[Cite as *Love v. Beck Energy Corp.*, 2015-Ohio-1283.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JAMES D. LOVE, et al PLAINTIFFS-APPELLEES VS. BECK ENERGY CORP., et al. DEFENDANTS-APPELLANTS	)))))))))	CASE NO. 14 NO 415 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Noble County, Ohio Case No. 213-0127

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: March 31, 2015

[Cite as *Love v. Beck Energy Corp.*, 2015-Ohio-1283.]
ROBB, J.

{¶1} Defendant-Appellant XTO Energy Inc. ("XTO Energy") appeals the decision of the Noble County Common Pleas Court granting summary judgment in favor of plaintiffs-appellees James and Lucinda Love (collectively "the Loves"). In arguing the trial court incorrectly granted summary judgment in the Loves' favor, XTO Energy presents this court with three issues. The first is whether the terms of the contract required the Loves' consent for defendant-amicus curiae Beck Energy Corporation to partially assign the lease to XTO Energy. The second issue is if consent was required, was requesting consent a futile act since the Loves indicated that they would not consent without receiving monetary compensation. The third issue is whether the Loves were required to meet the condition precedent of giving Beck Energy notice of the breach and thirty days to correct, or was such an act futile and not required.

{¶2} For the reasons expressed below, the trial court correctly determined that no portion of the lease could be assigned without the Loves' consent. Furthermore, this court concludes that it was not a futile act for Beck Energy to request the Loves' consent prior to the assignment. However, it would have been a futile act on the Loves' part to provide Beck Energy with a notice of breach. Thus, the trial court's decision is hereby affirmed.

Statement of the Facts and Case

{¶3} Largely, the facts in this case are not in dispute.

{¶4} In 1988 Roy Mason entered into three separate oil and gas leases with Beck Energy; he owned 196 acres in Jefferson Township, Noble County, Ohio. The first lease covered 65 acres of Roy Mason's land, the second lease covered 59 acres of Roy Mason's land, and the third lease covered 72 acres of Roy Mason's land. All three leases are practically identical in terms.

{¶5} In December 2002, the Loves acquired all 196 acres of Roy Mason's real property subject to the oil and gas leases with Beck Energy. It appears Lucinda had taken care of Roy Mason for thirty years and he gave her and her husband the farm. Lucinda Depo. 8, 10.

{¶6} In December 2011, without first obtaining the Loves' permission, Beck Energy assigned part interest in the leases to XTO Energy; it assigned its deep drilling rights.

{¶7} Partially in response to that action, in June 2013, the Loves filed a complaint against Beck Energy and XTO Energy seeking, among other things, to have the assignment of the deep drilling rights declared void. The Loves asserted, pursuant to the terms of the leases, their consent as Mason's heirs, successors, or assigns was needed prior to the assignment.

{¶8} Beck Energy and XTO Energy both filed answers. 08/08/13 Beck Energy Answer; 08/23/13 XTO Energy Answer.

{¶9} All parties filed motions for summary judgment and responses. 10/18/13 Loves' Motion for Summary Judgment; 02/07/14 Beck Energy's Response to Summary Judgment and Cross Motion for Summary Judgment; 02/07/14 XTO Energy's Motion in Opposition to Summary Judgment and Cross Motion for Summary Judgment; 03/06/14 Loves' Opposition Motion to Beck Energy and XTO Energy's Motions for Summary Judgment. Only three of the issues raised in the summary judgment motions and responses are pertinent to this appeal.

{¶10} The first concerns the assignment clauses found in paragraphs 13 and 21 of the leases. Paragraph 13, which is typed, provides that Beck Energy can assign the lease in whole or in part without Mason's consent. Paragraph 21 is handwritten and states Beck Energy cannot assign the lease without Mason's consent.

{¶11} The Loves argued that the language of paragraph 21 contains an unambiguous restriction on assignment and controls. They asserted that such clauses are valid.

{¶12} XTO Energy and Beck Energy both argued that paragraphs 13 and 21 must be harmonized with each other giving both effect. They asserted that the only way to harmonize the two provisions is to find that paragraph 21 limits paragraph 13. Thus, paragraph 13 allows for partial assignments without consent while paragraph 21 prohibits a full assignment of the lease without consent. They argued the use of

"this Lease" in paragraph 21 without a reference to "in whole or in part," which is used in paragraph 13, means there is only a prohibition on a full assignment of the lease.

{¶13} The second issue is based on the position that the lease requires the Loves' consent for the partial assignment from Beck Energy to XTO Energy. Beck Energy and XTO Energy argued the consent to assign clause was an unreasonable restraint upon alienation. Furthermore, they contended that if the contract required consent, consent could not be withheld unreasonably. They asserted that the Loves indicated they would only consent if they were monetarily compensated. According to Beck Energy and XTO Energy it is unreasonable as a matter of law to withhold consent in an attempt to gain monetary compensation.

{¶14} The Loves responded by arguing consent to assign clauses are not an unreasonable restraint on alienation and that it is not unreasonable to request monetary compensation for consent.

{¶15} The third issue concerns paragraph 17 of the lease, which provides if the lessor believes that the lessee has breached the lease it is to provide lessee notice and 30 days to remedy the breach before bringing action. The Loves admittedly did not comply with this provision. In the summary judgment motions, Beck Energy and XTO Energy asserted that the Loves are barred from filing a claim to challenge the assignments because they failed to comply with paragraph 17. Beck Energy and XTO Energy asserted paragraph 17 is a condition precedent to bringing suit.

{¶16} The Loves countered the above argument by asserting that paragraph 17 does not apply in this instance because the suit brought was not for a breach of contract but rather was a declaratory judgment action seeking a declaration from the trial court that Beck Energy could not assign the leases to XTO Energy without their consent. Furthermore, the Loves argued that the argument fails because notice would have been futile, i.e. it would have been a vain act. According to them, since at the time of the filing of the action, Beck Energy had already assigned the lease to XTO Energy, there was nothing for Beck Energy to cure upon notice by the Loves.

{¶17} After considering the parties arguments, the trial court found in the Loves' favor. 03/13/14 J.E. It concluded that the handwritten language controlled

over the pre-printed language and thus, consent was needed for any assignments. 03/13/14 J.E. It further found the consent to assign clause was not a restraint on alienation. 03/13/14 J.E. Lastly, it held that while the contract required notice of any breach and that no action shall be brought until 30 days after the notice, the notice would have been a vain act and served no purpose. 03/13/14 J.E. Thus, it was not required. 03/13/14 J.E.

{¶18} XTO Energy timely appeals that decision. Beck Energy did not file a notice of appeal. Instead it asked for leave to file an amicus curiae brief, which was granted.

Assignment of Error

"The trial court erred by entering summary judgment in favor of plaintiffs and against defendants, rendering the partial assignment from Beck to XTO void and of no force or effect."

{¶19} A summary judgment award is reviewed under a de novo standard of review. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Thus, we use the same test as the trial court, which is Civ.R. 56(C). That rule provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Zivich v. Mentor Soccer Club,* 82 Ohio St.3d 367, 369–370, 696 N.E.2d 201 (1998).

{¶20} XTO Energy divides this assignment of error into three parts. The first argument is in reference to paragraphs 13 and 21 of the lease and whether those paragraphs require consent for a partial assignment of the lease. The second issue is whether it was a futile act to ask for the Loves' consent to the assignment when the evidence shows that they would have only agreed to the assignment if they received monetary compensation. The third issue is whether it was futile of the Loves to give Beck Energy notice of the alleged breach and whether that waives the requirements in paragraph 17 of the lease. Each argument will be addressed in turn.

A. Does the lease require consent from the Loves for a partial assignment?

{¶21} A lease is a contract. "A contract is defined by the words written within the four corners of the document." *Cleveland Mack Leasing, Ltd. v. Chef's Classics, Inc.*, 7th Dist. No. 05 MA 59, 2006-Ohio-888, ¶ 19. When the language of a contract is clear and unambiguous, and not subject to multiple interpretations, the court will not consider extrinsic evidence, i.e., evidence outside the four corners of the document, to re-interpret the contract's terms. *Shifrin v. Forest City Enterprises, Inc.,* 64 Ohio St.3d 635, 597 N.E.2d 499 (1992), syllabus.

{¶22} In looking at the four corners of a contract there is a rule of construction that provides handwritten prevails over typed or preprinted terms when there is a conflict between the two. *French v. Pappalardo*, 8th Dist. No. 57152, 1990 WL 84278 (June 21, 1990). *See Loblaw, Inc. v. Warren Plaza, Inc.*, 163 Ohio St. 581, 127 N.E.2d 754 (1955), paragraph 1 of syllabus ("The typed portion of a contract prevails over the printed portion thereof, if the two are inconsistent."); R.C. 1303.17(B) (Ohio Uniform Commercial Code provides "[h]andwritten terms control typewritten and printed terms, and typewritten control printed."). There is also a rule of construction that when possible, a court's construction of a contract should attempt to harmonize all the provisions of the document rather than to produce conflict in them. *Pierce Point Cinema 10, L.L.C. v. Perin–Tyler Family Found., L.L.C.,* 12th Dist. No. CA2012–02–014, 2012–Ohio–5008, ¶ 11, citing *Farmers Natl. Bank v. Delaware Ins. Co.,* 83 Ohio St. 309, 337, 94 N.E. 834 (1911).

{¶23} As stated above, paragraphs 13 and 21 are the assignment clauses. They are in all three leases signed by Roy Mason and Beck Energy. Paragraph 13 is typewritten (preprinted) and states:

> The Lessee shall have the right to assign and transfer the within lease in whole or in part, and Lessor waives notice of any assignment or transfer of the within lease. Failure of payment of rental or royalty on any part of this lease shall not void this lease as to any other part. Lessor agrees that when and if the within lease is assigned, the Lessee herein shall have no further obligations

> hereunder. The Lessor further grants to the Lessee, for the protection of the Lessee's interest hereunder, the right to pay and satisfy any claim or lien against the Lessor's interest in the premises as herein leased and thereupon to become subrogated to the right of such claimant or lien holder, and the right to direct payment of all rentals and royalties to apply on the payment of any existing liens on the premises.

Beck Energy and Mason Leases.

> Paragraph 21 is handwritten by Mason and states:
>
> 21. The Lessee agrees not to assign or transfer this lease without Lessors consent.

Beck Energy and Mason Leases.

{¶24} Considering contract principles discussed above, we must determine whether paragraph 13 and 21 of the lease are conflicting or if the provisions can be harmonized.

{¶25} Beck Energy and XTO Energy argue that the provisions can be harmonized by concluding that "this Lease" language in paragraph 21 only refers to assignment of the entire lease because there was no qualifying language of "in whole or in part" that was used in paragraph 13. Therefore, according to Beck Energy and XTO Energy paragraph 21 limits paragraph 13 to only allowing partial assignments without needing Mason's consent. Thus, they assert that the trial court should not have applied the handwritten terms control over typed/pre-printed terms rule.

{¶26} Conversely, the Loves argue the provisions conflict and the handwritten terms control over typed/pre-printed terms rule applies. They also assert that this case is akin to Fourth Appellate District case *Harding v. Viking Internatl. Resources Co., Inc.*, 2013-Ohio-5236, 1 N.E.3d 872 (4th Dist.) and that in that case the Fourth Appellate District rejected all the same arguments that are presented in this case.

{¶27} Despite the Loves insistence to the contrary, the *Harding* decision does not help in resolving the issue of whether paragraphs 13 and 21 in the leases at issue can be harmonized or if they conflict. The contract provision at issue in *Harding* was:

> The rights of the Lessor may be assigned in whole or in part and shall be binding upon their heirs, executors and assigns. The rights and responsibilities of the Lessee may not be assigned without the mutual agreement of the parties in writing.

Id. at ¶ 14.

{¶28} In that case, the lessee (Carlton Oil Corporation) assigned its entire rights and responsibilities to Viking International Resources Company. In doing so Carlton Oil Corporation did not obtain the consent of lessor. This act was clearly in violation of the contract.

{¶29} As can be seen, the language in *Harding* is different from the language in our case. Furthermore, it does not appear that the arguments and issues presented in *Harding* are the same as the arguments and issues in the case at hand. In *Harding* there was no issue as to whether two provisions in the contract were in conflict with each other. Moreover, from the opinion, it does not appear that either party argued that the oil corporation had the right to assign the entire lease without obtaining consent, but did not have a right to assign part of the lease without obtaining consent from the lessor. Therefore, *Hardy* is distinguishable.

{¶30} That said, *Hardy* does squarely stand for the proposition that anti-assignment clauses are enforceable. *Id*. at ¶ 20. It cites to the Ohio Supreme Court's *Pilkington* decision which stated, "if there is clear contractual language prohibiting assignment, an assignment will not be enforced." *Id*. at ¶ 13, quoting *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6561, 861 N.E.2d 121, ¶ 36. See also *J.G. Wentworth, LLC v. Otisha Christian, et al.*, 7th Dist. No. 07MA113, 2008-Ohio-3089, ¶ 40. Consequently, any argument by Beck Energy or XTO Energy that the anti-assignment clause is per se an unreasonable restraint on alienation fails.

{¶31} Other than case law setting forth general contract construction laws, there is no case akin to the one before us. Thus, our resolution of the matter can only be based on the language in the lease and contract construction principles. XTO Energy and Beck Energy's argument is that "this Lease" language in paragraph 21 only means the entire lease and thereby harmonizes the two provisions. This is a

creative argument, but it fails because it is unlikely that a reasonable person reading paragraphs 13 and 21 would read the language in that manner. See *4522 Kenny Rd. v. Bd. of Zoning Adjustment,* 152 Ohio App.3d 526, 2003-Ohio-1891, 789 N.E.2d 246, ¶ 13 (10th Dist.) ("an ambiguity exists if a reasonable person can find different meanings"). Instead, a reasonable person would find that the two provisions conflict. A reasonable person would read the provisions and conclude that paragraph 13 allows Beck Energy to assign the lease without consent, while paragraph 21 does not allow Beck Energy to assign the lease without consent. Thus, we hold that there is a conflict between the two provisions.

{¶32} As stated above, if there is a conflict between handwritten terms and typed/pre-printed terms, rules of construction dictate that the handwritten terms control. Despite that rule, XTO Energy and Beck Energy urge this court to not apply it because the Loves did not argue that rule at the trial court level. According to XTO Energy and Beck Energy, the argument is waived.

{¶33} This argument presents this court with the threshold issue of whether the Loves have waived the argument. It is true that it is a basic rule that appellate courts will not consider arguments the parties raise for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections,* 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992); *Litva v. Richmond,* 172 Ohio App.3d 349, 2007–Ohio–3499, 874 N.E.2d 1243, at ¶ 18 (7th Dist.). It is also accurate that the Loves did not argue the handwritten terms control over typed/pre-printed terms rule to the trial court. That said, the trial court sua sponte applied the rule. It is unfair to now bar the Loves from arguing that the trial court's own reasoning is correct.

{¶34} Thus, since the Loves are not foreclosed from arguing the handwritten terms control and since we found that there is a conflict between the two provisions, the handwritten terms control over typed/pre-printed terms rule applies. This rule is straightforward. Its application to the lease at hand means that Beck Energy cannot assign the lease without the Loves' consent.

{¶35} In an attempt to have this court reach a different result, XTO Energy and Beck Energy argue that in applying the handwritten terms control rule, we must also look to extrinsic evidence to determine the parties' intent.

{¶36} We disagree. The court does not look to extrinsic evidence unless the intent of the parties cannot be gleaned from the four corners of the document. *Shifrin,* 64 Ohio St.3d 635, syllabus. When looking at the four corners of a document handwritten provisions control over typed/pre-printed provisions. Thus, the intent of the parties can be determined from the document and there is no need to look to extrinsic evidence.

{¶37} That said, Beck Energy and XTO Energy cited to the Ohio Supreme Court's decision in *Loblaw* for the proposition that even though the handwritten terms control over typed/pre-printed terms rule exists, it is not dispositive. Their interpretation of *Loblaw* is inaccurate. In *Loblaw*, the dispute was over what was the meaning of the phrase "demised premises"; did it mean the Loblaw store or the entire premises which included 33 acres of land? The Court concluded that it meant only the Loblaw store, using the construction rule that typed written terms control over pre-printed terms, i.e. forms. *Loblaw*, 163 Ohio St. at 589-90. The Court stated that the language of the preprinted form also indicated the interpretation was correct. *Id*. at 591 ("There are numerous other portions of the agreement which require the conclusion that the words 'demised premises,' as used therein, mean only the Loblaw store."). The Court applied another rule of construction that provides, "with respect to construing agreements restricting the use of real estate, is that such agreements are strictly construed against limitations upon such use, and that all doubts should be resolved against a possible construction thereof which would increase the restriction upon the use of such real estate." *Id*. at 591-592. In rendering its decision, the Court did not state that one rule of construction was more important than another rule of construction; the Court was merely using multiple lines of reasoning to support its conclusion, which is often done.

{¶38} Importantly, in *Loblaw,* the Court did not look to extrinsic evidence to reach the result. Rather it relied on rules of construction. Thus, Loblaw does not stand for the proposition that we must look to extrinsic evidence.

{¶39} In conclusion, the handwritten terms control over the typed/pre-printed terms rule is dispositive in this case. There is no need to look to extrinsic evidence. Thus, in applying the handwritten terms controls over typed/pre-printed terms rule,

the contract, in this instance, does not allow for assignments without Mason's consent. Provision 19 of the lease further states that all covenants and conditions between the parties extend to their heirs, successors and assigns. The evidence clearly shows that the Loves acquired Mason's real property, which included the leases, in 2002. This transfer occurred prior to Beck Energy's 2011 partial assignment of the leases to XTO Energy. Therefore, Beck Energy was required to obtain the Loves' consent prior to assigning the lease. Assigning a lease that contains a non-assignment clause voids the assignment. *Harding*, 2013-Ohio-5236, ¶ 21. Consequently, the trial court correctly voided the assignment from Beck Energy to XTO Energy. This assignment of error lacks merit.

B. Was requesting the Loves' consent for the assignment a futile act?

{¶40} On appeal, Beck Energy and XTO Energy assert that it would have been futile to request the Loves' consent for the assignment. There is a rule in Ohio that the law does not require futile or vain acts. *See State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs.*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224, ¶ 24 (parties do not need to pursue their administrative remedies if doing so would be a vain or futile act); *State ex rel. Strothers v. Turner*, 79 Ohio St.3d 272, 274, 680 N.E.2d 1238 (1997) ("[M]andamus will not issue to compel a vain act.").

{¶41} They assert it would have been futile to ask for consent to assign because the Loves would not have consented without receiving monetary compensation. Beck Energy and XTO Energy argue that the anti-assignment clause implicitly contains a reasonableness requirement, meaning the Loves could only withhold consent if it was reasonable. Beck Energy and XTO Energy insist that withholding consent until the lessor is monetarily compensated is unreasonable.

{¶42} The Loves counter, arguing it was not futile to ask for their consent. According to them, the anti-assignment clause does not contain a reasonableness requirement. Furthermore, they assert that it is not unreasonable to request monetary compensation for the consent to assign.

{¶43} The parties arguments demonstrate that the request for consent would be futile **only if** there is a reasonableness requirement in the anti-assignment clause **and** if it is unreasonable to request monetary compensation for the consent to assign. Thus, the first issue we must examine is whether there is a reasonableness requirement in the anti-assignment clause.

Is there a reasonableness requirement
in the assignment clause?

{¶44} In looking at the language of the assignment clause, there is no express language stating that lessor cannot arbitrarily or unreasonably withhold consent. XTO Energy and Beck Energy admit as such, but insist the rule of reasonableness is implicit and public policy dictates all contracts impose a duty of good faith and fair dealing between the parties.

{¶45} The Eighth Appellate District has specifically indicated that when a contract does not contain the limitation that consent cannot be arbitrarily or unreasonably withheld, consent can be withheld for **any** reason. *F & L Ctr. Co. v. Cunningham Drug Stores, Inc.*, 19 Ohio App.3d 72, 75, 482 N.E.2d 1296 (8th Dist.1984). "[T]he majority of authority in this country supports the view that where the consent of the lessor to an assignment is required, that consent may be withheld for any reason *absent express language* in the lease that it may not be unreasonably withheld." *Id*. citing *B & R Oil Company, Inc. v. Ray's Mobile Homes, Inc.*, 139 Vt. 122, 422 A.2d 1267 (1980); *Herlou Card Shop, Inc. v. Prudential Ins. Co. of America*, 73 App.Div.2d 562, 422 N.Y.S.2d 708 (1979).

{¶46} The Eighth Appellate Court's decision, however, has recently been criticized by the First Appellate District. *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, ¶ 14-16 (1st Dist.). In *Littlejohn*, the court indicated that the *F&L Ctr. Co* decision is over 20 years old and that there was a dissent. It agreed with the dissent in *F & L Ctr. Co.*, which indicated that, "Restrictions against the assignment of leases are restraints against the alienation of property interests. * * * This basic principle is exemplified by the trend of recent cases which have held that a lessor must act reasonably in withholding consent under a lease provision requiring the

lessor's consent to the lessee's assignment." *Id*. at ¶ 15 citing *F & L Ctr. Co.*, 19 Ohio App.3d at 76 (Nahra, J., dissenting). The *Littlejohn* court then explained:

> While Ohio courts have generally followed the majority opinion of *F & L Ctr. Co.,* "the trend has been in the opposite direction." A Florida court has held that a landlord could not arbitrarily or unreasonably refuse consent, explaining, "Underlying the cases abolishing the arbitrary and capricious rule is the now well-accepted concept that a lease is a contract and, as such, should be governed by the general contract principles of good faith and commercial reasonableness."

(Internal Citations omitted). *Littlejohn*, 2005-Ohio-4850 at ¶ 16.

{¶47} Therefore, there are currently opposing views on this issue. However, considering the date the lease was signed, this court is compelled to apply the reasoning of the *F & L Ctr. Co*. court. *F & L Ctr. Co.* is a 1984 decision and indicates what the majority of courts were doing at the time Mason and Beck Energy entered into the leases. Furthermore, the majority of cases that apply the reasonableness requirement do so because it is expressly written in the contract. Here, the contracts do not expressly indicate that the lessor's consent could not unreasonably be withheld. Beck Energy, as a sophisticated party that has entered into many leases, could have insisted that Roy Mason's handwritten anti-assignment clause contain language that the lessor could not withhold consent arbitrarily or unreasonably. Given that the language was not included in the lease, either Beck Energy did not request the addition of such language or Mason refused to agree to such language.

{¶48} Consequently, the anti-assignment clause provides that consent can be withheld for any reason, including monetary compensation. Therefore, the Loves had the right to withhold consent until they were monetarily compensated. As such, this leads to the conclusion that it would not have been a futile act for Beck Energy to request the Loves' consent.

C. Was it futile for the Loves to give
Beck Energy notice of the alleged breach?

{¶49} Paragraph 17 of the lease provides:

> In the event Lessor consider that Lessee has not complied with any of its obligations hereunder, either express or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract. Lessee shall have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee. Neither the service of said notice nor the doing of any acts by Lessee aimed to meet all or any part of the alleged breaches shall be deemed an admission or presumption that Lessee has failed to perform all its obligations hereunder.

Mason and Beck Energy Leases.

{¶50} As can be seen, this clause states it is a condition precedent to bringing the action. Typically condition precedents are conditions that must be performed before obligations in the contract become effective. *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 22. However, conditions precedent to bringing suit have been recognized. *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 54, 537 N.E.2d 624 (1989) (Notice of breach is a condition precedent to bringing an action for recovery, but the filing of the complaint cannot constitute adequate notice).

{¶51} The same arguments presented to the trial court are the ones presented to this court. Whether the condition precedent has to be met in this instance and if it did would it have been a futile act.

{¶52} The assertion that the condition precedent did not have to be met was based on the fact that the action filed by the Loves was a declaratory judgment act, not a breach of contract action. This argument fails due to the express terms of the

lease. The third sentence of paragraph 17 specifically states, "The service of said notice shall be precedent to bringing of **any action** by Lessor on said lease for **any cause** * * *." Paragraph 17 of the Beck Energy and Mason Leases. (Emphasis added). The terms "any cause" and "any action" includes a declaratory judgment action seeking to determine if the assignment to XTO Energy is void for failing to comply with the terms of the lease. Thus, the Loves' argument to the contrary is meritless. Notice of breach is a condition precedent to bringing any action.

{¶53} However, there is still the question of futility. A party is not required to perform a futile or vain act. *See State ex rel. Teamsters Local Union 436*, 132 Ohio St.3d 47, 2012-Ohio-1861, at ¶ 24; *Strothers*, 79 Ohio St.3d at 274.

{¶54} The trial court concluded that it would have been a futile act for the Loves to give Beck Energy notice of the breach. 3/13/14 J.E. Given the record in this case, we agree with that conclusion. If Beck Energy had been given notice, the manner in which to remedy the breach was either to pay the Loves for their consent or to void the assignment to XTO Energy. However, XTO Energy and Beck Energy through the entire proceedings have been adamant that the leases allow for a partial assignment without the Loves' consent and that if the Loves' consent was needed they could not unreasonably withhold their consent. Thus, giving notice would have been a futile act.

Amicus Curiae Brief

{¶55} The last issue before this court concerns the amicus curiae brief by Beck Energy and the additional arguments raised in it. Beck Energy was a defendant in the underlying trial court action. Beck Energy did not appeal the trial court's decision. Instead, Beck Energy moved to file an amicus curiae brief. That brief included the arguments XTO Energy raised in its appellate brief. However, Beck Energy also raised waiver and estoppel; it argued that since the Loves accepted and cashed royalty payments from Beck Energy it was barred by the doctrines of waiver and estoppel from asserting that Beck Energy did not have the right to partially assign the leases to XTO Energy.

{¶56} These issues are not being addressed because they are not properly before us. Beck Energy, as a party in the underlying case, could have appealed the

trial court's decision. However, it did not. Now it attempts to have this court review the trial court's decision regarding waiver and estoppel by circumventing the appellate process of filing a notice of appeal. Furthermore, raising arguments that were not raised by XTO Energy is outside the scope of an amicus curiae. The Eighth Appellate District has explained that the appearance of *amici curiae* is for the purpose of assisting the court on matters of law about which the court is doubtful. *Lakewood v. State Emp. Relations Bd.*, 66 Ohio App.3d 387, 394, 584 N.E.2d 70 (8th Dist.1990). "*Amici curiae* are not parties to an action and may not, therefore, interject issues and claims not raised by parties." *Id*.

{¶57} Thus, this court declines to consider issues raised in the amicus brief that were not raised in XTO Energy's brief.

Conclusion

{¶58} In conclusion, the sole assignment of error lacks merit. The trial court's decision is hereby affirmed.

Donofrio, P.J., Concurs.

DeGenaro, J., Concurs.