

IN THE SUPREME COURT OF OHIO

FOUNDATION MEDICI)	CASE NO. 2022-1247
)	
Appellant)	
)	On Appeal from the
vs.)	Trumbull County Court of Appeals,
)	Eleventh Appellate District
THE BUTLER INSTITUTE OF)	Case No. 2020-TR-0042
AMERICAN ART)	
)	
Appellee)	

MEMORANDUM OF
APPELLEE THE BUTLER INSTITUTE OF AMERICAN ART
OPPOSING JURISDICTION

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**STATEMENT OF WHY THIS CASE DOES NOT INVOLVE
MATTERS OF PUBLIC OR GREAT GENERAL INTEREST
AND SHOULD NOT BE ACCEPTED FOR REVIEW**

The appeal filed by Foundation Medici (“Medici”) is not one of public or great general interest. Having lost twice in its attempt to retain a valuable piece of art that does not belong to it, Medici appeals to this Court for a third review of the facts. Foundation Medici simply seeks to overturn the Eleventh District’s decision which vests in the Butler Institute of American Art (“The Butler”) sole ownership and right to possession of an important work of art entitled the Soulages. The Eleventh District Court of Appeals applied well-settled Ohio law analyzing whether a piece of chattel becomes part of realty when it affirmed the trial court’s decision granting summary judgment in favor of The Butler. And the Eleventh District’s decision demonstrates why Ohio’s long-standing fixture law is the correct analysis in cases involving works of art. While this case is of great interest to the parties, there are no issues of great importance or interest to the public. This case, properly decided by the trial court and Eleventh District, does not warrant this Court’s exercise of judicial review.

The Butler Institute of American Art, located in Youngstown, Mahoning County, Ohio, was established in 1919 as the first museum dedicated to showcasing works of American art. Its permanent collection contains celebrated works by artists such as Homer Winslow and Norman Rockwell. These important works are housed in The Butler’s historic original building and newly constructed wings and pavilions. In 1995, The Butler and Medici entered an agreement whereby Medici agreed to construct an art museum in Trumbull County which The Butler would thereafter operate as a Trumbull County branch of The Butler (“Trumbull Branch”). The parties executed a Lease for The Butler’s use of Medici’s premises for a term of 99 years and an

Operating Agreement which carried out the parties' mutual desire for The Butler to display its art in in Medici's building.

In the early 2000's, a local art patron told Dr. Louis Zona, Executive Director and Chief Curator of The Butler, that he was a fan of the artist Pierre Soulages. Dr. Zona told the patron that one of Soulages' murals was hanging in a bank in Pittsburgh. The two men travelled to Pittsburgh to see the mural and Dr. Zona offered to buy it from the owner to display at The Butler. The owner declined. But in 2009, the owner contacted Dr. Zona with news that the Soulages was being officially donated to The Butler. The Butler and Medici agreed to display the Soulages in an addition to be built at the Trumbull Branch. Under the terms of the lease Medici gave The Butler permission to build the addition. The Butler solicited donations from art patrons in both Trumbull and Mahoning County and paid for the construction of the addition in which the Soulages would be displayed.

The Soulages mural is made of individual terra cotta tiles, each of which had to be removed from the installation in Pittsburgh. The Butler hired designer Bart Gilmore of Gilmore Design to design and construct the addition. The design of the addition placed the Soulages in the middle of the room, leaving the perimeter walls for displaying other art. Gilmore designed a large, rotating, metal framework which sits on an axle. Each tile of the Soulages was hung by hooks on one side of the framework. On the other side, of the framework art is displayed. Thus, Gilmore's framework made maximum use of the space by providing a two-sided metal framework in the middle of the room, leaving the perimeter walls for displaying more artwork. The Butler designed and installed the Soulages with the intent that the mural could be disassembled if, in the future, it needed to be moved or loaned to another museum.

The Butler displayed artwork in Medici's building until a dispute arose in 2018 between the parties over the display of artwork depicting the Boy Scouts of America. Because of that dispute, Medici abruptly severed ties with The Butler by terminating the Lease and ordering The Butler to vacate the premises and remove its artwork. Pursuant to the Lease termination terms, The Butler complied. But before it could remove the Soulages, Medici filed a verified complaint to enjoin The Butler from removing only a single piece of The Butler's art—the Soulages. Since the filing of its verified complaint on November 15, 2019, the Soulages has remained at the Trumbull Branch. Both the trial court and Eleventh District reached the same conclusion: The Butler is the sole owner of the Soulages mural and is entitled to possession of the mural.

Because the Soulages was installed with the intent that it could be disassembled, The Butler has in place a plan to remove the Soulages in a manner that protects Medici's premises. The plan, which would take less than 10 days, contemplates any necessary repairs to Medici's property. Individual panels holding the tiles will be taken down from the metal framework, boxed and transported. New panels will be restored to the metal framework for future display of artwork. The addition from which the Soulages is removed will continue to be used for its intended purpose—the display of art in Trumbull County.

The trial court considered the above set of facts at an evidentiary hearing on February 6, 2020. Where The Butler and Medici presented witness testimony for the purpose of resolving the issues of ownership and possession of the Soulages mural. Following briefing, the trial court ruled that sole ownership and right of possession of the Soulages rested in The Butler. Medici appealed to the Eleventh District and obtained a stay preventing The Butler from removing the Soulages mural until the conclusion of the appeal. The Eleventh District's decision affirming the

trial court meant that The Butler could proceed with plans to remove the Soulages from Medici's premises. Medici's appeal to this Court is merely an attempt to stop The Butler from retrieving its property and delay the inevitable.

Medici's delay tactics in this Court even involve their attempt to present a new set of facts never presented to the Eleventh District or the trial court. In its memorandum in support of jurisdiction, Medici refers to The Butler's mural as the "New Soulages." Until this filing, Medici never used the term "New Soulages." Indeed, Medici never argued the mural and the metal framework combined to form a new work of art, either at the trial court's evidentiary hearing or in its appeal to the Eleventh District. Medici's attempt to recast the facts demonstrates this appeal is not about an issue of great public or general interest, but Medici's personal campaign to retain possession of property that belongs to The Butler.

Medici bases its request for this Court's jurisdiction on the suggestion that an exception should be carved out of fixture law in cases involving artwork installed in leaseholds in Ohio. Ohio's fixture law examines whether a piece of chattel becomes part of the realty or remains the personal property of the owner by examining: (1) whether the chattel has actually become annexed to the realty; (2) appropriation to the use or purpose of the realty; and (3) the owner of the chattels intention to make the personal property part of the realty. This legal analysis lends itself to artwork because these factors test perfectly whether the owner of art loses its ownership of a piece of art merely because it displays it somewhere other than real property it owns. Why would any artist or art owner agree to display its art if it could become part of the realty by virtue of its installation for display?

Ohio's existing fixture law provides the comprehensive analysis needed when this factual issue arises. Medici's memorandum does not demonstrate why art requires an exception to existing fixture law or why this Court should exercise jurisdiction in this case. Accordingly, Medici's request for jurisdiction must be declined.

RESPONSE TO APPELLANTS' PROPOSITIONS OF LAW

Medici's memorandum in support of jurisdiction does not include any propositions of law. Rather, Medici repeats its position that the Soulages is a fixture under Ohio law. By presenting an argument to this Court that merely repeats what the Eleventh District already considered, Medici effectively concedes this case is not one of public or great general interest. Ohio's fixture law is broad enough and considers myriad factors such that its application to works of art installed in leaseholds requires no exception to the general law.

When classifying property as real or personal, Ohio courts historically relied on *Teaff v. Hewitt*, 1 Ohio St. 511, 527 (1853), a case involving a dispute over whether machinery was a fixture of real property or removable personalty. This Court established three criteria for making this distinction: "(1) actual annexation to the realty, or something appurtenant thereto (2) appropriation to the use or purpose of that part of the realty with which it is connected; and (3) the intention of the party making annexation to make the article a permanent accession to the freehold..." *Id.* at 530.

As the Ohio Revised Code developed definitions with respect to real and personal property, this Court altered its reliance on the *Teaff* criteria to consider other factors:

such facts as the nature of the property; the manner in which it is annexed to the realty; the purpose for which the annexation is made; the intention the annexing party to make the property a part of the realty; the degree of difficulty and extent of any loss involved in removing the property from the realty; and the damage to the severed property which such removal would cause.

Masheter v. Boehm, 37 Ohio St.2d 68, 71, 307 N.E.2d 533 (1974). The *Masheter* court expressed an unmistakable desire to create a “proper rule of law, which provides that degree of flexibility and accommodation to circumstances necessary to ensure that . . . [the parties] will be dealt with fairly, with neither enjoying a windfall gain nor suffering unfair deprivation.” *Id.* at 76-77. Medici fails to explain why this flexible and comprehensive analysis does not apply to the artworld. As the following argument demonstrates an exception to the law of fixtures is not necessary.

Annexation to the realty

The Soulages mural is not permanently attached to the addition. While the metal framework is annexed to the building, the mural was hung on the metal framework so that it could be removed. The Butler, as owner of the mural, hung it in the addition for the enjoyment of the community, pursuant to its contractual relationship with Medici, which Medici unilaterally terminated. BIAA’s intention with respect to the mural’s permanence in the addition is reflected in the way it was displayed. The mural is removable.

Medici attempts to cast the mural as “The New Soulages” by arguing the mural and metal framework combined to become a new work of art. This argument was never presented to the courts below and has been waived. Regardless, the metal framework was constructed in the center of the addition to display artwork on both sides. It is part of the addition and therefore part of the improvement. But what was displayed on that framework, or on any other wall of the addition for that matter, is not a permanent addition, enlargement, or alteration.

The conclusion that the mural is not permanently affixed aligns with the Ohio Revised Code's definitions with respect to real property and personal property. R.C. 5701.02 provides definitions related to real property:

(C) "Fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.

(D) "Improvement" means, with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure."

R.C. 5701.03 provides definitions related to personal property and business fixtures:

(A) "Personal property" includes every tangible thing that is the subject of ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code.

(B) "Business fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. 5701.03(B)

Ohio courts rely on these definitions when determining whether a piece of property is permanently affixed or is removable personalty. In *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781, this Court considered whether three amusement park rides were real property because they sat directly on the ground and could not be disassembled and moved. ¶ 43. There was no evidence the rides would benefit a buyer of the land who engaged in a different business, so the rides did not constitute "structures" under R.C. 5701.02(E). *Id.* ¶ 41. Instead, the rides met the definition of "business fixtures" under R.C. 5701.03(B) because they primarily benefitted Funtime as the occupant of the premises and not the realty. *Id.* ¶ 46.

The simple fact is that the Soulages is artwork and artwork, particularly large works like the Soulages, must be specially installed. In this case, the metal framework provided a means to hang the Soulages in the center of the room so other artwork could be hung on the other side. The metal framework is a permanent fixture of Medici's real property. The artwork displayed on it is owned by The Butler.

Appropriation

With respect to appropriation, the addition in which the Soulages currently hangs will function for the purpose of displaying art with or without the mural. The metal framework will remain for the display of other artwork. The gallery, including the trench lights, will still highlight art. The lights will still be activated when the framework is turned to display whatever art Medici chooses after the Soulages mural is removed. The addition will continue to display art. But based on Medici's unilateral termination of the Lease, the premises no longer functions as The Butler's Trumbull Branch and The Butler no longer displays its art there.

The Butler's intentions in making annexation

Finally, under the third *Teaff* factor, as the owner of the mural it is The Butler's intentions that are relevant. Medici incorrectly focuses on what it characterizes as donors' intentions with respect to the display of the mural. Further Medici misrepresents the intentions of donors and the parties in bringing the Soulages mural to Trumbull County. The Butler intended to hang the Soulages mural in a manner that permitted its disassembly in the future. At the trial court's evidentiary hearing, Dr. Zona and Bart Gilmore testified unequivocally that this was The Butler's intention. Medici confuses the parties' intent to collaborate with an intent for The Butler

to relinquish its property when Medici chose to abruptly terminate that relationship. The Butler had no such intention.

There is no dispute that The Butler, not Medici, owns the Soulages mural. It hung the Soulages mural in a manner that allowed for its removal and in furtherance of The Butler and Medici's collaboration. Medici unilaterally ended that collaboration. If Medici succeeds in having The Butler's artwork deemed party of its real property, no art museum would ever display art outside their own building. The courts below recognized that Medici's position is contrary to the clear and unambiguous language of parties' written contracts and Ohio law. There is no justification for this Court to exercise jurisdiction over this dispute, which the lower court correctly decided in favor of The Butler.

CONCLUSION

The courts below correctly considered the facts under Ohio's fixture law and concluded The Butler owns the Soulages and is entitled to possess it. Medici provides no justification for carving out an exception to Ohio's fixture law simply because the chattel at issue is artwork. This Court exercises jurisdiction over cases involving public or great general interest as opposed to questions of interest only to the parties involved. Medici's appeal is wholly self-centered and intended to delay the inevitable return of the Soulages to its rightful owner. The Butler Institute of American Art respectfully requests this Court decline jurisdiction and allow The Butler to finally retrieve its Soulages mural.

/s/ Thomas J. Wilson

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CERTIFICATION

A copy of the foregoing has been forwarded by regular U.S. Mail and electronically this 4th day of November 2020 to:

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