

In the  
**Supreme Court of Athens**

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THESEUS, DUKE OF ATHENS,  
*Petitioner,*

v.

PETER QUINCE, et al.,  
*Respondents.*

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ON WRIT OF CERTIORARI  
TO THE SUPERIOR COURT OF ATHENS

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**BRIEF FOR PETITIONER**

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## QUESTIONS PRESENTED

Duke Theseus contracted with Peter Quince and his band of Rude Mechanicals to perform a tragicomic rendition of the story of Pyramus and Thisbe at the Duke's wedding reception on the Acropolis. Quince and the Rude Mechanicals ultimately declined to perform under the contract after the appearance of one of the players, Nick Bottom, was magically transformed into that of an ass. Quince invoked the contract's *force majeure* clause—which excused nonperformance due to an “act of the gods”—in declining to perform. He also contended that performance had become impossible or impracticable in light of Bottom's transformation.

The questions presented are:

- (1) Whether the transformation of Bottom was an act of the gods covered by the *force majeure* clause of the contract between Theseus and Peter Quince; and
- (2) Whether there is any basis in law or fact for holding that Quince's non-performance was excused by the doctrine of impossibility or impracticability.

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## INTRODUCTION

Duke Theseus contracted with Peter Quince and his band of Rude Mechanicals to deliver a comic rendition of the tragic love story of Pyramus and Thisbe, to be performed at Theseus's wedding to Queen Hippolyta at the Acropolis. Yet the play was not to be. One of Quince's players, a loud weaver by the name of Bottom, mysteriously changed form in the midst of the players' last rehearsal. Although this change did not affect Bottom's ability to fulfill his role in the play, the Mechanicals insisted that the show could not go on, leaving Theseus and Hippolyta without any entertainment at their wedding. What is more, the cancellation left Theseus and Hippolyta—who sold tickets to the performance—in breach of contract with many of Athens's most prominent citizens. Theseus brought suit for breach against the Mechanicals to remedy this public embarrassment.

The superior court correctly turned away the Mechanicals' *force majeure* defense—rooted in the baseless assertion that Bottom's transformation was an act of the gods. Remarkably, however, the superior court accepted the Mechanicals' argument that their nonperformance was excused by the contract doctrine of impossibility. That decision, which rested on the assumption that Bottom's altered appearance would have interfered with the Mechanicals' performance, misunderstood the essentially comical nature of their performance. And it left the Mechanicals off the hook for thousands of drachmae in damages.

This string of broken promises and legal errors would be comical if it were not so tragicomical. Theseus should have judgment.

## STATEMENT OF THE CASE

### A. The Wedding Of Theseus And Hippolyta

Duke Theseus needs little introduction to this Court. As the ruler of Athens, Theseus has accomplished many great deeds on this city's behalf. See Plutarch, *Life of Theseus* (c. 100). As relevant here, Theseus is a demigod, having sprung from Poseidon, Aethra, and Aegeus. See Henry John Walker, *Theseus & Athens* 85 (1994) (noting Theseus's "double paternity"). Notwithstanding his countless heroic accomplishments, Theseus recently met his semi-divine match in the warlike Hippolyta, Queen of the Amazons (and daughter of Ares). See generally Adrienne Mayor, *The Amazons: Lives and Legends of Warrior Women Across the Ancient World* (2016). Having "woo'd" Hippolyta on the battlefield, Theseus pledged to "wed [her] in another key, with pomp, with triumph, and with revelling." R.5.<sup>1</sup>

Thus, in preparing his wedding to Queen Hippolyta, Theseus sought entertainment for his guests. He asked Philostrate, his "usual manager of mirth," for recommendations of "masque" or "music" that might "beguile" his wedding party and guests. R.134. Philostrate—a discerning and experienced event-planner—recommended several critically-acclaimed artistic acts, including a noted singer-songwriter's rendition of Hercules's slaying of the centaur Nessus, and a celebrated ensemble's satirical commentary on the "death of learning, late deceased in beggary." R.134-35.

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<sup>1</sup> All citations to the record (R.[Page No.]) refer to William Shakespeare, *A Midsummer Night's Dream* (Henry Cuningham, ed.) (1905).

Theseus was unsatisfied with these options because they were either too familiar or else “not sorting with a nuptial ceremony,” and he looked for other offerings. R.135. He found an off-Acropolis, community-theater flyer advertising a “tedious brief scene of young Pyramus, and his love Thisbe; very tragical mirth.” R.135. Theseus, intrigued by the contradictions of this advertisement—“Merry and tragical! Tedious and brief!”—asked Philostrate for additional information. R.135-36.

Philostrate noted that the play was “as brief as I have known a play,” and opined that it was a poor fit for Theseus’s wedding. He advised that it “is not for you,” and that there was “nothing, nothing” that Theseus would find of interest in the play. R.137. As Philostrate explained, the story of Pyramus and Thisbe—young, doomed lovers in the ancient city of Babylon—is a “tragical” one, “for Pyramus therein doth kill himself.” R.136. Yet due to the amateurish nature of the production and its cast—“[h]ard-handed men, that work in Athens here, which never labour’d in their minds till now”—there was “not one word apt, one player fitted” to perform the play according to its proper spirit. R.136-37. According to Philostrate, the play did not succeed in conveying the tragic story of Pyramus and Thisbe, but rather brought its audience to “merry tears” and “loud laughter.” R.136. Pyramus therefore counseled Theseus that he should not seek out the players unless he could “find sport in their intents, extremely stretch’d, and conn’d with cruel pain.” R.137. Theseus’s bride-to-be, Queen Hippolyta, agreed with Philostrate that the Pyramus production was not suitable for the wedding, for she “love[d] not to see wretchedness o’ercharged.” R.138.

Yet Duke Theseus—Athens’s most magnanimous citizen—saw things differently. As he said to Hippolyta and Philostrate, “never anything can be amiss, when simpleness and duty tender it.” R.137. That is because “what poor simple duty cannot do, noble respect takes it in might, not merit.” R.138. He recalled that he had frequent occasion to receive greetings from “great clerks” whose words were inadequate, yet whose “modesty of fearful duty” provided as much information as “the rattling tongue of saucy and audacious eloquence.” R.138-39. Thus, Theseus credited “tongue-tied simplicity” as “speak[ing] most, to my capacity.” R.139. On that basis, Theseus decided to contract with the players, *see* R.137 (“I will hear that play”), and sent Philostrate forth to sort out the details with them.

### **B. The Contract With The Rude Mechanicals**

Philostrate, on Theseus’s behalf, subsequently agreed with director Peter Quince that Quince and his band of performers (known locally as the Rude Mechanicals) would perform their rendition of *Pyramus and Thisbe* on the night of Theseus’s and Hippolyta’s wedding. The play would be staged at the Theater of Dionysus on the Acropolis. Under the agreement, each of the players would receive “sixpence a-day” (equivalent to 3,000 drachmae) for their work, R.129, to be paid one half in advance and one half after the performance. The contract included a standard *force majeure* clause providing that each party would be relieved from obligation to the other in the event of “an extraordinary and unforeseen event . . . , including war, revolution, crime, or an act of the gods.” The contract further specified that acts of the gods included “hurricanes, earthquakes, fires,

volcanic eruptions, or epidemics.” Finally, the agreement stipulated that in the event that one party could no longer perform his obligations, he would immediately notify the other, and make all reasonable efforts to mitigate the harmful effects of non-performance.

In reliance on this agreement, Theseus proceeded to invite his wedding guests, along with selected other members of Athenian high society, to attend the play. Theseus, in order to cover the costs of the performance and the wedding—his funds having been depleted by the burdens of war, including the aforementioned “woo[ing],” R.5—charged each of the guests a substantial admission fee (100 drachmae).

In the meantime, Quince and his players ventured to the palace forest one mile outside of Athens for what they described as “obscene[ ]” and “courageous[ ]” rehearsals “by moonlight.” R.29. They undertook these dangerous nocturnal forest rehearsals apparently out of the concern that if they met “in the city,” they would “be dogged with company, and [their] devices known.” R.29.

By choosing to rehearse in the forest, the players ran a substantial risk, for the palace forest is known for strange and tragic occurrences at night. *See, e.g.*, R.34, 46 (describing kidnappings). The origin of these occurrences is unknown, but they are often thought by the local residents to be the work of invisible forest demons or fairies. Although these beliefs have passed out of fashion among many of the more aristocratic denizens of Athens, they cannot be discounted entirely. *See* R.131 (describing “antique fables” and “fairy toys” as “more strange than true”). *But see* R.133 (noting “great constancy” in the accounts of fairy activities). In any event, the risks of the forest

are obvious: quite recently, following nighttime visits to the forest, a group of confused young lovers began suffering from an unusual condition that interfered with those young people's affections. (Fortunately, and ironically, these symptoms redounded to the benefit of the victims, one of whom had previously been prepared to forfeit her life in Athens in the name of love. *See* R.7-9. All's well that ends well.)

The consequence of the players' risk-taking was as unfortunate as it was inevitable: the leading player, Nick Bottom—a weaver slated to play Pyramus—suddenly experienced a bizarre transformation that could only be understood as some kind of demonic possession or prank. For reasons that remain obscure—but which likely sound either in Bottom's name, or in his apparently difficult personality—Bottom's head was transformed into that of an ass in the midst of rehearsal. What is clear is that, notwithstanding his transformation, Bottom was able to (more or less) competently rehearse his lines, and even to sing. *See* R.74 (Bottom: "If I were true, fair Thisby, I were only thine."); *see also* R75-76 (singing, among other things, of the "plain-song cuckoo gray").

Overlooking Bottom's ability to perform, Quince decried Bottom's appearance alternately as "monstrous," "strange," and "haunted." R.74. He urged the entire cast to "fly" and to "pray." R.74. Bottom, abandoned, repeatedly bewailed his colleagues' "knavery," and attributed his altered state to their own cruel prank. *See* R.75 ("I see their knavery: this is to make an ass of me; to fright me, if they could."). Quince later notified Theseus that the play could not go on, and made no effort to either continue rehearsals of the Pyramus production or arrange a substitute performance.

### C. Procedural History

Duke Theseus filed a complaint in the Superior Court of Athens for breach of contract. As the complaint explained below, Quince's last-minute cancellation left Theseus and Hippolyta without any entertainment at their wedding reception: the wedding could not be postponed, since the couple had already put down a non-refundable deposit for their Acropolis venue. Worse still, ticket-holders to the Pyramus production have threatened to sue Theseus and Hippolyta for refunds unless the play is ultimately staged. Theseus has sought specific performance of the play at a later date and/or consequential damages flowing from the players' breach.

Quince and the other Rude Mechanicals asserted two affirmative defenses. First, they argued that their nonperformance was excused by the contract's *force majeure* clause, and specifically its allowance for nonperformance in the event of an "act of the gods." The players argued that Bottom's transformation was just such an act. Second, they argued that in any event their nonperformance was excused by the doctrines of impossibility and impracticability on the grounds that Bottom could not perform the part of Pyramus while in his altered state, and that no other player could have taken over the role. Theseus gathered extensive evidence in discovery rebutting these points, and showing that: (a) Bottom could have performed the role of Pyramus, even with the head of an ass; and (b) Bottom was capable of taking other roles in the play, and could have switched places with another player.

Despite this extensive evidence, the superior court granted only partial summary judgment to Theseus. It rejected the players' *force majeure* defense, but accepted the players' impossibility defense on the grounds that Bottom's transformation precluded performance of the Pyramus production. Nevertheless, the court held that the players could have presented a different play, and on those grounds awarded restitution of the advance payment that the players had taken for the Pyramus production. Yet the court also ordered Theseus to refund the audience's tickets, and ordered him to pay the players' legal fees. This Court granted Theseus's petition for a writ of certiorari.

### ARGUMENT

Duke Theseus should have judgment in full. Bottom's transformation—while unfortunate—was not an act of the gods covered by the parties' *force majeure* agreement, and did not prevent Quince and his band of Rude Mechanicals from staging their performance of the story of Pyramus and Thisbe. Theseus is entitled to all consequential damages for the players' breach or, at the very least, specific performance of the contract.

#### **I. Bottom's Transformation Was Not An Act Of The Gods**

The superior court held that the *force majeure* clause in the parties' contract does not govern the sudden transformation of Bottom's head into that of an ass. That conclusion was entirely correct for two reasons. First, all available facts suggest that Bottom's unusual condition is the work of some force other than the gods. Second, even if Bottom's

transformation were the work of the gods, it would fall outside of the scope of the *force majeure* clause's definition of "acts of the gods," which expressly enumerates a set of godly acts—volcanic eruptions, etc.—and does not include transformations of physical appearance. This Court should affirm the superior court's decision rejecting the players' *force majeure* defense.

**A. There Is No Evidence That The Gods Gave Bottom An Ass's Head**

The players' *force majeure* defense fails at the outset because—as the superior court correctly found—there is no substantial evidence in the record suggesting that the gods were responsible for Bottom's sudden transformation. Indeed, the evidence in the record points the other way: Bottom's appearance as an ass was almost certainly the work of some unseen (but ungodly) force, or perhaps the result of the players' own free-spirited hijinks.

The gods have been responsible for many strange, spiteful, and incomprehensible incidents over the years. *See, e.g.*, Aeschylus, *Prometheus Bound* (430 B.C.) (describing Zeus's elaborate, and frankly gross, punishment of the Titan Prometheus for having given mankind fire). But most of the gods' activities concern their fellow gods, or other creatures with some immediate connection to the gods. *See, e.g.*, Deborah Dickmann Boedeker, *Aphrodite's Entry Into Greek Epic* 38 (1974) (describing Hephaestus's plot to ensnare Aphrodite and Ares in a metal net). It is wholly implausible that the gods trained their caprice in this instance on an ordinary human being like Nick Bottom, who lacks divine ties.

At summary judgment, Theseus entered into evidence the testimony of his wife, Hippolyta, in support of this argument. Hippolyta, like Theseus, is a demigod of godly parentage, and the superior court properly recognized her as a demi-expert on the workings of the gods. *Cf. Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 597 (1993) (noting that the use of expert testimony need not provide comprehensive, “cosmic understanding” of phenomena, but should facilitate the “particularized resolution of legal disputes”). Hippolyta testified that, given Bottom’s ordinary life history, it was her opinion that Bottom was unlikely to have drawn the attention of the gods.<sup>2</sup> The superior court credited this testimony in support of its conclusion that Bottom’s transformation was not an act of the gods.

Additional evidence confirms the point. Theseus produced affidavits from among local residents who testified that the palace forest is known for unusual magical qualities, and is believed to harbor some kind of sub-divine class of demons. Although these lay witnesses later admitted in depositions that they had never seen such demons, the superior court concluded that their testimony was entitled to “some weight,” and found “plausible” the residents’ emphatic testimony that the forest is filled with mischief-making spirits of some kind.

Furthermore, the contemporaneous evidence shows that even Bottom did not believe that his transformation was an act of the gods. In discovery, Theseus turned up evidence showing that Bottom

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<sup>2</sup> But Hippolyta also noted that, having helped to ruin hers and Theseus’s wedding reception, Bottom might now reasonably expect to be drawn into various godly or demigodly feuds.

blamed *his fellow players* for his transformation in the immediate aftermath of the event. *See* R.75 (decrying the Rude Mechanicals’ “knavery” and concluding that they intended to “make an ass of me” and “fright me”). Bottom later testified at a deposition that that the gods, not the Rude Mechanicals, were responsible for his transformation. But the superior court recognized that Bottom’s previous assertions were flatly inconsistent with his more recent testimony that the gods were responsible for his condition. It thus refused to credit his new (altogether convenient) testimony as giving rise to a substantial question of disputed fact for purposes of summary judgment. That determination was correct.

**B. The *Force Majeure* Clause Does Not Cover Bottom’s Transformation**

Even assuming that the gods had a hand in Bottom’s unusual condition, that involvement would still not trigger the *force majeure* clause in the parties’ agreement. It has long been well settled in Athens—as in barbarian jurisdictions—that a party’s performance will be excused as a matter of *force majeure* only where “the *force majeure* clause specifically includes the event that actually prevents a party’s performance.” *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8, 9 (N.Y. App. Div. 2009) (citation omitted). That principle is all the more compelling here, since the parties’ agreement specifically sets forth a number of *force majeure* events—“war,” “crime,” “hurricanes,” and “volcanic eruptions,” among them—but says nothing about transformations of appearance. Because the *force majeure* clause does not address Bottom’s strange

condition, it does not excuse the players' nonperformance.

In the proceedings below, the players took the position that Bottom's condition was the result of an "epidemic," which is one of the events specifically defined as an "act of the gods" for purposes of the contract's *force majeure* clause. That argument is outlandish: no one else in Athens has been cursed with the head of an ass, and Bottom's condition remains entirely *sui generis*. To build their case for an epidemic, the players have pointed to the group of young lovers who recently suffered from a strange confusion of affections after a lark in the forest. But those young people's symptoms bear no resemblance to Bottom's, and it was in any event undisputed below that all of those young people are "full of joy and mirth." R.133. There is no evidence of an epidemic at work in Athens. Bottom's transformation was unique (perhaps because Bottom himself is uniquely asinine).

## **II. Bottom's Transformation Was An Asset, Not A Hindrance, To The Play**

Although the superior court correctly found that the players' nonperformance was not excused as a matter of *force majeure*, it went on to conclude that the performance was impossible in light of Bottom's transformation. That determination rested on a basic misconception of the parties' bargain and the nature of the players' performance. The players' rendition of the story of Pyramus and Thisbe was billed as a tragicomedy, and had been previously received by audiences as such. Bottom's transformation would only have added to the merriment of the occasion, befitting a wedding performance at the Theater of

Dionysus. Far from making performance impossible, Bottom's transformation would improve it.

It is scroll-book law that "[i]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance *objectively* impossible." *Kel Kim Corp. v. Central Markets, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987) (emphasis added). And here performance was not objectively impossible: The record shows that Bottom remains able to recite his lines and otherwise function as a stage performer even in spite of his ass's head. *See* R.74-76 (reciting lines and singing). The play could easily have gone on with Bottom in the role of Pyramus.

The players argued otherwise below on the grounds that the part of Pyramus "could not have been realistically portrayed while he was in the shape of an ass." But that argument assumes that the parties' contract envisioned a "realistic[ ]" portrayal of the tragedy of Pyramus and Thisbe. And that simply is not the case: Theseus chose to contract with the players precisely because their rendition of the story of Pyramus and Thisbe was not realistic. There is nothing comical about the *real* story of Pyramus and Thisbe. *See* Ovid, *Metamorphoses* (8 C.E.); R.136 (Philostrate's explanation that the actual story is a "tragical" one). The players' performance, by contrast, was billed as both "merry" and "tragical." R.135. That ambiguity was what made the performance appealing: no one wants to watch a wholly tragic story of love and suicide played out at a *wedding* reception (much less at a venue such as the Theater of Dionysus—a place known for raucous celebration). Theseus was searching for something "sorting with a nuptial ceremony," R.135, and he

believed that it could be found in a performance that inspired “merry tears” and “loud laughter.” R.136.

As the Rude Mechanicals’ performance was contracted for with the expectation of “mirth,” R.135, Bottom’s performance as Pyramus would have been only enhanced by his appearance on stage with the head of an ass. Indeed, the ass is a beloved and familiar creature whose very appearance often lends a satisfyingly comic aura to any scene, even (and perhaps especially) when the ass himself is upset or discontented. *See, e.g.,* A.A. Milne, *Winnie-The-Pooh* (1926). Thus, a transformed Bottom would be perfectly cast for the Rude Mechanicals’ performance. At the very least, Bottom’s transformation did not make that performance objectively impossible.

### CONCLUSION

This Court should affirm in part, reverse in part, and in all other respects “make amends ere long.” R.159.

Respectfully submitted,

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