Day Two, at 15-16; P-04 [ASHSUPP00133-ASHSUPP00137]; T.t. Day One, at 177-178; T.t. Day Two, at 15-16; P-05 [ASHSUPP00138-

⁷ Woldenberg also shared the Gameplan Memo with those outside SuperAsh, including his friend and real estate contact B.J. Feller (“Feller”).

ASHSUPP00139]). On June 9, 2021, Woldenberg wrote to SuperAsh member Jay Sill, noting “[w]e did not pursue anything regarding the late [2020] notice. They will probably be late on the next one. One more one-year renewal. Then things get more interesting.” (P-05 [ASHSUPP00138-ASHSUPP00139]). On August 6, 2021—less than one month before the renewal deadline—Woldenberg wrote: “Oh they will keep renewing. The question is will we get them to pay us market rent?” (*Id.*).

E. The 2021 renewal for the 2022 lease year.

Before the September 3, 2021 renewal deadline approached, Ashland took steps to timely prepare and execute a formal renewal notice. (T.t. Day One, at 47-48). In early August 2021, William Whitaker, Ashland’s Vice-President and Treasurer and the executive “most directly responsible” for the Ground Leases with SuperAsh, coordinated with Ashland’s outside legal counsel, William Wallach, to prepare the notice. (*Id.*; J-09 [ASHSUPP00123-ASHSUPP00124]; T.d. 284, ¶ 14-18 [SUPP000093-94]). Wallach requested that Whitaker return the signed renewal notice to him so that he could share news of the renewal with Valvoline. (T.t. Day 1, at 47-57, 75; D-06 [ASHSUPP00023-ASHSUPP00024]; T.d. 284, ¶ 14-18 [SUPP000093-94]). This differed from the prior year, when Whitaker was expressly instructed to forward the notice directly to SuperAsh, but “Mr. Whitaker concluded that perhaps [Mr. Wallach’s] request had been due to the ongoing arbitration and other litigation, and counsel’s need to manage communications with all the participants.” (Trial Court Opinion at 6 [APPX000036]; T.t. Day One, at 47-51; T.d. 284, ¶ 14-18 [SUPP000093-94]).

On August 11, 2021, Whitaker executed the notice and sent it to Wallach, anticipating it would in turn be sent to SuperAsh. (T.t. Day One, at 47-57; J-09 [ASHSUPP00123-ASHSUPP00124]; D-06 [ASHSUPP00023-ASHSUPP00024]; T.d. 284, ¶ 14-18 [SUPP000093-

94]). On August 12, 2021, Wallach forwarded the executed notice to Valvoline, with a message stating the notice had been “sent by Ashland to [SuperAsh],” demonstrating Wallach’s mistaken belief that Whitaker had sent the notice to SuperAsh. (J-09; T.t. Day One, at 47-51; T.d. 284, ¶ 18 [SUPP000094]). Because of the miscommunication between Wallach and Whitaker, however, the renewal notice was not sent to SuperAsh in advance of September 3, 2021. (Trial Court Opinion at 6-7 [APPX000036-37]).

In the weeks following September 3, 2022, SuperAsh did not reach out to Ashland to determine why the renewal notice had not been received despite SuperAsh’s admission that it knew Ashland intended to renew and knew about the Speedway arbitration and its impact on these properties. (*See* T.d. 284, ¶ 19 [SUPP000094]; J-10 [ASHSUPP00125-ASHSUPP00128]; T.t. Day Two, at 16-18, 25-27). Then, on November 3, 2021, Woldenberg sent Whitaker a termination of lease notice stating for the first time that “SuperAsh understands that Ashland intended and intends to allow the Ground Lease to expire on December 31, 2021,” because notice had not been received by September 3, 2021. (*See* T.d. 284, ¶ 19 [SUPP000094]; J-10 [ASHSUPP00125-ASHSUPP00128]; T.t. Day Two, at 16-18, 25-27). Whitaker responded within minutes, attaching the August 11, 2021 signed renewal letter, and stating “I take it that you didn’t receive the attached? I’ll connect with counsel since I’m not sure why this wasn’t shared.” (T.d. 284, ¶ 20 [SUPP000094]; P-11 [ASHSUPP00140-ASHSUPP00141]). SuperAsh waited this long (following the plan laid out in the Game Plan Memo) despite admitting that it was aware of the late renewal issue as of September 8, 2022. (T.t. Day One, at 181-82, 189). By comparison, just a few months earlier, SuperAsh immediately sent notice to Ashland on July 1, 2021, when the June 30 rent payment was less than one day late (T.t. Day One, at 45 and 160-61; T.t. Day Two, at 16-18; J-08 [ASHSUPP00121-AHSUPP00122]).

This undisputed factual evidence led the Trial Court to conclude that “late delivery was completely unintentional,” and “it was only through inadvertence or honest mistake that the renewal was not timely delivered to SuperAsh.” (Trial Court Opinion at 6, 11-12 [APPX000036, 41, 42]).

F. Prejudice and hardships to the parties and the public.

SuperAsh suffered no prejudice from the delayed notice because it “did not change its position, or even genuinely anticipate that Ashland would not renew,” at any time prior to its receipt of the written notice on November 3, 2021. (Trial Court Opinion at 8 [APPX000038]). “SuperAsh did not engage a broker to sell the properties or seek new tenants. It did not invest in property upgrades or improvements.” (*Id.*; T.t. Day One, at 202-03; T.t. Day Two, at 60-62; 119-21).⁸ Indeed, as set forth above, SuperAsh planned for this exact sequence of events to seize and capitalize on a late notice, so there would be no reason for SuperAsh to incur any additional expense as a result of the late notice. *See supra*.

Conversely, terminating the Leases would cause enormous hardship to Ashland, Speedway, and others. In 2013, Ashland paid \$13.7 million to purchase the buildings and improvements on all 24 properties, which was done “in contemplation of continuing to renew the leases or using the option to purchase the ground.” (J-04, p. 3 [ASHSUPP00093]; T.t. Day One, at 152-55). Between 2014 and 2022, Speedway paid another \$11.8 million for improvements to the properties. (P-35 [ASHSUPP000143-ASHSUPP00183]; P-36 [ASHSUPP00184-ASHSUPP00188]; T.t. Day One, at 195-97; T.d. 284, ¶ 29-33 [SUPP000095]). All improvements would purportedly be forfeited to

⁸ Indeed, the Trial Court found it is “reasonable to infer that termination of the Leases would significantly harm SuperAsh,” because of lost rent and the difficulties of releasing or selling the properties. (Opinion at 8 [APPX000038]; *see also* T.t. Day Two, at 119-21 (suggesting the properties would remain empty for months)).

SuperAsh if the Leases were terminated. (Trial Court Opinion at 8 [APPX000038]; J-03 at § 15.3 [SUPP000045]; T.t. Day Two at 116-18).

The Trial Court also found termination would “caus[e] ... predictable public harm,” including the possibility that “[c]onvenience store employees would be put out of work. Petroleum product supply contracts and other commercial contracts would go unfulfilled. Potentially significant and expensive close-out issues with underground petroleum storage tanks could be triggered.” (Trial Court Opinion at 8 [APPX000038]).

G. The parties enter into tolling agreements in attempt to resolve the dispute.

Following SuperAsh’s refusal to extend the Ground Leases, Ashland attempted to seek a business resolution. In exchange, SuperAsh demanded that Ashland execute a series of Tolling Agreements requiring Ashland to pay approximately \$1 million in “rent,” for January through April 2022, and \$80,000 in “tolling fees,” to permit Ashland to continue to occupy the properties while discussions took place. (T.t. Day One, at 57-60; J-12⁹ [SUPP000097-98], J-13 [SUPP000099-100], J-15 [SUPP000101-102], and J-16 [SUPP000103-105]; T.d. 284, ¶ 21 [SUPP000094]; T.t. Day Two, at 113-14). Under the terms of the Ground Leases, if SuperAsh had properly recognized the renewal, Ashland would have only been required to pay \$512,400 for all 24 properties for all of 2022. (*See id.*; *see also* J-03 [SUPP000001-90]).

Although the final Tolling Agreement expired on April 15, 2022, Ashland paid—and SuperAsh accepted—\$250,000 in rent for the entire month of April. (*See* J-16 [SUPP000103-105]; *see also* T.t. Day Two at 113-16). Thus, SuperAsh accepted rent of about \$125,000 for weeks

⁹ SuperAsh’s copies of the tolling agreements list them as Joint Exhibits 11 through 15, but they were marked at the trial court as Exhibits 12, 13, 15, and 16. Regardless, Ashland will cite the tolling agreements located in SuperAsh’s Supplement.

beyond the alleged termination of the Leases and Tolling Agreements. (Trial Court Opinion at 11 [APPX000041]).

H. The declaratory judgment action.

When the parties were not able to resolve their issues after months of negotiations (and after SuperAsh sent an email terminating further negotiation (P-29 [ASHSUPP00142])), Ashland filed a declaratory judgment complaint against SuperAsh in Franklin County, Ohio. (Complaint). SuperAsh filed a Counterclaim seeking declaratory judgment and alleging forcible entry and detainer and breach of contract. (SuperAsh Answer).

After a multi-day trial with multiple witnesses, the trial court entered judgment in favor of Ashland and ruled that SuperAsh could ***not*** terminate the Leases. The trial court observed that “Ohio is among the many states recognizing that equity can come to the aid of someone making an innocent, unintended error under a lease.” (Trial Court Opinion at 8 [APPX000038]). The court held that, even if Ashland failed to comply with the Lease’s notice requirements, it was entitled to equitable relief because the delay was the result of an “honest mistake,” SuperAsh suffered no prejudice, and Ashland and others would suffer massive and inequitable forfeitures as a result of termination. (*Id.* at 2-13 [APPX000042, 43]). The trial court also found SuperAsh was equitably

estopped from terminating the leases because it's acceptance of rent beyond the alleged expiration of the Lease term. (*Id.* at 17 [APPX000047]).¹⁰

I. The Tenth District's decision below affirmed.

Recognizing the honest mistake doctrine is well established and nearly universally recognized throughout Ohio and elsewhere, the Tenth District Court of Appeal considered the rule and found that the facts here satisfied both prongs of the rule. That is the court of appeals found that: (1) Ashland's late notice resulted from accident, fraud, surprise, or honest mistake and the late notice did not prejudice SuperAsh; and (2) even if there was no evidence of an honest mistake, Ashland and Speedway made valuable improvements to the leased property that would be forfeited if the late notice was not excused and SuperAsh was not prejudiced by the late notice. (Decision at ¶¶ 46-55 [APPX000016-APPX000019]). As a result, the court of appeals affirmed the trial court's decision.¹¹ (*See id.* at ¶ 69 [APPX000024]).

¹⁰ Since the Trial Court's decision below, the courts in three Kentucky counties, relying on the Ohio trial court's rulings, followed suit, ruling that Ashland was also entitled to equitable relief under Kentucky's honest mistake doctrine. *See SuperAsh Remainderman Limited Partnership v. Ashland LLC*, Fayette District Court, Civil Action No. 22-C-4161 (Fayette D. Ct., Dec. 9, 2022); *SuperAsh Remainderman Limited Partnership v. Ashland LLC*, Harrison District Court, Civil Action No. 22-C-00198 (Harrison D. Ct. KY, Dec. 1, 2022); *SuperAsh Remainderman Limited Partnership v. Ashland LLC*, Jefferson District Court, Civil Action No. 22-C-008708 (Jefferson D. Ct. KY, Jan. 6, 2023). All three of these decisions were affirmed on appeal to the circuit courts. *SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC*, Civil Action No. 22-XX-42 (Fayette Ky. Cir. Ct., Feb. 24, 2023); *SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC*, Civil Action No. 22-XX-03 (Harrison Ky. Cir. Ct., April 14, 2023); *SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC*, Civil Action No. 22-XX-02 (Jefferson Ky. Cir. Ct., April 12, 2023). The Kentucky Court of Appeals accepted discretionary review of these decisions and consolidated them for briefing and argument. *SuperAsh Remainderman Limited Partnership v. Ashland LLC and Speedway LLC*, Nos. 2023-CA-0427-D, 2023-CA-0566-D, 2023-CA-0578-D (Ky. Ct. App. Sep. 6, 2023). That appeal is currently pending.

¹¹ In rendering its decision, the Court of Appeals did not decide the assignment of error regarding equitable estoppel, finding that the arguments were moot in light of the Court's decision on honest mistake. (Decision at ¶ 60 [APPX000021-APPX000022]).

III. ARGUMENT

APPELLEE’S PROPOSITION OF LAW NO. 1: A court may grant a tenant equitable relief from the tenant’s failure to timely submit a notice to renew a lease if (1) the failure resulted from accident, fraud, surprise, or honest mistake and the landlord would not be prejudiced, or (2) even in the absence of accident, fraud, surprise, or honest mistake, the tenant made valuable improvements to the leased property and the landlord would not be prejudiced. (recognizing and adopting the honest mistake doctrine as set forth in *Ward v. Washington Distributors, Inc.*, 67 Ohio App.2d 49 (6th Dist. 1980)).

APPELLEE’S PROPOSITION OF LAW NO. 2: A court may in the appropriate circumstance relieve a tenant from their failure to submit a timely notice to renew a lease under the common law equitable honest mistake doctrine generally described in *Ward v. Washington Distributors, Inc.*, 67 OhioApp.2d 49 (6th Dist. 1980).

A. The honest mistake doctrine is narrow in scope and application.

Contrary to the entire theme of the briefs of Appellant and its amici, the honest mistake doctrine applied by the courts below is not a radical or extreme invitation for Ohio courts to rewrite the terms of parties’ contracts, let alone an invitation to do so under the guise of vague and unpredictable notions of fairness. In fact, the opposite is true. The doctrine is long-established, well-defined and limited in scope to specific factual circumstances like those presented here. In those rare circumstances in which courts apply the doctrine, it has *no* impact on the substantive financial terms of the parties’ contractual deal. And it serves as a needed backstop to prevent landlords reaping unearned and substantial windfalls at the expense of their tenants.

1. The honest mistake doctrine is limited to the procedures for the renewal of leases and does not upend any substantive term of the parties’ contractual agreement.

By its terms, the honest mistake doctrine addresses under what limited circumstances a parties’ failure to strictly comply with the notice requirements for renewing a lease (typically the failure to provide notice within the time frame set forth in the contract or the method or mechanism by which such notice was provided) may be excused and nothing more.

As such, the doctrine implicates no substantive terms of parties' contracts. Neither the amount of rent owed (for the renewal period or otherwise), the duration of the renewal period, nor any other obligation of the tenant to the landlord is affected by the doctrine. In fact, given the non-substantive purpose and effect of the honest mistake doctrine, it is content neutral. By contrast, other common law equitable doctrines like waiver, estoppel, duress, unconscionability, or common law limitations on liquidated damages, can and do completely upend the financial terms of a contract. In short, the honest mistake doctrine is comparatively benign.¹²

2. The honest mistake doctrine is not a vague or uncertain rule left to the unpredictable whims of trial court judges on an ad hoc basis.

As the Tenth District's decision below exemplifies, the honest mistake doctrine has well-established and straightforward parameters and a body of caselaw to draw upon for guidance.

The doctrine contains two very specific prongs, *i.e.*, two separate, limited scenarios when a court may grant a tenant equitable relief for failure to timely submit a notice to renew a lease. The first is when the "failure resulted from accident, fraud, surprise, or honest mistake and the landlord would not be prejudiced." *See SuperAsh*, 2023-Ohio-3556, ¶41. The second is when "even in the absence of an honest mistake, the tenant made valuable improvements to the leased property and the landlord would not be prejudiced." *Id.*

As to the first scenario, an "honest mistake" does *not* apply where "a tenant has full knowledge of the lease renewal date and does not attempt to submit a timely renewal notice." *Id.* at ¶ 49 (citing cases). In such circumstances, the tenant's failure to renew "results from a willful

¹² Appellant's complaint that the rent required to be paid under the Ground Leases is below market, *see* Brief at 5 & 22, proves the point. That purported "below market rent" term is a substantive financial term contained in the parties' agreement that was not *altered* by application of the honest mistake doctrine in this case. To the contrary, it is one of many substantive terms that is being enforced because of doctrine applied. In short, to the extent any party here wants to upend the substantive deal reached by the parties in the Ground Leases, it is Appellant not Ashland.

omission rather than an honest mistake.” *Id.* (citing cases). In other words, the first prong only applies “where a tenant is reasonably mistaken regarding the renewal date or takes reasonable steps to submit a timely renewal notice.” *Id.* at ¶ 50 (citing cases). The first prong does not apply simply because of a tenant’s mere forgetfulness or other inexcusable neglect.

As to the second scenario, equitable relief can relieve a tenant’s mere forgetfulness, but only when a tenant will lose valuable improvements made by the tenant to the lease property in the absence of equitable relief. As the court below explained, the relevant forfeiture that matters here is not the loss of the option to renew itself, but instead, the substantial loss of the value of the improvements made by the tenants to the property, which were made in good faith and with the intent to renew the lease. *Id.* at ¶ 48 (citing cases).

Finally, under either scenario, “a court must find that the landlord will not suffer prejudice.” *Id.* at ¶ 41. As to that inquiry, courts find that the prejudice to the landlord must arise from the delay itself, *i.e.*, the landlord must have changed his position in reliance upon the late notice, such as securing another tenant, incurring other expenses, or taking other material steps to its detriment in reliance on its belief that the tenant did not intend to renew. *Id.* at ¶¶ 41-45 (citing cases). Prejudice, however, does not include the mere loss of the landlord’s contractual rights to the property based upon the alleged nonrenewal of the lease or the enforcement of the material terms of the lease had the renewal been timely. *Id.* at ¶ 46.

In short, the honest mistake doctrine does not permit a court to simply do whatever it believes is “fair” unmoored to text or precedent. Instead, the doctrine provides clear instructions permitting courts to apply the doctrine only in rare circumstances and only when necessary to avoid inequitable windfalls.

3. The honest mistake doctrine does not create incentives for mischief by tenants; it prevents landlords from obtaining unearned and substantial windfalls.

Appellant incorrectly suggests that application of the honest mistake doctrine provides a mechanism for mischief by a tenant who, “under the guise of sheer inadvertence,” could “gamble with a fluctuating market, at the expense of his landlord, by delaying his decision beyond the time fixed in the agreement.” Brief at 28 n.23 (quoting *Greenhill Inv. Co. v. Tabet*, 1986 WL 412, *6 (Del. Chancery, Oct. 31, 1986)).

As a preliminary matter, as discussed above, the honest mistake doctrine only applies in limited circumstances, and any court would properly reject an attempt to exercise the doctrine if it were used as a ruse for purposes of gambling on the market. Such a delay would not be caused by either an honest mistake or even mere forgetfulness, but instead by a willful and deliberate act of the lessee. Of course, there was no evidence of any such ruse by Ashland here, let alone in service of some inconceivable “gamble” concerning the value 24 properties located in five different states.

Moreover, even when such a ruse is suspected but could not be proven, the doctrine simply does not apply to “sheer inadvertence” except under the limited circumstance when the tenant risks forfeiture of valuable improvements to the leased property. *SuperAsh* at ¶ 48. In such a scenario, it is unrealistic (and disingenuous) to suggest that a tenant would purposefully “gamble” such valuable lease improvements (here, worth more than \$25 million dollars) in order to *potentially* buy a few months to determine whether the relatively stable real estate market would materially change in the interim. The risk of such gamesmanship is simply fantasy, and would not be supported by the courts even if it existed.

In contrast, however, the honest mistake doctrine does prevent the type of gamesmanship that SuperAsh attempted here – lying in wait and using an inadvertent failure to timely renew in order to seize for itself millions of dollars in gas station buildings and improvements without

having to pay for them. Simply put, to the extent that the Court is concerned with the potential mischief of contracting parties, such mischief is deterred by the existence of the honest mistake doctrine not its elimination.

4. The honest mistake doctrine is not extraordinary or unique in the law of contracts.

The honest mistake doctrine is part of the entire body of contract law that places equitable guardrails on the ramifications of strict enforcement of provisions contained in contracts. These equitable guardrails manifest in a variety of equitable and common law doctrines that reject the concept that contractual relationships are governed solely by a hyper technical compliance with the contract provisions as written and nothing more.

For example, “[s]imple contract law has always distinguished between a material breach and an immaterial breach. A man may breach his contract but that does not necessarily void the contract or excuse performance by the other. If the breach is immaterial, the contract is still enforceable although subject to damages.” *Blenheim Homes, Inc. v. Mathews*, 119 Ohio App. 44, 48, 196 N.E.2d 612 (10th Dist. 1963). A material breach occurs when a party violates a term essential to the purpose of the agreement. *Austin v. Mid-Ohio Pipeline Servs., LLC*, 2023-Ohio-1958, 217 N.E.3d 122, ¶ 37 (5th Dist.) (quotation omitted). “Mere nominal, trifling, or technical departures will not result in a breach of contract; slight departures, omissions, and inadvertencies should be disregarded.” *Austin* at ¶ 37 (quotation omitted).

While the issue in this case does not involve a *breach* of the Ground Leases *per se*, the material/immaterial distinction is relevant to demonstrate that contract law has always distinguished between contract obligations that are more meaningful than others, especially when it comes to enforcing a *continuation* of the parties’ contractual relationship.

The honest mistake doctrine reflects this distinction and overall goal of the law. It recognizes the commonsense notion that, while parties may agree that a notice of lease renewal is to be provided by a certain day and under certain methods, the specifics of “when” or “how” the notice is to be provided are not themselves essential to the purpose of the agreement or to the substance of the parties’ deal. Instead, some date and some mechanism need to be selected for practical reasons. Accordingly, common sense further tells us that the parties do not expect that failure to comply perfectly with such *procedural* terms will *necessarily* result in the termination of the contractual relationship, especially in those circumstances when the elements of the honest mistake doctrine exist.

Appellant’s position requires this Court to hold that the parties to these Ground Leases, and parties to leases in general, understood and desired that millions of dollars of improvements would be forfeited just because a miscommunication between the tenant and its lawyer resulted in a late renewal notice, without any prejudice to the landlord.

Likewise, the honest mistake doctrine mirrors the general obligation imposed by Ohio law that “the parties to a contract owe each other a duty of good faith and fair dealing.” *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶ 43 (1st Dist.). ““Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”” *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, 839 N.E.2d 49, ¶ 26 (1st Dist.) (quoting Restatement of the Law 2d, Contracts (1981), Section 205, Comments a). Accordingly, “[a]ny agreement -whether a lease, a secured loan, or something else - has an implied covenant of good faith and fair dealing that requires not only honesty but also reasonableness in the enforcement of the contract.” *Id.* at ¶ 27.

Reasonableness in the enforcement of the Ground Leases is not advanced by the elimination of the honest mistake doctrine.

Finally, the honest mistake doctrine reflects the overall maxim that “the law abhors a forfeiture.” *Ensel v. Lumber Ins. Co.*, 88 Ohio St.269, 281 (1913); *see also Ohio Dep’t of Liquor Control v. FOE Aerie 0456*, 99 Ohio App. 3d 380, 385 (10th Dist. 1994) (noting “the enduring maxim that forfeitures are not favored in law or equity”). In fact, the Restatement (Second) of Contracts § 229 of the Restatement expressly provides that, “[t]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.” There is nothing in the record (let alone common sense) to suggest that *the deadline* to provide renewal notice under the Ground Leases was a material part of the agreed exchange, and certainly no evidence of such was presented or argued below. Thus, “a court may, in appropriate circumstances, excuse the non-occurrence of a condition solely on the basis of the forfeiture that would otherwise result.” *Id.*, comment a. Here, Appellant cannot and does not dispute that “[w]ere SuperAsh to prevail in this case not only the land leases but also buildings and improvements on the land—some only recently erected at a cost of millions of dollars—would be forfeited.” Trial Court Opinion at 14.

B. Appellants’ proposition of law is extreme on its face, in its rationale, and in its potential ramifications.

While application of the honest mistake doctrine is not radical when appropriate, Appellant’s proposition of law is.

Appellant’s proposition of law does not request that the honest mistake doctrine be limited to a narrower set of circumstances. Appellant does not ask that this Court limit the doctrine to only one or another of its prongs. Appellant does not seek clarification as to what is or is not an “honest mistake” for purposes of the doctrine. And Appellant does not challenge how the lower courts

applied the doctrine to the facts of this case or argue why the doctrine should not be applied to the facts here. Simply put, none of these issues are properly before this Court.¹³

Rather, using general principles of law (*i.e.*, the importance of the freedom of contract generally and the importance of enforcing the express terms contained in therein) as a sledgehammer, Appellant seeks to have this Court adopt a broad and categorical rule. Its rule would render the law entirely powerless to excuse *any failure* to follow the strict requirements for renewal of leases under any circumstance, no matter how minor, or for any reason. Its strict and unyielding rule would apply when the renewal notice is one day (or even one hour) late, sent to the wrong address because of a typographical error, sent by email instead of certified mail, lost in the mail, or any other innumerable possible scenarios occur. And Appellant's rule would apply regardless of whether the landlord suffered any prejudice or regardless of the ramifications including a multi-million-dollar windfall to the landlord like in this case.

Appellant's proposition of law is not just extreme on its face, it wholly undermines the reasonable expectations of the parties not only to the Ground Leases at issue here, but also to all other contracting parties in Ohio who have entered into contracts. "Except where a contrary intent is evident, the parties to a contract are deemed to have contracted with reference to existing law." *Eastwood Local School Dist. Bd. of Edn. v. Eastwood Edn. Assn.*, 172 Ohio App.3d 423, 2007-Ohio-3563, 875 N.E.2d 139, ¶ 27 (6th Dist.). The "'laws existing at the time of the making of a contract enter into and form a part of the contract as fully as if expressly incorporated in the contract.'" *Id.*, quoting 11 Lord, Williston on Contracts (4th Ed. 1999) 205-206 and citing *Bell v.*

¹³ Appellant's catch-all *list* of grounds for why the lower court should be reversed even if the honest mistake doctrine otherwise applies, *see* Brief at 40-41, are not properly before this Court. None of these issues were properly preserved, presented to, or accepted for review by this Court, and Appellant's superficial listing of them is clearly insufficient to adequately present such arguments to this Court for review.

Northern Ohio Tel. Co., 149 Ohio St. 157, 158, 78 N.E.2d 42 (1948). In other words, contracting parties in Ohio, including the parties in this case, entered into their agreements assuming that the honest mistake doctrine, a bedrock equitable common law doctrine, was in effect and would govern the parties' contracts.

Here, the Ground Leases at issue in the case were formed in 2010, *thirty years after* the "well settled principles of equity" comprising the honest mistake doctrine were, at the latest, first formally recognized for purposes of Ohio jurisprudence. *See Ward v. Washington Distributors, Inc.*, 67 Ohio App.2d 49 (6th Dist. 1980). During those intervening 30 years, the honest mistake doctrine continued to be nearly universally recognized by Ohio courts. *See infra*. Thus, when the Ground Leases were formed in 2010, the doctrine was the well-established law in Ohio, and under the reasonable expectations of the parties, deemed to have been incorporated into the Ground Leases given that nothing in the Ground Leases expressly or otherwise indicates a contrary intent.

Finally, Appellant's proposition of law is radical because it is based solely on an argument that, if accepted, could have far-reaching, uncertain, and unexpected ramifications. Again, at its core, Appellant's argument is based solely on the general obligation to enforce contract terms *as written*. That principal is important to contract law, but no more important now than when the honest mistake doctrine was adopted and developed. If an appeal to such general principals of contract law is alone sufficient to upend such well-established common law equitable doctrines such as the honest mistake doctrine, what other equally established equitable doctrines do such general principles not equally upend? The honest answer to that question is none. Simply put, if the Court accepts Appellant's argument here, Ohio courts will be inundated with similar arguments seeking to undermine countless other common law equitable doctrines that generations of contracting parties in Ohio have relied upon in drafting their agreements.

C. The honest mistake doctrine is a well-established common law rule in Ohio and throughout the nation.

1. *Ward* was not an outlier when decided (or now) but reflected a well-developed common law doctrine that had developed since at least the 1920s.

As SuperAsh’s brief reflects, the seminal case for the adoption of the honest mistake doctrine in Ohio law is *Ward v. Washington Distributors, Inc.*, 67 Ohio App.2d 49 (6th Dist. 1980). In *Ward*, a commercial 12-year lease was subject to two renewal options for five years each, so long as notice was provided by the lessee at least 30 days before the end of the preceding term. *Id.* at 50-51. At the end of the first term, the lessee failed to provide timely notice of renewal, which was not provided until one day after the lease expired under its terms. *Id.* at 52. The landlord sued to evict, and the trial court agreed, finding (as Appellant asserts here) that the lessee was not entitled to equitable relief since it failed to renew in accordance with the clear provisions of the lease. *Id.* at 53.

The Sixth District reversed, finding that “application of well-settled principles of equity” applied to excuse the late renewal notice. *Id.* at 53. As the *Ward* court explained, “[e]quity will relieve a lessee from the consequences of a failure to give notice at the time, or in the form and manner, required as a condition precedent to renewal of a lease, where such failure results from accident, fraud, surprise or honest mistake, and has not prejudiced the lessor.” *Id.* at 53. In fact, “[e]ven where there is an absence of an honest mistake by the lessee, where the lessee has made valuable improvements to the leased premises, the lessee should not be denied equitable relief from his own neglect or inadvertence if a forfeiture of such improvements would result provided, there is no prejudice to the landlord.” *Id.* at 53. Since an honest mistake (a misreading of the lease and misfiling of certain related documents), the prospect of forfeiture of valuable improvements (over \$72,000 of unamortized leasehold improvements and fixtures), and a lack of prejudice were

established in the record, reversal was required and an order decreeing the renewal of the lease for an addition five-year term was entered by the court of appeals. *Id.* at 55-56.

The honest mistake doctrine recognized in *Ward* was not created out of whole cloth. In support, the *Ward* opinion cited cases going back to 1922 from Nevada, Florida, New York, and Connecticut. *Id.* at 54. Notably, in his concurrence, Judge Wiley further recognized that the court's analysis was consistent with the "principals of law stated in Annotation 44 A.L.R.2d 1359, 1366, 1369, Sections 4 and 5, and the cases cite therein." *Id.* at 56.

Likewise, while *Ward* may have been the first time the doctrine was set forth in a concise and direct way for purposes of Ohio jurisprudence, the Ohio cases cited by *Ward* reflect that the doctrine existed in Ohio law even earlier. *Id.* at 54. While none of these cases dealt directly with the honest mistake doctrine by name, each implicitly recognized that the law provided for equitable considerations in defense of a forcible entry and detainer claim, including to excuse late notice of renewal under a commercial lease. *See, e.g., Barr Hotel Co. v. Lloyd Mackeown Buick Co.*, 104 Ohio App. 69, 74, 146 N.E.2d 879 (3d Dist. 1957) (recognizing that a municipal court had jurisdiction to entertain equitable considerations to excuse late notice of renewal under commercial lease, including evidence of testimony as to the improvements which a lessee had placed on the premises and the hardship which would be suffered by a lessee's loss of possession thereof); *Rea v. Helsley*, 86 Ohio App. 114, 114, 90 N.E.2d 168 (10th Dist. 1949) (finding that the municipal court had jurisdiction to determine that the tenant is entitled to equitable relief against a forfeiture of the lease). In sum, the assumption underlying all these cases was that equity could be invoked to excuse the late notice or other obligations under the express terms of a lease.

- 2. The honest mistake doctrine has been either expressly or implicitly adopted by every court of appeals in Ohio to have addressed the issue, except for one, the Second District's decision in *Carroll Building*, which is an extreme outlier, even in its own district.**

Significantly, even before the instant case, the equitable principles of *Ward* had been expressly or implicitly adopted by courts in at least the Second, Fourth, Eighth, Tenth, Eleventh, and Twelfth District Courts of Appeals, and recognized as the law in Ohio by the Federal District Court for the Northern District of Ohio. *See, e.g., Evans v. Bauer*, 2d Dist. No. 2445, 1989 WL 101132 (Aug. 31, 1989) (applying *Ward* and excusing late notice of lease renewal where the tenant mistakenly believed that the lease terminated approximately three weeks after it actually did and there was no showing of prejudice to the landlord); *Gehret v. Rismiller*, 2d Dist. No. 06CA1705, 2007-Ohio-1893, ¶¶ 24-25 (recognizing without criticism the general principles of *Ward* and distinguishing it from the facts of the case); *Molnar v. Castle Bail Bonds*, 4th Dist. No. 04CA2808, 2005-Ohio-6643, ¶¶ 50-51, 72 (recognizing that equitable relief could be available under *Ward* but finding that the trial court did not abuse its discretion in finding that lessee failed to satisfy the requirements for equitable relief); *Vivi Retail, Inc. v. E & A N.E. Ltd. Partnership*, 8th Dist. No. 90527, 2008-Ohio-4705, ¶¶ 20-21 (adopting *Ward* and finding that lessee was excused from a late notice of renewal where lessee did not remember the exact renewal date for renewal and there was no evidence that landlord changed its position in reliance on lessee's late notice); *Capuano v. Epic Properties*, 10th Dist. No. 93APE03-311, 1994 WL 505127, at *2 (Sept. 15, 1994) (expressly recognizing that “[c]ourts will sometimes relieve a lessee from the consequences of a tardy renewal of a lease when the lessee meets the requirements for obtaining equitable relief” and that those equitable principles are set forth in *Ward*.); *Convenient Food Mart, Inc. v. Atwell*, 11th Dist. No. 2003-L-174, 2005-Ohio-704, ¶¶ 25-26 (expressly “accept[ing] the general proposition of *Ward*,” but finding that the facts of the case were inapposite); *Burns v. Norcott*, 12th Dist. No. CA97-08-

036, 1998 WL 142410, at *4 (Mar. 30, 1998) (noting that “the record does not contain sufficient evidence that appellant made substantial *improvements to the property which would justify equitable relief*” to excuse late notice of renewal of lease); *First Interstate Avon, Ltd. v. Cost Plus, Inc.*, No. 1:19 CV 2079, 2020 WL 6047360, at *5 (N.D. Ohio Oct. 13, 2020) (“As previously recognized by this Court, even though the language of a lease may be clear and unambiguous, equitable relief may be granted to relieve a lessee from the consequences of a failure to give notice at the time, or in the form and manner required as a condition precedent, where the failure results from accident, fraud, surprise or honest mistake and has not prejudiced the lessor.”).

This broad and near-universal recognition by Ohio’s courts and commentators belies any notion that *Ward* represents some aberration in need of correction. Rather, it reflects that Ohio courts have recognized that *Ward* was well reasoned, uncontroversial, and a proper reflection of well-established law.

The Ohio cases cited by Appellant are not to the contrary, let alone representative of “criticism [of *Ward*].” *See generally* Brief at 33-35. Many are, in fact, to the opposite and have implicitly or explicitly recognized that equitable relief under the honest mistake doctrine may be appropriate in certain circumstances, just not under the facts of each of those specific cases. *See Convenient Food Mart, Inc.* at ¶¶ 25-26 (expressly “accept[ing] the general proposition of *Ward*,” but finding that the facts of the case were inapposite and not sufficient to justify such equitable relief); *Molnar* at ¶¶ 50-51, 72 (finding that the trial court did not abuse its discretion in finding that lessee failed to satisfy the requirements for equitable relief under *Ward*); *Paterakis v. Est. of Tuma*, 66 Ohio App. 3d 373, 377 (8th Dist. 1990) (applying *Ward* but concluding that plaintiffs were not entitled to equitable relief because plaintiffs’ failure to renew was not due to an honest mistake but a deliberate attempt to establish a new business in an adjacent building that

subsequently fell through and the landlord would suffer prejudice); *Capuano* at *2 (expressly recognizing that the equitable principles of *Ward* are to be followed where they can be satisfied); *Urology Services, Inc. v. Green*, 8th Dist. Cuyahoga App. No. 50205, 1986 WL 2937, at *3-4 (March 6, 1986) (recognizing and discussing with approval the general applicability of the honest mistake doctrine under *Ward* but finding that equitable relief was not warranted under the facts of the case). As Ashland previously demonstrated, *supra*, the honest mistake doctrine is only applicable under a limited set of circumstances. This means that naturally there will be many cases where the doctrine does not apply. SuperAsh’s caselaw thus only serves to highlight that the honest mistake doctrine is not as radical as SuperAsh would have this Court believe.

Recently, in *Quest Wellness Ohio, LLC v. Samuels*, 7th Dist. No. 23 MA 0013, 2023-Ohio-4450, the Seventh District reversed a trial court decision permitting a tenant’s late lease renewal. *Id.* at ¶¶ 69-75. However, in ruling on a motion to certify a conflict based on the Tenth District’s decision in this case, the Seventh District expressly disclaimed that its decision was a rejection of *Ward* or the honest mistake doctrine. *Quest Wellness Ohio, LLC v. Samuels*, 7th Dist. No. 23 MA 0013, 2024-Ohio-556, ¶ 7-9 (finding no conflict between the underlying *Quest Wellness* decision and the honest mistake doctrine reflected in the Tenth District’s decision in this case). The Seventh District explained that “we held that plain error existed because the trial court improperly applied substantial compliance based solely on legal stipulations” and “even acknowledged that ‘[t]here

are instances where courts have applied the substantial compliance doctrine to commercial leases where tenants failed to provide written notice of the intent to extend a lease.” *Id.*¹⁴

At the end of the day, of all the Ohio cases cited by Appellant, only *one* case comes close to affirmatively repudiating the honest mistake doctrine. *See Fifth Third Bank W. Ohio v. Carroll Bldg. Co.*, 180 Ohio App.3d 490, 2009-Ohio-57 (2d Dist.). While language in *Carroll Bldg.* certainly could be read as reflecting the Second District’s discomfort with certain aspects of *Ward*, the opinion does not affirmatively or expressly repudiate the general concept that equitable factors may excuse late lease renewals under certain circumstances. Even to the extent that *Carroll Bldg.* disagrees with some portion of *Ward*, it is a clear outlier, even within the Second District. Before *Carroll Bldg.*, the Second District had issued multiple opinions discussing *Ward* with approval. *See, e.g., Evans*, 1989 WL 101132 (applying *Ward* and excusing late notice of lease renewal where the tenant mistakenly believed that the lease terminated approximately three weeks after it actually did and there was no showing of prejudice to the landlord); *Gehret* at ¶¶ 24-25 (recognizing without criticism the general principles of *Ward* and distinguishing it from the facts of the case). Tellingly, *Carroll Bldg.* completely fails to even address these prior Second District precedents.

3. The honest mistake doctrine, in some form, is widely accepted by other states.

Appellant wrongly asserts that the honest mistake doctrine is a minority position among the states. Br. at 30. In making its argument, Appellant relies on *SDG Macerich Props., LP v. Stanek Inc.*, 648 N.W.2d 581 (Iowa 2002). *Id.* However, a review of *Stanek Inc.* reveals that Iowa, along

¹⁴ Finally, while the words “honest mistake” appear vaguely in the recent Franklin County Court of Common Pleas decision in *Harvest Pizzeria, LLC v. Rosemarie Keidel*, Case No. 19 CV 04684 (Oct. 5, 2023) (SUPP000174-184), it is not clear that the application of the doctrine was itself raised or even supported by the evidence in the case. Tellingly, no case law addressing the doctrine was cited or analyzed, and based upon the court’s analysis, the arguments of the tenant were primarily focused on arguments relating to the doctrines of course of dealings and waiver.

with the vast majority of other states, applies a similar version of the honest mistake doctrine. Indeed, Appellant even quotes *Stanek Inc.*'s language that affirms the doctrine: "As a general principle, a court of equity has the power to relieve a party from the consequences of a mistake." Br. at 31, quoting *Stanek Inc.* at 587. Appellant further acknowledged that *Stanek Inc.* defined mistake as an "erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or omission done or suffered by one or both parties, without its erroneous character being intended or known at the time." *Id.*, quoting *Stanek Inc.* at 587.

Unlike in *Stanek Inc.* wherein the defendant just forgot to send notice of renewal, Ashland was under the mistaken belief that notice, which had been timely prepared and executed, had been sent. Compare *Stanek Inc.* at 587; with *supra* at 7-8. Ashland's mistaken belief was the result of two human beings, attempting to do their best, having a miscommunication that caused one to think the other had sent the timely prepared and executed notice. *Supra* at 7-8. Such circumstance falls squarely within the definition of mistake provided in *Stanek Inc.*

Furthermore, *Stanek Inc.* specifically notes that a majority of the state courts allow equitable relief "in cases of fraud, misrepresentation, undue influence, *mistake*, waiver and

duress.” *Stanek Inc.* at 589 (emphasis added). And that observation remains true.¹⁵ Additionally, a number of other states allow equitable relief in special circumstances beyond mere negligence and in order to avoid a forfeiture, which equity abhors.¹⁶ And in Connecticut, Hawaii, Kansas, Maryland, and Michigan, the courts allow equitable relief as long as the party has not been willful or grossly negligent. *Conn. Light & Power Co. v. Lighthouse Landings, Inc.*, 279 Conn. 90, 106 n.15 (2006); *Aickin v. Ocean View Invests. Co.*, 84 Haw. 447, 455 (1997); *Fleming Cos. v. Equitable Life Ins. Co.*, 16 Kan. App. 2d 77, 78 (1991); *Banks v. Haskie*, 45 Md. 207, 224-25

¹⁵ *Andrews v. Blake*, 205 Ariz. 236, 247 (2003); *Gardner v. HKT Realty Corp.*, 23 Ark. App. 148, 152 (1988); *Wilkins v. Evans*, 1 Del. Ch. 156, 164 (1821); *Dugan v. Haige*, 54 So.2d 201, 202 (Fla. 1951); *Stanek Inc.* at 587; *Lykins Ents. v. Felix*, 2007 Ky. Unpub. LEXIS 7, at *27 (Nov. 21, 2007); *Richard v. Tarpon Oil Co.*, 269 So.2d 261, 266 (La. App. 1972); *Koch v. H & S Dev. Co.*, 249 Miss. 590, 622 (1964); *Fletcher v. Frisbee*, 119 N.H. 555, 559 (1979); *Sosanie v. Perneti Holding Corp.*, 115 N.J. Super. 409, 414 (1971); *Ballard v. Miller*, 87 N.M. 86, ¶ 17 (1974); *Baygold Assocs., Inc. v. Congregation Yetev Lev of Monsey, Inc.*, 19 N.Y.3d 223, ¶ 4 (2012); *Brazell v. Soucek*, 130 Okla. 204, ¶ 8 (1928); *W. Savs. Fund Soc. v. Southeastern Penn. Transp. Auth.*, 285 Pa. Super. 187, 196 (1981); *Am. Oil Co. v. Rasar*, 203 Tenn. 37, 48 (1957); *Utah Coal & Lumber Rest. v. Outdoor Endeavors Unlimited*, 2001 UT 100, ¶ 14; *Sentara Ents. v. CCP Assocs.*, 243 Va. 39, 44 (1992); *Ammar v. Cohen*, 96 W. Va. 550, 555-56 (1924); *Herman v. Kennard Buick Co.*, 5 Wis. 2d 480, 487 (1958); *Duncan v. G.E.W., Inc.*, 526 A.2d 1358, 1364 (D.C. 1987).

¹⁶ *See Delage v. Hazzard*, 16 Ala. 196, 201-02 (1849) (“sufficient legal excuse”); *Moran v. Holman*, 501 P.2d 769, 771 (Alaska 1972) (“It is also well established in this jurisdiction that equity abhors a forfeiture and will seize upon slight circumstances to relieve a party therefrom.”); *Riley v. Warner*, 217 Ark. 901, 903 (1950) (forfeiture for delay not enforced unless no “sufficient excuse” for delay); *White v. Greenamyre*, 77 Colo. 33, 35-36 (1925) (excusable neglect); *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 796 (1992) (equity intercedes in cases of forfeiture and resulting unconscionable penalty); *Linn Corp. v. LaSalle Nat’l Bank*, 98 Ill. App. 3d 480, 484 (1981) (excuse delay in light of potential forfeiture and significant improvements); *Medomak Canning Co. v. York*, 143 Me. 190, 195 (1948) (“such acts as will bring it within the power of equity to relieve”); *Trollen v. Wabasha*, 287 N.W.2d 645, 647 (Minn. 1979) (“excusable and inconsequential tardiness”); *Beck v. Strong*, 572 S.W.2d 484, 491 (Mo. App. 1978) (forfeiture would be unconscionable and result in hardship); *Host Int’l v. Summa Corp.*, 94 Nev. 572, 574 (1978) (special circumstances); *W. Tire v. Skrede*, 207 N.W.2d 558, 562 (N.D. 1981) (forfeiture unconscionable); *33 Flavors Stores, Inc. v. Hoffman’s Candies, Inc.*, 296 S.C. 37, 40 (App. 1988) (special circumstances); *Barton & Sons, Inc. v. Burbank Props., LLC*, 196 Wash.2d 199, 213 (2020) (delay inadvertent); *Brown v. Johnston*, 2004 WY 17, 32 (forfeitures unfavored).

(1876); *Mkt. Dev. Corp. v. Village Green Props., Ltd.*, 2000 Mich. App. LEXIS 1021, at *26 (Sept. 12, 2000).

The clear import of these cases is that the vast majority of states apply some form of equitable relief when there has been a late notice to renew a lease in the rare circumstances at issue here. There is no reason for Ohio to deviate from this majority (or its precedential history) by eliminating such a well-established commonsense approach.

4. The honest mistake doctrine is widely recognized by the treatises and commentators.

Additionally, treatises and commentators recognize the application of the honest mistake doctrine to options to renew. Indeed, numerous Ohio-specific treatises note that the honest mistake doctrine is the law in this state. Ohio Jurisprudence notes that “[e]quity will relieve a lessee from the consequences of a failure to give notice at the time . . . required as a condition precedent to the renewal of a lease, where such failure results from accident, fraud, surprise, or honest mistake.” 65 Ohio Jur. 3d § 445. And, “even in the absence of an honest mistake, equitable relief should not be denied where the lessee has made valuable improvements to the property.” *Id.* § 188.

Another Ohio treatise notes that it “is a well-settled rule, however, that unless the delay in renewing is so great as to be inexcusable, a failure to renew within the specified time will not preclude equitable relief.” 20 Ohio Real Prop. Law & Prac. § 20.04. Further, “[e]quity will relieve a tenant from the consequences of a failure to give notice at the time, or in the form and manner, required as a condition precedent to the renewal or extension of a lease if the tenant’s failure resulted from fraud, *honest mistake*, accident or surprise, and the landlord will not be prejudiced.” *Id.* (emphasis added).

Yet another Ohio commentator notes that “[n]otwithstanding protestations to the contrary, common law judges did not invariably view a party’s contractual performance on time as an

absolute duty.” 1 Corbin on Ohio Contracts § 37.01 (2024). Rather, the “question was always one of degree under all of the surrounding circumstances.” *Id.* And that this principle is particularly true when needed to avoid forfeitures. *Id.* § 37.03.

Similarly, American Jurisprudence acknowledges the near-universal acceptance of the honest mistake doctrine, noting that “courts may give equitable relief to a lessee who exercises an option to renew after the date specified in the lease, but before the expiration of the lease term.” 49 Am. Jur. 2d § 154. “This may be true even where the lease is clear and unambiguous.” *Id.* § 179. Indeed, honest mistake or inadvertence is a factor in determining whether courts should grant equitable relief, and “courts may also grant equitable relief from a failure to timely exercise a renewal or extension option where there was mistake mixed with some element of neglect.” *Id.* §§ 180, 183.

American Law Reports agrees, noting that “all courts [that] have dealt with the issue in recent years have recognized that there can be special circumstances which may warrant equitable relief from a lessee’s failure or delay in giving notice to renew an option in its lease.” *Circumstances Excusing Lessee’s Failure to Give Timely Notice of Exercise of Option to Renew or Extend Lease*, 27 A.L.R. 4th 266. These special circumstances include “accident, fraud, surprise, or mistake.” *Id.* And the Restatement provides that “[e]quitable considerations . . . may entitle the tenant to relief against the forfeiture of his lease for a mere failure to perform his promise.” Restatement (Second) of Prop.: Landlord & Tenant § 13.1; *see also* Restatement (Second) of Contracts § 229 (“To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.”).

Commentators further agree that the honest mistake doctrine is widely accepted. For example, Williston on Contracts notes that “a mistake by the defendant, although not sufficient . . . to give equitable ground for its reformation or rescission will, in some cases excuse the defendant from liability.” 25 Williston on Contracts § 67:26 (4th Ed.). The treatise further states that “equity may relief where the failure to renew is caused by inadvertence or oversight,” and it cites to an Ohio case providing that failure to provide notice can be excused in cases of “fraud, mistake, accident or surprise.” 15 Williston on Contracts § 46.12 (4th Ed.). It also notes that courts should not deprive a party of the “remedy of specific performance where a condition precedent has not occurred” because this “would often in effect inflict upon that party an unreasonable forfeiture or penalty.” 25 Williston on Contracts § 67.24 (4th Ed.). Journal articles also note this common and long-standing rule. *See, e.g.,* Michael Regan, *Notices to Renew Commercial Leases: Where Contract and Equity Collide*, 40 N.Y. Real Prop. L.J. 46, 46 (2012) (“Equity has long served as a basis to save a commercial tenant from the consequences of failing to comply with an option to renew a long-term commercial lease.”).

The clear consensus is that the honest mistake doctrine is a widely adopted equitable remedy for the mistaken failure to provide timely notice to renew a lease. Any argument from the Appellant that the doctrine should be eliminated by this Court represent a dangerous and vanishingly small minority opinion.

D. The decision below was not dependent on a broad iteration of the honest mistake doctrine as adopted by the Connecticut Supreme Court in F. B. Fountain, and even if it were, the issue is not properly before this Court.

Appellant contends that *Ward* was predicated upon and reflects a broad view of the honest mistake doctrine adopted in the seminal Connecticut Supreme Court case of *F. B. Fountain Co. v. Stein*, 97 Conn. 619, 118 A. 47 (1922), which according to Appellant, reflects a minority extension

of the doctrine. App. Brief at 28-30. Appellant’s criticism of *F.B. Fountain* and its purported application here is a red herring.

In *F. B. Fountain*, the Connecticut Supreme Court recognized that *under the general rule*, when failure to give timely notice results from “*accident*, fraud, surprise, or *mistake*, equity will relieve,” and that “these grounds of relief are the well-recognized aids to equitable interposition, and their application has been definitely determined.” *Id.* at 624 (emphasis added). The court further recognized that authorities “differ as to whether such relief can be afforded in cases of mere negligence as by forgetfulness.” *Id.* The court then held that “in cases of willful or gross negligence in failing to fulfil a condition precedent of a lease, equity will never relieve. But in cases of mere neglect in fulfilling a condition precedent of a lease, *which does not fall within accident or mistake*, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease.” *Id.* at 626-27.

To be fair, the rule adopted in *F. B. Fountain* is, at least to some extent, reflected in the *second* iteration of the honest mistake doctrine adopted in *Ward* and applied by the Tenth District below, to wit, that even in the absence of accident, fraud, surprise, or honest mistake (*i.e.*, even where the delay in providing notice of renewal is the result of the mere forgetfulness of the tenant), equity may still intervene when non-renewal would result in the forfeiture of significant tenant improvements and there was no prejudice to the landlord. That being said, however, the validity of the *second iteration* of the honest mistake doctrine recognized below is not before this Court.

First, the scope of this Court’s review is limited to the proposition of law accepted for review. *See Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823, ¶ 4. Here, Appellant did not seek review of the validity of that portion of the honest mistake

doctrine adopting the *F. B. Fountain* rule. Appellant’s proposition of law and the one that was accepted by this Court for review is that there is no room for any application of the doctrine under any circumstance and in any form, whether the first or second iterations of the rule as adopted in *Ward* and applied below.

Second, any such effort to seek review of only the second prong of the honest mistake doctrine would have been in vain because the ruling below was not dependent on application of that part of the doctrine. As the court below explained, Ashland satisfied both the first and second prongs:

[T]he evidence demonstrated that Ashland intended to renew the ground leases by executing the renewal notice in August 2021, and that the failure to timely submit the renewal notice resulted from a miscommunication between Whitaker and Wallach regarding who would send the notice. As such, the evidence supported the trial court’s conclusion that Ashland’s failure to timely submit the 2022 renewal notice resulted from an honest mistake and that Ashland was entitled to equitable relief. [Decision at ¶ 55 (APPX000019)].

Since the decision below was not dependent on the prong of the honest mistake doctrine reflected in *F. B. Fountain*, it is fully supported by the traditional definition of an honest mistake reflected in the first prong of *Ward*. As such, a ruling by this Court limiting the doctrine to such contexts would have no effect on the result below.

E. The honest mistake doctrine reduces transaction costs to contracting parties in Ohio.

“When applying the law to complex endeavors ..., it often is desirable to adopt default rules, whether in the form of legal presumptions or standardized contracts.” *Girolametti v. Michael Horton Assocs.*, 332 Conn. 67, 77-78, 208 A.3d 1223 (2019) (citing E. Zamir, “The Inverted Hierarchy of Contract Interpretation and Supplementation,” 97 Colum. L. Rev. 1710, 1755-56, 1768 (1997); T. Rakoff, Comment, “Social Structure, Legal Structure, and Default Rules: A Comment,” 3 S. Cal. Interdisc. L.J. 19, 20, 25-26 (1993)). Such default rules “help to reduce

transaction costs, increase efficiencies, and resolve contractual ambiguities.” *Id.* at 78. At the same time, “to the extent that public policy is not offended, parties retain the flexibility and freedom to contract around default rules to better serve their unique interests and needs.” *Id.* citing Ayres & R. Gertner, “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,” 99 *Yale L.J.* 87, 87-88 (1989); *see e.g., Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 50 (refusing to find that arbitration clauses in consumer contracts are per se invalid in part because “form contracts” can provide advantages to consumers in reducing transaction costs).

Amici disingenuously contend that the mere existence of the honest mistake doctrine as an available remedy increases transaction costs by breeding uncertainty in the law resulting in landlords demanding higher rents to compensate them “for the risk of being unable to exit the arrangement” except through litigation. Brief of Amicus Curiae Networks USA at 14-15. To be sure, in a very broad sense, uncertainty and unpredictability in the law can increase transaction costs, but there is no reason to believe (and certainly no evidentiary basis to support such belief) that the purported “uncertainty” inherent in the existence of the honest mistake doctrine results in higher rents. In fact, reason suggests the opposite.

First, the honest mistake doctrine does not affect any right of the landlord to “exit the arrangement” and Amici does not (and cannot) explain how it does. The doctrine concerns solely the right to renew a lease by the tenant – a provision that is triggered at the sole discretion of the tenant. Thus, because the landlord has no control over whether the tenant will or will not renew, the economics of the deal (including the rents charged) must necessarily assume renewal because *it is the right to renew* that matters. Simply put, it offends credulity to suggest that a landlord will demand higher rents because of the existence of the honest mistake doctrine.

Second, the potential costs associated with the risk of litigation merely counsels for a clear rule, not necessarily the selection of one rule over the other. So long as the rule is clear, parties can effectively predict outcomes, at least within reason. Notably, as the Tenth District’s decision below reflects, the enormous litigation cost expended by the parties to this case were not incurred because Ohio’s honest mistake doctrine was unclear or because there was a reasonable dispute as to its application to the facts in this case. Rather, SuperAsh’s Game Plan Memo, drafted nine months before it attempted to terminate the Leases, set forth in great detail its plan to roll the dice in litigation because the potential windfall to it is so great. *See supra* at 5-6.

Third, and perhaps most importantly, the honest mistake doctrine reduces transaction costs for contracting parties. Contrary to the hyperbolic rhetoric of the Appellant and its amici, the issue for this Court is not the false either/or that contracting parties must be *stuck* with “contract certainty” (their preferred rule) or the alleged uncertainty inherent the honest mistake doctrine. Parties are always free to contract around default common law rules. *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, ¶ 15 (“Parties to a contract may include terms in derogation of the common law, but the intent to do so must be clearly indicated.”). Thus, the issue for this Court is which rule should serve as the default rule, not which rule contracting parties in Ohio must be stuck with.

Here, a default rule in favor of the availability of the honest mistake doctrine in the appropriate case results in less transaction costs for two interrelated reasons.

First, having a default rule that applies the honest mistake doctrine in the rare cases where it is necessary reflects what most parties would want to govern their relationship, thus negating the need for negotiation over its terms in most case. *See Girolametti*, 332 Conn. at 78 (default rules should reflect what these particular parties actually would have chosen or what arrangements most

reasonable bargainers would prefer had they expressly considered the question at the outset), *citing* I. Ayres & R. Gertner, *supra*, 99 Yale L.J. 89-92; *see also* *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1021 (Del. 2001) (“We begin with the basic proposition that default damages rules, like other contract rules, should generally reflect the contract term that most parties would have bargained for at the time of the agreement.”).

Second, the transaction costs associated with “opting out” of the honest mistake doctrine are minimal in those circumstances when the parties do not want to have the doctrine to apply. In such cases, parties who wish to opt out can simply state in their contract that the renewal requirements are to be strictly construed and shall not be altered or excused by any common law or other equitable considerations, including but not limited to the honest mistake doctrine.

In contrast however, if the Court were to adopt what Appellant proposes (precluding the honest mistake doctrine as a matter of common law), the cost of opting into the safeguards of the doctrine through contract negotiation would be very high. The parties would have to spend resources negotiating the terms of a version of the honest mistake to predict the many eventualities that are unlikely to occur; contemplate and consider multiple possible fact scenarios that are very difficult to predict; and negotiate and draft specific contract language to address those multiple possible fact scenarios. And a determination as to whether those contractual opt-in provisions apply in individual cases will inevitably end up in Ohio’s courts more often than honest mistake doctrine cases do now. The law should not impose those costs on parties or the courts when the alternative is so much more cost-effective. *See, e.g. All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 867 (7th Cir. 1999) (J. Posner) (noting that the wholesale elimination of the commercial fraud tort would impose significant costs on contracting parties who want to obtain legal protection against such fraud “only by insisting that the other party to the contract reduce all representations

to writing, and so there will be additional contractual negotiations, contracts will be longer, and, in short, transaction costs will be higher” and “the additional costs will be incurred in the making of every commercial contract, not just the tiny fraction that end up in litigation”); *Chaplin v. Nationscredit Corp.*, 307 F.3d 368, 373 (5th Cir. 2002) (finding that a rule allowing litigants to settle claims with a plain and simple statement that the release covers any and all claims reduces transaction costs and puts sophisticated and unsophisticated litigants alike on equal footing in part because an alternative rule would “add needless transactions costs to settlements” by forcing litigants to scour the code and law to identify every possible cause of action).

The Ground Leases at issue demonstrate how easily one can contract around default common-law rules. For example, the Ground Leases contain a “non-waiver” provision. (2010 Ground Lease at 57 [SUPP000062]). Under the common law, contracting parties may be deemed to have waived and/or be estopped from enforcing terms of a contract when that party has previously acquiesced to a previous non-compliance thereof. *Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc.*, 8th Dist. Cuyahoga No. 84748, 2005-Ohio-1017, ¶ 26 (“[A] party may waive the right to literal compliance with the terms of a contract by engaging in actions or a course of conduct inconsistent with literal compliance.”). Many contracts, including the Ground Leases at issue here, contain provisions where the parties expressly and in simple terms contract around the default common law rule, stating to the effect that the waiver of any breach of any provision will not be deemed a waiver of any subsequent breach of the same or any other provision and that custom and practice may not be used as a defense to the demand of strict compliance. *See* Ground Lease Section 24.2 [SUPP000062].

Simply put, as the parties to the Ground Leases recognized, there are default equitable rules which the parties can easily and with minimal effort, contract around.¹⁷ That ability extended just as easily to the honest mistake doctrine.

F. The honest mistake doctrine does not offend the Ohio Constitution’s contract clause, and Appellant did not properly preserve such an argument anyway.

Appellant spends five pages of its brief claiming that equitable principles violate the Ohio Constitution’s contract clause. Br. at 36-40. But the Constitution’s contract clause *does not* apply to judicial decisions; and therefore, the honest mistake doctrine *cannot* violate the Ohio Constitution. *Kissinger v. Pavlus*, 2002-Ohio-3083, ¶ 23 (10th Dist.) (“The express restriction of Section 28, Article II, Ohio Constitution, is on the General Assembly, not the judiciary or its decisions.”).

Faced with this law, Appellant disingenuously cites *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to claim that judicial action can impair contract rights. *Id.* at 38-39. However, Appellant ignores that the U.S. Supreme Court clearly held “a judicial impairment of a contract obligation was not within § 10, Article I of the Constitution, since the inhibition was directed only against impairment by legislation.” *Fleming v. Fleming*, 264 U.S. 29, 31 (1924). And this limitation applies with equal force to the Ohio Constitution’s contract clause.

First, the “Ohio constitutional protection of contracts is coextensive with that of the federal Constitution.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶ 10. Thus, if the federal contract clause does not reach judicial action, Ohio’s contract clause likewise does not reach judicial action.

¹⁷ The fact that the parties chose not to contract around other equitable doctrines, such as the honest mistake doctrine, is telling with respect to the contracting parties’ true intent.

Second, like the federal contract clause, Ohio’s contract clause expressly applies to the legislature; not the courts: “the *general assembly* shall have no power to pass retroactive laws, or laws impairing the obligation of contracts.” Ohio Constitution, Art. II, § 28 (emphasis added). As this Court has held, the contract clause “protects vested rights from new legislative encroachments.” *Bielat v. Bielat*, 87 Ohio St.3d 350, 352 (2000); *see also Toledo City School Bd. of Educ. v. State Bd. of Educ. of Ohio*, 146 Ohio St.3d 356, 2016-Ohio-2806, ¶ 47 (Pfeifer, J, concurring) (“Article II, Section 28 of the Ohio Constitution provides a restraint on the power of the General Assembly.”).

That Ohio’s contract clause applies only to the General Assembly is further evidenced by the test for determining whether the clause has been violated. “A two-part test has been established to determine whether a *statute* unconstitutionally impairs a contract. The first question is whether the *legislation* at issue operates as a substantial impairment of a contractual relationship. If the answer is yes, the next question is whether the *legislation* is reasonable and necessary to serve an important public purpose.” *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, ¶ 16 (emphasis added) (citation omitted). There is no corresponding test for judicial action.

Ohio’s contract clause simply does not apply to judicial action. And because it does not apply to judicial action, equitable doctrines, such as the honest mistake doctrine (which involves judicial not legislative action), cannot violate the contract clause. Therefore, the lower courts’ decisions did not and cannot violate the Ohio Constitution.

Finally, even if the contract clause argument were viable (it is not), Appellant waived any such argument by failing to raise it in the trial court or with the Tenth District. This Court has long and consistently refused to consider constitutional questions that were “not raised in either the trial court or the Court of Appeals” because such claims are “deemed waived.” *Clarington v. Althar*,

122 Ohio St. 608, 608 (1930); *see also State ex rel. Specht v. Oregon City Bd. of Educ.*, 66 Ohio St.2d 178, 182 (1981) (“It is well founded that a constitutional question cannot be raised in a reviewing court unless it appears it was urged in the trial court.”); *State ex rel. VanCleave v. Sch. Empls. Ret. Sys.*, 120 Ohio St.3d 261, 2008-Ohio-5377, ¶ 29 (holding that appellant waived her constitutional claim by failing to raise it in the court of appeals). Accordingly, because Appellant did not raise its constitutional claims in the courts below, those claims are “deemed waived.” *Clarrington* at 608.

G. To the extent this Court adopts Appellants’ proposed proposition of law, the Court should do so only on a prospective basis.

In Ohio, the general rule “is that a decision will be applied retroactively unless retroactive application interferes with contract rights.” *DiCenzo v. A Best Prods. Co.*, 120 Ohio St.3d 149, 2008-Ohio-5327, ¶ 12. When a decision affects contractual rights, it should “be applied only prospectively.” *Id.* ¶ 11.

In applying the contract exception to the general rule of retroactive application, this Court has held that the applicable “controlling decisional law” is the law in effect at the time of contracting. *Ross v. Farmers Ins. Grp. of Cos.*, 82 Ohio St.3d 281, 290 (1998). Accordingly, “when a court later finds the law in effect at the time the parties entered into the contract unconstitutional or otherwise invalid, contractual rights and obligations remain undisturbed.” *Burt v. Harris*, 2004-Ohio-756, ¶ 30 (10th Dist.).

As explained above, the parties to the Ground Leases at issue here contracted when Ohio’s courts had widely and consistently recognized the validity of the honest mistake doctrine. Because the doctrine was the law in Ohio at the time of contracting, that doctrine is part of the parties’ contract “as if expressly incorporated in the contract.” *Eastwood* at ¶ 67. Applying any decision that disavows the doctrine to the facts here would be tantamount to rewriting the parties’ contract,

which courts do not do. *See Burt* at ¶ 30 (“[W]here contractual rights have arisen based upon a law later invalidated, the decision invalidating the relied-upon law cannot be applied to avoid or alter the terms of the contract.”).

Because this case involves contract rights, which is an explicit exception to the general rule regarding retroactive application of court decisions, any decision that overturns prior caselaw regarding the honest mistake doctrine must be applied only prospectively and may not be used to modify the parties’ agreement here. In short, even if this Court were to disavow the honest mistake doctrine (it should not), its decision should be applied only prospectively.

H. To the extent this Court adopts Appellants’ proposed proposition of law to the contracts at issue in this case, the Court must remand the case to the Tenth District Court of Appeals to address the trial court’s alternative basis for its ruling in Appellees’ favor.

As an alternative basis for granting equitable relief, the Trial Court ruled that Appellant was estopped from terminating the Ground Leases because Appellant knowingly accepted rents due beyond both the termination date (December 31, 2021) and otherwise due under the Tolling Agreements. Amended Judgment, ¶ 4 (APPX000028). Appellant challenged this alternative basis for the trial court’s granting of equitable relief in its appeal to the Tenth District.

The Tenth District, however, declined to address the Appellant’s arguments as to the validity of the equitable estoppel basis for the trial court’s decision, finding that those arguments were mooted by its determination that the trial court did not err by granting Ashland equitable relief under the honest mistake doctrine. (Decision at ¶ 60 [APPX000021-22]). Reversal here solely on the applicability of the honest mistake doctrine would therefore make the alternative basis for the trial court’s decision ripe for review. As such, any reversal in favor of the Appellant by this Court would not warrant an instruction declaring the Ground Leases expired by their own terms on December 31, 2021, but instead warrant remand to the Tenth District for consideration of

Appellant's arguments raised challenging the Trial Court's alternative basis for equitable relief, equitable estoppel.

IV. CONCLUSION

For the foregoing reasons, this Court should reject Appellant's effort to rewrite well-established law throughout the nation in exchange for an extreme proposition that would prevent application of the honest mistake doctrine in all circumstances and regardless of the consequences. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

/s/ Gerhardt A. Gosnell II

JAMES E. ARNOLD (0037712)

Email: jarnold@arnlaw.com

MICHAEL L. DILLARD, JR. (0083907)

Email: mdillard@arnlaw.com

GERHARDT A. GOSNELL II (0064919)

Email: ggosnell@arnlaw.com

TIFFANY CARWILE (0082522)

Email: tcarwile@arnlaw.com

ARNOLD & CLIFFORD LLP

115 West Main Street, 4th Floor

Columbus, Ohio 43215

Phone: (614) 460-1600

*Counsel for Appellees Ashland Global
Holdings Inc., and Ashland LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 4, 2024, Merit Brief of Appellees Ashland Global Holdings, Inc. and Ashland LLC was electronically filed with the Ohio Supreme Court and was served via electronic mail upon all counsel of record.

/s/ Gerhardt A. Gosnell II

Gerhardt A. Gosnell II (0064919)