

IN THE SUPREME COURT OF OHIO

Michael K. Cundall, et. al.

Plaintiffs,

vs.

U.S. Bank, N.A.,
Predecessor Trustee, et al.

Defendants.

08-0314

On Appeal from the
Hamilton County Court
of Appeals, First
Appellate District

Court of Appeals
Case Nos. C070081; C070082

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANTS
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THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The Court should accept this case for review because the First Appellate District's unprecedented decision directly conflicts with numerous decisions of this Court, other Ohio appellate courts, and federal courts. If allowed to stand, the First District's decision will prevent fiduciaries from settling disputes and will call into question the validity of untold thousands of releases and settlements.

For over a century, this Court has required a plaintiff suing to set aside a release and settlement for fraud in the inducement to first tender back any consideration the plaintiff obtained. Contrary to this longstanding Ohio law, the First District held that Ohio's tender rule does not apply in this case solely because the released party was a fiduciary.¹ Such decision hamstring both fiduciaries and their principals, crippling common business and personal relationships because, under the First District's ruling, no one is bound by an agreement to release their fiduciary. This case is of great significance because it impacts all trustees, joint venturers, majority and controlling shareholders, directors, agents, partners, attorneys, and all other fiduciaries.

This Court requires tender because public policy favors the settlements encouraged by the rule and because the requirement is just. Tender puts the parties back in status quo ante when plaintiffs break contracts to release by suing over released claims. Tender also prevents parties from settling claims and using the proceeds to bankroll actions against the parties they just released, leaving the released parties to defend themselves without the benefit of those funds.

The Eighth Appellate District recognized these same considerations in its January 2008

¹ *Cundall v. U.S. Bank*, 1st Dist. Nos C-070081, 82, 2007 Ohio 7067 at ¶ 25, attached as Exh. A.

decision *Weisman v. Blaushild*.² Finding that the tender requirement was “well settled” and “clear,” the Eighth District affirmed the dismissal of a plaintiff’s claims for failure to tender, even though the plaintiff was suing his fiduciary over released claims.³ In *Lewis v. Mathes*, the Fourth Appellate District held likewise.⁴ Thus, the outcome of this case would have been the opposite in both the Eighth and Fourth Districts.

The First District’s *Cundall* decision also conflicts with other Ohio authority. In support of its failure to require tender, the First District asserts that a presumption of fraud applies in contradiction of other Ohio authority. And in *dicta*, the First District suggests a new standard for a fiduciary to overcome the presumption of fraud that contradicts Ohio law and other cases. Finally, contrary to the law of Ohio and the law of other states, the First District held that the statute of limitations for constructive trusts begins to run at the termination of the express trusteeship, rather than when the allegedly wrongful transfer occurs. This ruling will encumber property rights believed settled more than two decades ago. For these reasons, this Court should accept jurisdiction and overturn the First District’s failure to follow Ohio law.

STATEMENT OF THE CASE AND FACTS

By 1984, Cincinnati businessman Richard R. Cundall, Jr. and his adult children were no longer satisfied with the dividend income on their shares of the Koons-Cundall-Mitchell Corporation (“KCM”).⁵ KCM was a holding company whose sole asset was shares of Central Investment Corporation (“CIC”), a publicly-held company. From the 1970s to the 1990s, CIC redeemed its shares through tender offers and arms-length transactions. In 1983, CIC paid the

² 8th Dist. No. 88815, 2008 Ohio 219, ¶ 26.

³ *Weisman*, 2008 Ohio 219 at ¶ 31, 37.

⁴ 4th Dist., 161 Ohio App. 3d 1, 2005 Ohio 1975, ¶ 27, 32.

⁵ T.d. 74, 6/1/2006 Affidavit of William R. Tobin at ¶ 3-5 and Exh. C to same (identifying Richard Cundall, Jr. as President of Honeymoon Paper Products, Inc.).

opportunistic and aggressive industrialist Lloyd Miller a premium for his CIC shares.⁶

Richard Cundall had close ties to CIC and KCM, serving as a director of KCM and as an Assistant Treasurer and director of CIC.⁷ Richard Cundall knew the value of KCM stock. After his wife Betty Lou Cundall died in 1977, as her executor Richard reached an agreement with the IRS valuing her KCM shares at \$68.21 per share.⁸

To arrange the sale of all their KCM shares, Richard Cundall and his adult children approached the President of CIC, Richard Cundall's brother-in-law John F. "Bud" Koons, III. The Cundalls rejected an offer of \$155 per share in 1983, but in 1984 sold their shares for \$210 per share even though they knew Lloyd Miller had received more for his stock.⁹ The per share value paid by CIC to the Cundalls was consistent with the valuation method used by CIC in numerous other redemptions from shareholders.

The sale included 3,104 shares of KCM held in the John F. Koons, Sr. and Ethel Bolan Koons Trust, of which Bud Koons served as trustee. This trust, known as the Grandparents Trust, was an inter vivos trust established by Bud's parents. Share A of the Grandparents Trust held KCM stock for the benefit of Bud Koons' descendants while the KCM shares in Share B were held for the benefit of the Cundalls. The majority of the Cundalls' KCM stock was held in another trust known as the Betty Lou Cundall trust, of which U.S. Bank was trustee in 1984, or was owned outright by the Cundalls.¹⁰

To induce the sale Richard Cundall and his adult children, who were represented by their

⁶ T.d. 98, Plaintiffs' Memo. in Opp. to Defendants' Motions to Dismiss at 3.

⁷ T.d. 83, Memo. in Support of Motion to Dismiss at 3.

⁸ T.d. 74, 6/1/2006 Affidavit of William R. Tobin at ¶ 4.

⁹ T.d. 74, 6/1/2006 Affidavit of William R. Tobin at ¶¶ 4, 6.

¹⁰ 2/7/1984 letters from the Cundalls, attached as Exh. A to T.d. 83, Motion to Dismiss.

own counsel,¹¹ provided Bud Koons with releases as part of their consideration. The releases expressly confirmed that each Cundall “requests and approves the sale by the Trustee,” Bud Koons, of the 3,104 KCM shares to CIC. Furthermore, on their own behalf and on behalf of their “heirs,” the Cundalls released Bud Koons, and his heirs and executors from all “claims . . . known or unknown” in connection with the stock sale.¹² Bud Koons then approved the sale even though CIC had to pay much of the purchase price with a note bearing 10% interest.¹³

The Cundalls enjoyed their 1984 proceeds of more than \$3.5 million for more than two decades while the remaining CIC and KCM shareholders continued bearing the risk of a non-diversified investment in a company that reinvested most of its earnings. That risk was substantial, as demonstrated by PepsiCo, Inc.’s 1998 lawsuit to strip CIC of its largest assets. After successfully defending PepsiCo’s litigation, CIC sold its soft drink businesses in January 2005.

Two months later, Bud Koons passed away. Eager to grab a share of the proceeds of the 2005 sale, Richard’s son Michael Cundall had himself appointed trustee of Trust B.¹⁴ Ignoring his own release and those of his siblings of Bud Koons, Michael Cundall sued Bud Koons’ estate, heirs, and the successor trustees of Bud Koons’ trusts over the 1984 stock sale.¹⁵

However, Michael Cundall did not comply with Ohio law – before filing suit he failed to

¹¹ T.d. 98, Plaintiffs’ Memo. in Opposition to Defendants’ Motions to Dismiss at 13; 5/27/1983 A. Weber letter, attached to T.d. 86, Opp. to Motion to Consolidate; 2/16/1984 Schwartz, Manes & Ruby invoice, attached as Exh. C to T.d. 74, 6/1/2006 Affidavit of William R. Tobin.

¹² Releases, attached to T.d. 83, Motion to Dismiss at Exh. B.

¹³ T.d. 74, 6/1/2006 Affidavit of William R. Tobin at ¶ 12.

¹⁴ *Cundall v. U.S. Bank, et al.* (Hamilton Cty. C.P.), No. A 0507295.

¹⁵ In a bizarre twist, Bud Koons and CIC’s longtime counsel Drew & Ward represent Michael Cundall. Drew & Ward partner Dick Ward served as successor trustee over Trust A after Drew & Ward divided the Grandparents Trust in 1992. Moreover, this lawsuit attempts to dismantle the very estate plan that Drew & Ward was paid to construct.

tender back any consideration received by the Cundalls when they sold their stock. As a result, the trial court dismissed all claims pursuant to Ohio Civ. R. 12(b)(6). The trial court also ruled that Mr. Cundall's 23-year old claims were not timely presented within the statutory period.¹⁶

The First District reversed, holding that the tender rule does not apply in a fiduciary context.¹⁷ The First District based its ruling in part on a presumption of fraud, even though another Ohio court of appeals did not apply a presumption of fraud to an inter vivos trust.¹⁸ In *dicta*, the First District also discussed a burden for a fiduciary to meet to overcome a presumption of fraud that conflicts with established Ohio law.¹⁹ Finally, the First District held that the statute of limitations in favor of a constructive trustee begins to run only upon the termination of the express trusteeship, despite the contrary rulings of this Court and other Ohio courts.²⁰

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A plaintiff who alleges that a release was obtained by fraud in the inducement must tender back the consideration received in exchange for the release before suing the released party over the released claims, even if the released party owed fiduciary duties to the plaintiff.

The First District found that Ohio's tender rule, most recently affirmed by the Ohio Supreme Court in *Haller v. Borrer Corp.* (1990), 50 Ohio St. 3d 10, "is not controlling here" because *Haller* "was a personal-injury case involving an arm's-length transaction, and there was no fiduciary relationship between the parties."²¹

¹⁶ T.d. 182, Entry Granting Defendants' Motions to Dismiss at 8-9, attached as Exh. B.

¹⁷ *Cundall*, 2007 Ohio 7067 at ¶ 25.

¹⁸ *Cundall*, 2007 Ohio 7067 at ¶ 7, 34, 37, 40; *Biddulph v. DiLorenzo*, 8th Dist. No. 83808, 2004 Ohio 4502, ¶ 2, 30-31.

¹⁹ *Cundall*, 2007 Ohio 7067 at ¶ 37. *Craggett v. Adell Ins. Agency* (8th Dist. 1993), 92 Ohio App. 3d 443, 451.

²⁰ *Cundall*, 2007 Ohio 7067 at ¶ 84; *Ruple v. Hiram College* (8th Dist. 1928), 35 Ohio App. 8, 15. See *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 171-72.

²¹ *Cundall*, 2007 Ohio 7067 at ¶ 20-22.

For every type of release before it, without exception, and for over a century, this Court has held that before attacking a release for fraud in the inducement, a plaintiff must first tender back the consideration received in exchange for the release.²² In *Manhattan Life Insurance Co. v. Burke*, the Supreme Court explained this process, stating that:

[N]o doubt exists, of the soundness of the general proposition that where a party to a compromise desires to set aside or avoid the same, and be remitted to his original rights, he must place the other party in *statuo quo* by returning or tendering the return of whatever has been received by him under such compromise . . . [T]he petition should allege the fact of such return or tender, prior to, or at least contemporaneous with, the commencement of the suit. Further, as a general proposition, the rule obtains even though the contract of settlement was induced by the fraud or false representations of the other party; the ground being that by electing to retain the property, the party must be conclusively held to be bound by the settlement.²³

In *Haller*, this Court reaffirmed the tender rule: “[a] release of liability procured through fraud in the inducement is voidable only, and can be contested only after a return or tender of consideration.”²⁴ Relying on this Court’s unbroken line of opinions, Ohio appellate courts have consistently applied the tender rule to a myriad of releases – until now.²⁵

²² *Haller v. Borrer Corp.* (1990), 50 Ohio St. 3d 10, 14-15 (we respectfully note that the release in *Haller* was for breach of contract employment claims, not personal injury claims as the First District states); *Shallenberger v. Motorists Mut. Ins. Co.* (1958), 167 Ohio St. 494, 503-05 (The Supreme Court has “consistently held that a releasor of an unliquidated claim cannot recover anything on account of that claim without first avoiding the release; and that, except where, unlike the instant case, the release is void, such releasor cannot undertake to avoid that release without first tendering back the consideration received therefore.”) (emphasis added); *Block v. Block* (1956), 165 Ohio St. 365, 374-77 (alimony and separation agreement); *In Re Estate of Gray* (1954), 162 Ohio St. 384, 390-91 (In a case involving a fiduciary, the Court notes the tender rule and does not carve out an exception for fiduciaries. The Court held that the tender rule did not apply because the settlement did not cover the claim); *Picklesimer v. Baltimore & Ohio RR. Co.* (1949), 151 Ohio St. 1, 4-5, 7 (personal injury claims); *Manhattan Life Ins. Co. v. Burke* (1903), 69 Ohio St. 294, 302 (insurance dispute).

²³ *Manhattan Life Ins. Co.*, 69 Ohio St. 294, 302-03.

²⁴ *Haller*, 50 Ohio St. 3d at 14.

²⁵ E.g. *Weisman*, 2008 Ohio 219 at ¶ 37, 43 (minority shareholder’s claims over buyout); *Lewis*, 2005 Ohio 1975 at ¶16, 32 (minority shareholder’s claims over buyout); *Adams v. State of Ohio*

Principles of equity, fairness, and policy favor the tender rule: “[T]he requirement of a tender before rescission . . . is an equitable one. He who seeks equity must first do equity. The defendant has the same right to invoke equitable principles as the plaintiff has.”²⁶ Likewise, this Court found the tender rule fair because: “a releasor ought not be allowed to retain the benefit of his act of compromise and at the same time attack its validity when he understood the nature and consequence of his act, regardless of the basic nature of the inducement employed.”²⁷ The Court also found that public policy favors tender because “the law favors the prevention of litigation by compromise and settlement of controversies.”²⁸

Despite the equity, fairness, and public policy favoring enforcement of the tender rule, the First District determined that the tender rule does not apply in the fiduciary context because no cited cases, no Ohio cases, and no cases from other jurisdictions have applied the tender rule in the fiduciary context.²⁹ The First District was incorrect.

Both the Eighth and the Fourth Districts have applied the tender rule in the fiduciary context.³⁰ The plaintiffs in both cases, *Weisman* and *Lewis*, were minority shareholders in close

(10th Dist. June 28, 1996), 1996 Ohio App. LEXIS 2752 at *9 (employment claims); *Erwin v. Allstate Ins. Co.* (1st Dist. June 2, 1993), 1993 Ohio App. LEXIS 2782 *3-4 (property damage claims); *Harchick v. Baio* (8th Dist. 1989), 1993 Ohio App. LEXIS 2782, 180 (personal injury claims); *Stone v. City of Rocky River* (8th Dist. Oct. 31, 1985), 1985 Ohio App. LEXIS 9080 *5 (claims for injuries due to improper police interrogation); *Kirk v. Kirk* (3d. Dist. Dec. 30, 1983), 1983 Ohio App. LEXIS 12970 *7 (alimony and child support claims); *Axx v. Schirg* (6th Dist. May 21, 1976), 1976 Ohio App. LEXIS 7935 *4 (personal injury claims); *Kercher v. Brown* (2d. Dist. 1947), 72 N.E.2d 588, 589-90 (automobile injury claims); *Walker v. Empire Life Ins. Co.* (8th Dist. 1905), 18 Ohio C.C. (n.s.) 591, 595 (breach of insurance contract claims).

²⁶ *Kercher*, 72 N.E.2d at 590.

²⁷ *Haller*, 50 Ohio St. 3d at 14 (emphasis added), citing *Shallenberger*, 167 Ohio St. 494; *Picklesimer*, 151 Ohio St. at 7; *Weisman*, 2008 Ohio 219 at ¶ 26.

²⁸ *Haller*, 50 Ohio St. 3d at 14, citing *White v. Brocaw* (1863), 14 Ohio St. 339, 346; *Shallenberger*, 167 Ohio St. at 505; *Weisman*, 2008 Ohio 219 at ¶ 26.

²⁹ *Cundall*, 2007 Ohio 7067 at ¶ 24-25.

³⁰ *Weisman*, 2008 Ohio 219 at ¶ 37, 43; *Lewis*, 2005 Ohio 1975 at ¶ 27, 32.

corporations. When they were asked to leave the company, both plaintiffs released the majority (and controlling) shareholders in connection with a stock buyout agreement.³¹ Majority and controlling shareholders in a close corporation owe a fiduciary duty of the “utmost good faith and loyalty.”³² The Eighth and Fourth Districts both found that the plaintiffs should have tendered back the consideration received for the release before filing suit over the released claims, even though the plaintiffs alleged that the majority shareholders fraudulently induced them to sign the release.³³ As the Eighth District explained in *Weisman*:

The law in Ohio governing releases is well settled . . . [and] clear. . . . Since [the minority shareholder] agreed to the release provision in exchange for consideration in the [settlement agreement], they *only had one option*. They first *had to rescind and tender back the consideration – before they could bring their suit.*³⁴

In its recent *Weisman* decision, the Eighth District also explained that when, as the Cundalls did, “the parties have negotiated the release with the assistance of legal counsel, and both sides have agreed to the language included in the release, there is an assumption that the parties are fully aware of the terms and scope of their agreement.”³⁵ Thus, within a period of less than a month, two Ohio appeals courts have reached the opposite conclusion concerning the applicability of this Court’s tender rule.

³¹ *Lewis*, 2005 Ohio 1975 at ¶ 2-4. *Lewis* held only one third of the company’s stock. *Id.* at ¶ 2. The *Lewis* trial court found that: “By combining their interests, [the other two shareholders] became controlling shareholders in the company.” *Lewis v. Mathes* (Washington Cty. C.P. Mar. 3, 2004), No. 02 OT 274 at 1. The majority shareholder in *Weisman* was the president and CEO of the company. *Weisman*, 2008 Ohio 219 at ¶ 1.

³² *Crosby v. Beam* (1989), 47 Ohio St. 3d 105, 108, 109; *Miller v. McCann* (1st Dist. Dec. 26, 1997), 1997 Ohio App. LEXIS 5778 *5. The duty is owed when “the minority shareholder is an officer of the corporation.” *Miller*, 1997 Ohio App. LEXIS 5778 at *6.

³³ *Weisman*, 2008 Ohio 219 at ¶ 13, 37, 43; *Lewis*, 2005 Ohio 1975 at ¶ 17, 27, 32.

³⁴ *Weisman*, 2008 Ohio 219 at ¶ 31, 37 (emphasis in original).

³⁵ *Weisman*, 2008 Ohio 219 at ¶ 24, quoting *Task v. Nat’l City Bank* (8th Dist. Feb. 10, 1994), 1994 Ohio App. LEXIS 437 *11-12.

Likewise, courts around the country, including federal courts in Ohio, require plaintiffs to tender back consideration before suing their fiduciaries for released claims and claiming that their fiduciaries fraudulently induced their release.³⁶ This is true even though the fiduciaries in these cases owe the same “punctilio of honor” to their principals as the joint venturers did in *Meinhard v. Salmon* (N.Y. 1928), 249 N.Y. 458, and which the panel applies to Bud Koons.³⁷

The First District’s decision not to apply the tender rule in a fiduciary context stands alone and contradicts over a century of law from the Ohio Supreme Court, all other Ohio appellate courts, and courts around the country applying the tender rule to all releases, even releases of fiduciaries.

Proposition of Law No. 2: A presumption of fraud does not apply to an action of a trustee of an inter vivos trust when the trust document permits the action or to a release given by a represented party to a fiduciary.

To justify its unique ruling on tender, the First District relies on a presumption of fraud.³⁸ That reliance is misplaced. No presumption of fraud applies here. The Grandparents Trust is an inter vivos trust that gave its trustee, Bud Koons: “full power and authority in his discretion and

³⁶ *Goldstein v. Murland* (E.D. Pa. June 24, 2002), 2002 U.S. Dist. LEXIS 11331 *2-3, 10 n.8 (law partners); *Rinke v. Auto. Moulding Co.* (Mich. App. 1997), 573 N.W.2d 344, 345-46 (minority shareholders); *Environ Prods., Inc. v. Advanced Polymer Tech. Inc.* (E.D. Pa. June 30, 1997), 1997 U.S. Dist. LEXIS 9582 *3, 9-11 (joint venturers); *Jiffy Lube Int’l v. Jiffy Lube of Pa., Inc.* (E.D. Pa. 1994), 848 F.Supp. 569, 574, 576-78 (joint venturers under both Maryland and Pennsylvania law); *Rue v. Helmkamp* (Mo. App. 1983), 657 S.W.2d 76, 76, 78-80 (joint venturers). The federal courts also apply the tender rule to ERISA fiduciaries. *Samms v. Quanex Corp.* (6th Cir. Oct. 17, 1996), 1996 U.S. App. LEXIS 27356 *7-8; *Bittinger v. Tecumseh Prods. Co.* (E.D. Mich. 1998), 83 F.Supp. 2d 851, 871-72; *Wittorf v. Shell Oil Co.* (5th Cir. 1994), 37 F.3d 1151, 1154; *Ljubisaveljevic v. Nat’l City Corp.* (S.D. Ohio May 30, 2007), 2007 U.S. Dist. LEXIS 39126 *23-24; see *Taylor v. Visteon Corp.* (6th Cir. 2005), 149 Fed. Appx. 422, 426-27. The “common law of trusts” defines the scope of ERISA fiduciaries’ “powers and duties.” *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp.* (U.S. 1985), 472 U.S. 559, 570.

³⁷ *Cundall*, 2007 Ohio 7067 at ¶ 27, citing *Meinhard*, 249 N.Y. at 464.

³⁸ *Cundall*, 2007 Ohio 7067 at ¶ 7, 34, 37, 40.

without being required to apply to any court for authority and without being subject to the laws of the state or nation . . . [t]o sell . . . any assets”³⁹

In *Biddulph v. DiLorenzo*, an Ohio case involving a trust with language similar in scope to the Grandparents Trust, the trustee of an inter vivos trust established by the trustee’s father for the benefit of the trustee and her brother sold trust property to a company owned by the trustee’s husband.⁴⁰ After the purchase was executed, the trustee’s brother offered more money for the property. The trustee refused his offer.⁴¹ Her brother sued, alleging self-dealing by the trustee.⁴²

The Eighth District did not apply a presumption of fraud in *Biddulph*. Rather, the Eighth District held that the court below did not err in finding that the property was permissibly sold because: 1) the trust authorized the sale and 2) “the trustee’s actions [i.e. the sale] were not otherwise limited by statutory or common law” since the trust was an inter vivos trust, not a testamentary trust.⁴³

As in *Biddulph*, the trust at issue here is an inter vivos trust which allows the trustee to sell any trust property without applying to any court for permission.⁴⁴

Not only does the First District’s opinion conflict with the Eighth District’s opinion in *Biddulph*, but by suggesting that the presumption of fraud applies to a release, the First District’s decision undermines the efficacy of the Ohio Trust Code. At R.C. § 5801.10, the Trust Code

³⁹ Grandparents Trust at 8-9, attached as Exh. B to T.d. 60, Amended Complaint. No court approval was required because Bud Koons was an inter vivos trustee. *Dater v. Charles H. Dater Found.*, 1st Dist. Nos. C-020675, C-020784, 2003 Ohio 7148, ¶ 91-94, *discretionary appeal denied* (2004), 102 Ohio St. 3d 1459, 2004 Ohio 2569.

⁴⁰ *Biddulph*, 2004 Ohio 4502 at ¶ 2, 3, 15, 28.

⁴¹ *Id.* at ¶ 10.

⁴² *Id.* at ¶ 29.

⁴³ *Id.* at ¶ 30, 31.

⁴⁴ *Biddulph*, 2004 Ohio 4502 at ¶ 2, 28; Grandparents Trust, at 8-9, attached as Exh. B to T.d. 60, Amended Complaint.

endorses settlements between trustees and beneficiaries.

Proposition of Law No. 3: Fiduciaries may overcome a presumption of fraud by showing that: the plaintiffs had competent and disinterested advice or that they entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, or that their consent was not obtained by reason of the power of the influence to which the relation gave rise.

In *dicta* the First District discusses the burden a fiduciary must meet to overcome the presumption of fraud.⁴⁵ Instead of citing to Ohio's standards for overcoming this presumption, the First District relies on a New York case, quoting this case as follows:

“[Any] acquisition of the shares of the beneficiaries by one of the fiduciaries must be dealt with as *presumptively void unless* affirmative proof is made by the fiduciaries that their dealings with each beneficiary was in every instance aboveboard and fully informative. The fiduciaries in such circumstances have the obligation to show affirmatively not only that they acted in good faith but that they volunteered to the beneficiaries every bit of information which personal inquiry by the beneficiaries would have disclosed.”⁴⁶

This quotation does not reflect Ohio law. While there are many means of overcoming the presumption of fraud, the means suggested by this New York case conflict with decisions of other Ohio courts of appeals. In *Craggett v. Adell Insurance Agency*, the Eighth District held that a fiduciary may rebut the presumption of fraud by showing that: “the plaintiff had competent and disinterested advice *or* that she entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, *or* that her consent was not obtained by reason of the power of the influence to which the relation gave rise.”⁴⁷ Other courts have also found that the

⁴⁵ *Cundall*, 2007 Ohio 7067 at ¶ 37.

⁴⁶ *Id.* at ¶ 37 (emphasis added), citing *Birnbaum v. Birnbaum* (N.Y. App. 1986), 117 A.D.2d 409.

⁴⁷ *Craggett*, 92 Ohio App. 3d at 451, citing *McAdams v. McAdams* (1909), 80 Ohio St. 232 (emphasis added). Two Ohio cases set forth slightly different standards. *McAdams*, 80 Ohio St. 232 at 243 (“the other party had competent and disinterested or independent advice, or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise.”), citing *Kerr on Fraud*, 151; *Yost v. Wood* (5th Dist. July 11, 1988),

presumption of fraud may be rebutted just “by evidence that the other party obtained independent advice.”⁴⁸

“Once the fraud is rebutted,” this Court has found, “fraud may not be presumed. It must be established by clear and convincing evidence before the instrument will be reformed on that ground.”⁴⁹

Two of the means to overcome the presumption of fraud provided in *Craggett*—showing that “the plaintiff had competent and disinterested advice” and showing that the plaintiff’s consent “was not obtained by the power of influence to which the relationship gave rise”—are not provided for in the New York case the First District cites.

The second means of overcoming the presumption of fraud articulated in *Craggett* conflicts with the cited passage from the New York case. The New York case requires fiduciaries to show in part that they “volunteered” information to the beneficiaries.⁵⁰ However, in *Craggett* the second means of overcoming the presumption of fraud does not require that the fiduciary be the source of the information, so long as the fiduciary’s principal “entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect.”⁵¹

1988 Ohio App. LEXIS 2791 *8-9 (“A rebuttal is accomplished where it is shown that the client had competent and disinterested advice *or* that he entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise) (emphasis in original).

⁴⁸ *Sullivan v. Mebane Packaging Group, Inc.* (N.C. App.), 581 S.E.2d 452, 462, *review denied* (N.C. 2003), 588 S.E.2d 473; *Cash v. State Farm Mut. Auto. Ins. Co.* (N.C. App.), 528 S.E.2d 372, 380, *aff’d* (N.C. 2000), 538 S.E.2d 569; *Estate of Smith* (N.C. App.), 487 S.E.2d 807, 813 (applying this standard to a trustee), *review denied* (N.C. 1997), 494 S.E.2d 410, *citing Watts v. Cumberland Cty. Hosp. Sys., Inc.* (N.C. 1986), 343 S.E.2d 879, 884.

⁴⁹ *McAdams*, 80 Ohio St. 232 at 243. *Accord, Studniewski v. Krzyzanowski* (1989), 65 Ohio App. 3d 628, 630; *Cross v. Ledford* (1954), 161 Ohio St. 469, 475; *Craggett*, 92 Ohio App. 3d at 451; *Yost*, 1988 Ohio App. LEXIS 2791 at *9-10.

⁵⁰ *Cundall*, 2007 Ohio 7067 at ¶ 37.

⁵¹ *Craggett*, 92 Ohio App. 3d at 451.

Under the *Craggett* standard, Defendant-Appellants have already met any burden they have to rebut a presumption of fraud. Michael Cundall admitted in his trial court briefing that the Cundalls were represented by counsel in the 1984 stock transaction.⁵² The First District's *dicta* does not accurately state Ohio law. Instead, the panel's decision that a release provided to a fiduciary by a person represented by counsel is presumptively void is a stunning departure from Ohio law. The decision undermines completely the ability of any fiduciary to make agreements with their principal. The First District's decision should not be permitted to stand.

Proposition of Law No. 4: The statute of limitations on a lawsuit seeking to impose a constructive trust begins to run in favor of the constructive trustee from the date of the initial, alleged wrongful transfer, not from the termination of the express trusteeship.

Contrary to the law of Ohio and other jurisdictions, and citing only to a case that supports Defendant-Appellants' position, the First District decided to treat alleged constructive trustees identically to express trustees with respect to when the statute of limitations begins running. Here, Michael Cundall seeks to impose a constructive trust over the KCM shares transferred to CIC in 1984 (and the proceeds thereof).⁵³ The First District determined that the statute of limitations on Plaintiffs' claim for a constructive trust began to run at the termination of Bud Koons' express trusteeship upon his death in 2005 rather than in 1984 when the alleged wrongful transfer to the initial constructive trustee was made.⁵⁴

However, other Ohio courts addressing this issue have explicitly held that the statute of limitations for a claim related to a constructive trustee's alleged receipt of property begins to run

⁵² T.d. 98, Plaintiffs' Memo. in Opp. to Defendants' Motions to Dismiss, at 13.

⁵³ T.d. 60, Amended Complaint at ¶ 8.

⁵⁴ *Cundall*, 2007 Ohio 7067 at ¶ 84.

when the allegedly improper transfer is made.⁵⁵

Similar to this case, in *Ruple v. Hiram College*⁵⁶ the plaintiff alleged that an express trustee had wrongfully paid money to a trust company that, in turn transferred the money to the defendants. The court determined that since no trust relationship existed between the defendants and the plaintiff, if the wrongful payment to the defendants “created a trust, it must have been a constructive trust only.”⁵⁷ The court held that “only direct, express trusts are exempt from the statute of limitations” and that “trusts which arise from an implication of law, or constructive trusts, are not within the rule, but are subject to the operation of the statute [of limitations].”⁵⁸

The Ohio Supreme Court, treatises, and cases from other jurisdictions uniformly state that while the statute of limitations does not run against an express trustee until termination of the trusteeship, that rule does not apply to constructive trusts.⁵⁹

The panel here cited this Court's decision in *Peterson v. Teodosio* for the proposition that statutes of limitations attach to causes of action.⁶⁰ While the *Peterson* decision does note that it

⁵⁵ *Ruple v. Hiram College* (8th Dist. 1928), 35 Ohio App. 8, 15; *Allen v. Deardoff* (1st Dist. 1921), 14 Ohio App. 16, 19-20; *McCauley v. German Nat'l Bank* (Hamilton Cty. C.P. 1914), 1914 Ohio Misc. LEXIS 137, *15-16.

⁵⁶ *Ruple*, 35 Ohio App. 8.

⁵⁷ 35 Ohio App. at 15.

⁵⁸ *Id.* at 15, quoting 2 Wood on Limitation (4th Ed.) §200; accord *Allen*, 14 Ohio App. 16.

⁵⁹ *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 171-72; Bogert, Trusts and Trustees (2d ed. Rev.), § 953 (When a plaintiff alleges, as he has here, that “the reason that equity decrees a constructive trust is that the title to the property has been wrongfully acquired, then a cause of action for its recovery immediately accrues.”); 91 Ohio Jurisprudence 3d Trusts, § 565 (“Where money or property, the subject of an existing trust, is paid out . . . or conveyed, in breach of trust, to one who thereby becomes chargeable as a constructive trustee, the rule is that the statute at once begins to run in his favor.”); *Carroll County v. Eureka Springs Sch. Dist.* (Ark. 1987), 729 S.W.2d 1, 4; *Villarreal v. Glacken* (Md. App. 1985), 492 A.2d 328, 335-36; *Hart v. Nat'l Bank of Birmingham* (5th Cir. 1967), 373 F.2d 202, 207-08; *Redding v. Main* (Ky. App. 1946), 196 S.W.2d 887, 889; *Cone v. Dunham* (Conn. 1890), 20 A. 311, 313.

⁶⁰ *Cundall*, 2007 Ohio 7067 at ¶ 84 n. 64.

is a rule of “universal application that limitation statutes will run with respect to actions seeking imposition of constructive trusts,”⁶¹ this rule actually works in Defendants' favor. The First District’s ruling that the statute of limitations on Cundall's breach of fiduciary duty claim runs from when Bud ceased to be trustee is *an exception* to the four-year statute of limitations in R.C. § 2305.09. As *Ruple* recognized, that exception does not apply to the initial constructive trustee or successor constructive trustees. The *Peterson* decision even cites approvingly the very section of Bogert's treatise setting forth this same rule.⁶²

The panel’s decision to treat a claim against a constructive trustee the same for statute of limitations purposes as claims against an express trustee is inconsistent with numerous decisions, it will undermine property rights that have existed for decades.

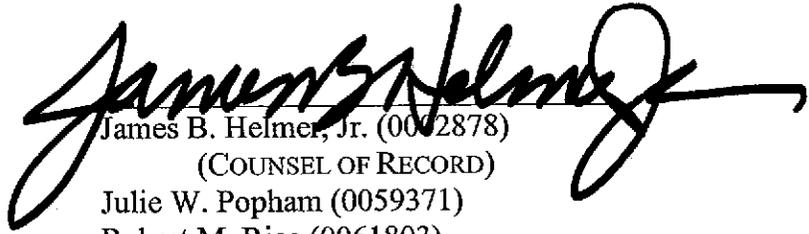
CONCLUSION

For well over a century, the tender rule has prevented abusive lawsuits while fairly allowing a plaintiff to sue so long as the plaintiff first puts the released party back in status quo by returning the consideration. The First District’s unprecedented decision not to apply the tender rule is at odds with both this Court and decisions of sister appellate courts. It imperils the ability of all fiduciaries to settle claims, calling into question the validity of untold thousands of releases and settlements. Defendant-Appellants respectfully request that the Court grant jurisdiction and correct the First District’s radical departures from established Ohio law.

⁶¹ 34 Ohio St.2d at 172.

⁶² 34 Ohio St.2d at 172. The treatise is quoted *supra* at n. 59.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on February 8, 2008, a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to the following counsel:

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ENTERED
DEC 28 2007

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

MICHAEL K. CUNDALL, INDIVIDUALLY,
and MICHAEL K. CUNDALL, SUCCESSOR
TRUSTEE,

Plaintiff-Appellant,

vs.

U.S. BANK, N.A., PREDECESSOR TRUSTEE,
RICHARD W. CAUDILL, EXECUTOR OF
THE ESTATE OF JOHN F. KOONS, III,
DECEASED, KEVEN E. SHELL, ANCILLARY
ADMINISTRATOR OF THE ESTATE OF
JOHN F. KOONS, III, DECEASED, KEVEN
E. SHELL, SUCCESSOR TRUSTEE,
RICHARD W. CAUDILL, SUCCESSOR
TRUSTEE, WILLIAM P. MARTIN II, D.
SCOTT ELLIOT, G. JACK DONSON, JR.,
MICHAEL CAUDILL, DEBORAH KOONS
GARCIA, JOHN F. KOONS, IV, JAMES B.
KOONS, CAROLINE M. KOONS,
KATHLEEN M. KOONS BAKER, MAURA L.
KOONS, JEREMY B. KOONS, MORGAN N.
KOONS, CHRISTINA KOONS, NICHOLAS
KOONS BAKER, and CARSON NYE KOONS
BAKER,

Defendants-Appellees,

PETER B. CUNDALL, et al.,

Defendants,

and

MICHAEL K. CUNDALL, JR., COURTNEY
FLETCHER CUNDALL, and HILLARY
CUNDALL,

Cross-Claimants/Defendants-
Appellants.

: APPEAL NOS. C-070081
 C-070082
: TRIAL NO. A-0602080
:
: *JUDGMENT ENTRY.*



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 28, 2007 per Order of the Court.

By:


Presiding Judge

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

MICHAEL K. CUNDALL, INDIVIDUALLY,
and MICHAEL K. CUNDALL, SUCCESSOR
TRUSTEE,

Plaintiff-Appellant,

vs.

U.S. BANK, N.A., PREDECESSOR TRUSTEE,
RICHARD W. CAUDILL, EXECUTOR OF
THE ESTATE OF JOHN F. KOONS, III,
DECEASED, KEVEN E. SHELL, ANCILLARY
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JOHN F. KOONS, III, DECEASED, KEVEN
E. SHELL, SUCCESSOR TRUSTEE,
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GARCIA, JOHN F. KOONS, IV, JAMES B.
KOONS, CAROLINE M. KOONS,
KATHLEEN M. KOONS BAKER, MAURA L.
KOONS, JEREMY B. KOONS, MORGAN N.
KOONS, CHRISTINA KOONS, NICHOLAS
KOONS BAKER, and CARSON NYE KOONS
BAKER,

Defendants-Appellees,

PETER B. CUNDALL, et al.,

Defendants,

and

MICHAEL K. CUNDALL, JR., COURTNEY
FLETCHER CUNDALL, and HILLARY
CUNDALL,

Cross-Claimants/Defendants-
Appellants.

: APPEAL NOS. C-070081
C-070082
: TRIAL NO. A-0602080

: *OPINION.*

PRESENTED TO THE CLERK
OF COURTS FOR FILING

DEC 28 2007

COURT OF APPEALS

OHIO FIRST DISTRICT COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: December 28, 2007

Drew & Ward and Richard G. Ward, for Plaintiff-Appellant,

William H. Blessing for Cross-Claimants/Defendants-Appellants,

Frost Brown Todd, LLC, and Susan Grogan Faller, for Defendant-Appellee U.S. Bank,

Peter L. Cassady, Brian G. Dershaw, and Beckman, Weil, Shepardson, LLC, for Defendants-Appellees Deborah Koons Garcia, John F. Koons, IV, James B. Koons, Caroline M. Koons, Kathleen M. Koons, Maura L. Koons, Jeremy B. Koons, and Morgan N. Koons,

Donald J. Mooney, Jr., Pamela K. Ginsburg, and Ulmer & Berne, LLP, for Defendants-Appellees Christina Koons, Nicholas Koons Baker, and Carson Nye Koons Baker,

James B. Helmer, Jr., Julie W. Popham, Robert M. Rice, Erin M. Campbell, and Helmer, Martins, Rice & Popham and Taft, Stettinius & Hollister, LLP, for Defendants-Appellees Richard W. Caudill, Executor, Keven E. Shell, Ancillary Administrator, Richard W. Caudill, Successor Trustee, Keven E. Shell, Successor Trustee, William P. Martin II, Successor Trustee, D. Scott Elliott, Successor Trustee, G. Jack Donson, Jr., Successor Trustee, and Michael Caudill, Successor Trustee.

Please note: This case has been removed from the accelerated calendar.

MARK P. PAINTER, Judge.

{¶1} Michael Cundall sued a group of defendants for tortious breach of fiduciary duty, a constructive trust, a declaratory judgment, an accounting, and related relief. The suit alleged egregious breaches of trust. The trial court dismissed the case. Michael and his children, the cross-claimants, now appeal. We reverse the trial court's judgment in all respects except for the dismissal of U.S. Bank.

I. Two Trusts

{¶2} John F. Koons, Sr. ("John"—we use first names because many of the parties have the same last names) was president and chief executive officer of Central Investment Corporation ("CIC"), which had originally owned the Burger Brewing Company in Cincinnati, but had diversified into soft-drink bottling, which prospered long after the brewery had closed. John F. Koons, III, ("Bud") succeeded his father as president and CEO of CIC. (Another corporation, Koons-Cundall-Mitchell, was a holding company for CIC stock. To make the case simpler to understand, we refer to both as CIC.)

{¶3} In 1976, John and his wife, Ethel, created a trust ("the Grandparents Trust"). They placed 6,309 shares of CIC stock in the trust. Bud served as trustee of the Grandparents Trust from its creation. The trust document instructed the trustee to equally divide the initial assets into Fund A ("the Koons Fund"), for the benefit of Bud's children, and Fund B ("the Cundall Fund"), for the benefit of John and Ethel's daughter Betty Lou Cundall's children.

And it directed the trustee to divide equally any additional amounts contributed by any person, unless the amounts were specifically earmarked for one of the funds. The two funds were to be separate for accounting and distribution purposes. The trust document specifically prevented Bud from distributing the income or principal of the trust either to Bud directly or for his benefit. But it gave Bud the power to sell any assets of the trust for cash "without being subject to the laws of the state or nation," whatever that may mean.

{¶4} Betty Lou created a separate trust in 1977. The Betty Lou Trust contained 10,077 shares of CIC stock. U.S. Bank (formerly First National Bank of Cincinnati, Firststar, and Star) was the trustee of the Betty Lou Trust from its inception until 1996. U.S. Bank also served as the commercial banker for Bud's company, CIC.

{¶5} In 1983, Bud offered to purchase the Cundall family's shares of CIC stock, including the shares that were in the Cundall Fund and the Betty Lou Trust. Bud's first offer, for \$155 per share, was refused. Shortly thereafter, CIC purchased company stock from another shareholder, Lloyd Miller, at \$328 per share.

{¶6} Michael alleged that Bud had approached him and his siblings—the beneficiaries of the Cundall Fund—and told them that he would stop distributing dividends and that the CIC shares would be worth nothing if they did not sell. (As sole trustee for the Grandparents Trust, Bud had the unfettered power to distribute income or principal as he saw fit.) In 1984, the Cundall family sold back to the company all their shares of CIC, from both the Cundall Fund and the Betty Lou Trust, for \$210 per share, \$118 less per share than what Miller had received for his shares. The Cundalls signed documents that purported to release

the trustees—Bud as trustee of the Grandparents Trust and U.S. Bank as the trustee for the Betty Lou Trust—from any liability for the sale in exchange for their “consent” to the sale. That is, Bud, as fiduciary, procured a release from the beneficiaries for selling the trust stock to his own corporation.

{¶7} Michael’s “bullying” allegation was just that and, as with all other allegations, remains to be proved. But if it is true, it is a patently egregious violation of a fiduciary duty. And even if it is not true, there is a strong presumption that the dealings were unfair.

{¶8} In 1992, Bud Koons signed a “Division of Trust” document. It divided the Grandparents Trust into two new trusts, A (“the Koons Trust”) and B (“the Cundall Trust”). At that time, the CIC stock that remained in the Koons Trust was worth \$1,011 per share. But the allegedly “equal” trusts were equal no longer: the Koons Trust was valued at \$2,656,908 and the Cundall Trust was valued at \$536,431. Bud resigned as trustee of the Koons Trust, but continued serving as trustee for the Cundall Trust until his death in 2005. Odd.

{¶9} In 1996, U.S. Bank was removed as trustee of the Betty Lou Trust.

{¶10} In February 2005, Pepsiamericas Inc. bought CIC for \$3009.74 per share, or approximately \$340 million. In March 2005, shortly after Pepsi bought CIC, Bud died.

II. Who Will be Trustee?

{¶11} The original trust instrument that had created the Grandparents Trust named three successor trustees if Bud ceased to be the trustee. Shortly after Bud died, one of three named successor trustees began examining the trust.

He wrote a letter to another named successor trustee questioning the huge disparity in values, since the assets were supposed to be evenly split, and speculated that any trustee or lawyer who knew or should have known about the disparity could be exposed to personal liability.

{¶12} All three of the named successor trustees declined to serve as fiduciaries. The trust specified that in the event that the three were unable or unwilling to serve as trustee, U.S. Bank would be appointed as the trustee. U.S. Bank eventually also declined to serve as trustee.

{¶13} Michael apparently became aware of the disparity in the funds and petitioned the trial court to become Bud's successor as the trustee of the Grandparents Trust. He took over as the trustee in November 2005.

III. Case Filed and Dismissed

{¶14} In March 2006, Michael filed suit against Bud's estate, the successor trustees, the Koons children and grandchildren, the Cundall children and grandchildren, and U.S. Bank. According to Michael, he named everyone so that any of the beneficiaries could come forward and make whatever claims they wanted. Some of the Cundalls filed cross-claims against Bud's estate, the trustees, and the Koons beneficiaries.

{¶15} Michael alleged that Bud had breached his fiduciary duty to the beneficiaries of the Cundall Fund by mishandling the trust funds. Further, he alleged that Bud and U.S. Bank had breached their fiduciary duties and defrauded the Cundalls by misrepresenting the true value of the CIC stock and by self-dealing.

{¶16} In January 2007, the trial court dismissed the case on a Civ.R. 12(B) motion, holding that the Cundalls were required to tender the consideration they had received from the 1984 sale of their CIC stock before bringing suit. The trial court dismissed with prejudice U.S. Bank and Bud's estate on statute-of-limitations grounds. It dismissed without prejudice the out-of-state Koons beneficiaries for lack of personal jurisdiction. The trial court also denied as moot Michael's motion to file a second amended complaint and all other pending motions. This appeal followed.

IV. Assignments of Error

{¶17} Michael asserts seven assignments of error. He contends that the trial court erred by (1) granting the motions to dismiss on the basis of the "tender rule"; (2) disregarding the facts alleged in the complaint and considering documents outside of the complaint on a Civ.R. 12(B)(6) motion; (3) granting U.S. Bank's motion to dismiss on statute-of-limitations grounds; (4) dismissing the claims against Bud's estate; (5) denying Michael's motion to file a second amended complaint; (6) granting the out-of-state defendants' motions to dismiss for lack of personal jurisdiction; and (7) denying Michael's request for an accounting.

{¶18} The Cundall children also assert assignments of error that overlap Michael's first, fourth, and sixth assignments of error, so we consider these together.

V. Tender not Necessary

{¶19} In 1984, CIC bought back all of its shares in both the Cundall Fund of the Grandparents Trust and the Betty Lou Trust. The Cundalls signed releases

purporting to discharge Bud—the trustee of the Grandparents Trust—and U.S. Bank—the trustee of the Betty Lou Trust—from all liability stemming from the transaction.

{¶20} The trial court, relying on *Haller v. Borrer Corporation*,¹ dismissed the Cundalls' case primarily because the Cundalls had not tendered back the money that they had received from the stock transaction. But *Haller* is not controlling here.

{¶21} *Haller* was a personal-injury tort case. The Ohio Supreme Court laid out the rules for tender in tort cases. If a release is procured by fraud in the factum—when a misrepresentation prevents a meeting of the minds about the nature of the document—the release is void, and thus a tender is not required. But if a release is procured by fraud in the inducement—when the party understands the document, but is induced to sign by a fraudulent misrepresentation within the document—the release is voidable, and the party is required to tender any consideration given in return for the release before filing suit. The goal in the latter situation is to restore the parties to the status quo ante; that is, where they were before they settled the case. In an arm's-length transaction, it would be manifestly unfair to have a party keep the money in the meantime and argue that they should get more.

{¶22} The differentiation of types of fraud in *Haller* does not apply to this case. *Haller* was a personal-injury case involving an arm's-length transaction, and there was no fiduciary relationship between the parties.

¹ (1990), 50 Ohio St.3d 10, 552 N.E.2d 207.

{¶23} But “ordinary rules of fraud or undue influence do not apply where there is a fiduciary relationship.”²

{¶24} We have found no Ohio cases—or any cases from *anywhere*—directly on point on the tender issue, probably because no one has been clever or audacious enough to propose such a theory.

{¶25} None of the cases cited in support of the tender theory involve a fiduciary relationship in which the fiduciary benefited from a transaction with the party who was owed a fiduciary duty. In *Lewis v. Mathes*,³ for example, the plaintiff claimed that the defendants had breached a fiduciary duty. But nothing in the case suggested that a fiduciary relationship existed, because the plaintiffs and the defendants were equal shareholders in a corporation. We have found no case in any jurisdiction that requires a tender when a fiduciary has allegedly breached its duty by self-dealing. And we will surely not create such a requirement here.

{¶26} In this case, both U.S. Bank and Bud were trustees, and thus they were in fiduciary relationships with the Cundalls.⁴ Therefore, both U.S. Bank and Bud undertook a duty of loyalty. The duty of loyalty arises not from a provision in the trust, but on account of the trustee-beneficiary relationship.⁵ The duty of loyalty requires a trustee who has a personal stake in a transaction to adhere to a particularly high standard of behavior.⁶ The duty of loyalty is “the essence of the

² *Muth v. Maxton* (1954), 53 O.O. 263, 119 N.E.2d 162.

³ 161 Ohio App.3d 1, 2005-Ohio-1975, 829 N.E.2d 318.

⁴ *O'Neill v. O'Neill*, 169 Ohio App.3d 852, 2006-Ohio-6426, 865 N.E.2d 917, at ¶8.

⁵ 3 Scott, Trusts (5 Ed.2007) 1077, Section 17.2.

⁶ *Id.*

fiduciary relationship.”⁷ Fiduciaries have the burden of proving the “perfect fairness and honesty” of a transaction that was entered into during the fiduciary relationship.⁸ Whether the fiduciary has demonstrated the fairness of a transaction is a question of fact for a jury.⁹

{¶27} Fiduciaries have a duty to “administer the trust solely in the interests of the beneficiaries.”¹⁰ Perhaps Justice Cardozo stated it best: “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”¹¹

{¶28} This “punctilio of an honor” will be enforced by this court.

{¶29} Some defendants contend that because the Grandparents Trust instrument gave Bud unfettered discretion to sell assets for cash without “being subject to the laws of Ohio,” the transaction could not have been fraudulent. Nonsense. What law was the trustee under—none? Bud clearly was under the jurisdiction of Ohio and was therefore subject to Ohio’s laws; and a trustee may not “take advantage of liberal provisions of a trust instrument to relieve himself from the legal responsibility of a fiduciary under the law.”¹² Statutory and

⁷ *Boxx, Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code (2002)*, 67 *Mo.L.Rev.* 297, 280, quoting *Shepherd, The Law of Fiduciaries (1981)*, 48.

⁸ *Atwater v. Jones (1902)*, 24 *Ohio C.C. (N.S.)* 328, 34 *Ohio C.D.* 605; *Kime v. Addlesperger (1903)*, 2 *Ohio C.C. (N.S.)* 270, 277, 14 *Ohio C. D.* 397; *Peterson v. Mitchener (1947)*, 79 *Ohio App.* 125, 133, 71 *N.E.2d* 510.

⁹ *Monaghan v. Rietzke (1949)*, 85 *Ohio App.* 497, 501, 89 *N.E.2d* 159.

¹⁰ *R.C. 5808.02*. See, also, *Restatement of the Law 2d, Trusts (1992)*, Section 170; 853 *Rounds, Tax Management: Estates, Gifts, and Trusts: Fiduciary Liability of Trustees and Personal Representatives (2003)*, A-25.

¹¹ *Meinhard v. Salmon (1928)*, 249 *N.Y.* 458, 464, 164 *N.E.* 545.

¹² *In re Estate of Binder (1940)*, 137 *Ohio St.* 26, 43-44, 27 *N.E.2d* 939.

common law govern the rights and responsibilities of fiduciaries.¹³ And even though the new Ohio Trust Code mandates that a trustee is not liable for breach of trust if the beneficiary has consented to the conduct,¹⁴ that provision does not apply if the consent is procured by improper conduct of the trustee, a fact that Michael alleged. Furthermore, the transaction in question took place in 1984, long before the 2007 Ohio Trust Code was enacted.

{¶30} Even if we were to disregard the statutory laws of Ohio, the common law would still apply, and a fiduciary duty still would exist. Thus Bud and U.S. Bank had the highest duty to act solely in the Cundalls' best interests concerning both the signing of the releases and the sales of CIC stock.¹⁵ Perhaps they did. But it is their burden to so prove.

{¶31} When a fiduciary—or an entity connected with the fiduciary—ends up with property originally in the trust, bells ring and sirens wail.

{¶32} Self-dealing—when trustees use the trust property for their own personal benefit—is considered “particularly egregious behavior.”¹⁶ And any direct dealings between a trustee and a beneficiary are “viewed with suspicion.”¹⁷

{¶33} Many jurisdictions have held that transactions between a fiduciary and a beneficiary entered into during the fiduciary relationship are presumptively fraudulent.¹⁸ Other jurisdictions have held that releases will not be upheld if one

¹³ *Biddulph v. Delorenzo*, 8th Dist. No. 83808, 2004-Ohio-4502, at ¶27.

¹⁴ R.C. 5810.09.

¹⁵ See, also, Restatement of the Law 2d, Trusts (1992), Sections 170 and 206.

¹⁶ 857 Horwood and Wolven, Tax Management: Estates, Gifts and Trusts: Managing Litigation Risks of Fiduciaries (2007), A-18.

¹⁷ Bogert, Trusts & Trustees, (2 Ed.1995) 542, Section 943.

¹⁸ See, e.g., *Grubb v. Estate of Wade* (Ind.App.2002), 768 N.E.2d 957, 962; *Brown v. Commercial Natl. Bank* (1968), 94 Ill.App.2d 273, 279, 237 N.E.2d 567; *Birnbaum v. Birnbaum* (N.Y.App.1986), 117 A.D.2d 409, 416-417, quoting *In re Rees' Estate* (1947), 72 N.Y.S.2d 598, 599.

party is at a disadvantage because it has depended on the fiduciary to protect its interests,¹⁹ or if the release protects the fiduciary against fraud, violates public policy, or relieves the fiduciary of a duty imposed by law.²⁰

VI. Releases Are Highly Suspect

{¶34} After examining Ohio statutes, Ohio case law, and other jurisdictions' case law, we believe that documents that purport to release a fiduciary from liability concerning a transaction that occurred during the fiduciary relationship, where the fiduciary has gained some benefit, are highly suspect. And a beneficiary may challenge this type of transaction without tendering back the consideration given for the release—the so-called “tender rule” has absolutely no application in the fiduciary setting.

{¶35} Bud and U.S. Bank gained from the releases because they purported to absolve them from any potential liability, even if the stock sale itself was a breach of their fiduciary duties.

{¶36} Bud, and perhaps U.S. Bank, also gained from the stock sale. Bud was CEO of the corporation that bought the shares. Bud's side of the family benefited from the unequal division of the trust. U.S. Bank was the commercial banker for the corporation.

¹⁹ *Gugel v. Hiscox* (1910), 122 N.Y.S. 557, 138 A.D. 61.

²⁰ *United States v. United States Cartridge Co.* (C.A.8, 1952), 198 F.2d 456, 464. See, also, *Arst v. Stifel, Nicolaus & Co.* (D.Kan.1997), 954 F.Supp. 1483, 1493, quoting *Belger Cartage Serv. v. Holland Construction* (1978), 224 Kan. 320, 330, 582 P.2d 1111; *Mid-America Sprayers, Inc. v. United States Fire Ins. Co.* (1983), 8 Kan.App.2d 451, 455, 660 P.2d 1380; *Ganley Bros. v. Butler Bros. Bldg. Co.* (Minn.1927), 212 N.W. 602, 603.

{¶37} In a slightly different context, a New York court put it thus: “[Any] acquisition of the shares of the beneficiaries by one of the fiduciaries must be dealt with as presumptively void unless affirmative proof is made by the fiduciaries that their dealings with each beneficiary was in every instance aboveboard and fully informative. The fiduciaries in such circumstances have the obligation to show affirmatively not only that they acted in good faith but that they volunteered to the beneficiaries every bit of information which personal inquiry by the beneficiaries would have disclosed.”²¹

{¶38} If the releases and stock sales are to be proved valid in this case, the burden is on the fiduciaries to show that they acted with the utmost good faith and exercised the most scrupulous honesty toward the beneficiaries, placed the beneficiaries’ interests before their own, did not use the advantage of their trustee positions to gain any benefit at the beneficiaries’ expense, and did not place themselves in a position in which their interests might have conflicted with their fiduciary obligations.²²

{¶39} We are aware of the argument that since Bud did not himself purchase the shares—they were purchased by the corporation he was CEO and majority shareholder of—it was not technically self-dealing. This court has previously, and correctly, rejected that argument.²³

²¹ *Birnbaum v. Birnbaum* (1986), 503 N.Y.S.2d 451, 117 A.D.2d 409, quoting *In re Rees' Estate* (1947), 72 N.Y.S. 2d 598, 599.

²² See, e.g., *Atwater v. Jones*, supra; *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, at ¶¶ 29-30; *Schoch v. Bloom* (1965) 5 Ohio Misc. 155, 158; *In re Guardianship of Marshall* (May 26, 1998), 12th Dist. Nos. CA96-11-239 and CA96-11-244; 3 Scott, Trusts (5 Ed.2007) 1078, Section 17.2.

²³ *In re Trust U/W of Woltering* (1999), 1st Dist. No. C-970913.

{¶40} Therefore, the Cundalls were not required to tender back the consideration. The trial court erred by dismissing Michael and his children's claims on this ground. The Cundalls' first assignment of error is sustained.

VII. Civ.R. 12(B): Evidentiary Materials

{¶41} An appeals court reviews a trial court's entry of a Civ.R. 12(B) dismissal de novo.²⁴ When determining the validity of a dismissal under the rule, we accept as true all factual allegations in the complaint.²⁵

{¶42} Civ.R. 12 states, "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56." Michael argues that the trial court erred by considering documents outside the pleadings and by not considering the entire trust document. Michael had filed a Civ.R. 12(F) motion to strike the documents attached to the defendants' motions to dismiss.

{¶43} There is no evidence that the trial court failed to consider the entire trust document. But the trial court might have improperly considered evidence outside the pleadings.

{¶44} The trial court considered the documents that released U.S. Bank and Bud from liability and the letters concerning the stock transaction. Both were attached to Bud's personal representatives' motion to dismiss.

²⁴ *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶5.

²⁵ *Id.*

{¶45} The Ohio Supreme Court has determined that a court may consider documents outside the complaint to ascertain whether it has subject-matter jurisdiction under Civ.R. 12(B)(1).²⁶ This court has held that a trial court may consider documents that are referred to or incorporated in the complaint.²⁷ In this case, the complaint specifically referred to the releases. Therefore, the releases were properly considered by the trial court.

{¶46} The complaint did not refer to the letters that detailed the sale terms. The trial court did not state for what purpose it had considered the letters. If the court considered the letters for the purpose of determining if it had jurisdiction over the case, it did so properly. The court could only consider materials that established the relevant dates for statute-of-limitations purposes.

{¶47} But the court was not permitted to consider the letters for Civ.R. 12(B)(6) purposes. The complaint discussed the stock sale, but did not incorporate or specifically refer to the letters.

{¶48} We do not know for what purpose the trial court considered these letters because the trial court's entry focused predominantly on the tender issue as its reason for granting the Civ.R. 12(B) motions. But our decision makes the issue moot.

VIII. U.S. Bank—Motion to Dismiss

{¶49} This court reviews the trial court's Civ.R. 12 decisions de novo, so we consider whether each set of defendants should have been dismissed from the

²⁶ *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526, paragraph one of the syllabus.

²⁷ *Coors v. Fifth Third Bank*, 1st Dist. No. C-050927, 2006-Ohio-4505, at ¶11.

case. The trial court dismissed U.S. Bank from the case because the statute of limitations had run. We agree with the trial court's determination. U.S. Bank was out of the picture in 1996 when it ceased to be the trustee for the Betty Lou Trust, and the statute of limitations began to run at that time.

{¶50} In the amended complaint, Michael alleged that U.S. Bank had served as the trustee of the Betty Lou Trust and that it had breached its fiduciary duty. In 1984, when CIC bought back its stock from the Betty Lou Trust, U.S. Bank was both the trustee of the Betty Lou Trust and the commercial banker for CIC. Michael alleged that U.S. Bank had breached its fiduciary duties to the Cundalls by participating in and enabling the stock sale, which was not in the best interests of the beneficiaries. He alleged that U.S. Bank had engaged in self-dealing by approving a stock sale that would have benefited one of its powerful customers. Further, Michael alleged that U.S. Bank knew and misrepresented the true value of the stock, and that Michael had not discovered the fraud until after Bud's death in 2005.

{¶51} U.S. Bank argues that the statute of limitations began to run in 1984, when the transaction had occurred. Alternatively, it argues that its last involvement in the trust was in 1996, well outside the four-year limitations period. Finally, it argues that the Cundalls could not have recently discovered fraud, because they claimed that they had been bullied by Bud in 1984 to sell the stock, and because CIC had purchased back its stock back from another person for a higher price several months before the Cundalls sold their stock.

{¶52} The statute of limitations for breach of a fiduciary duty and fraud is four years.²⁸ For a trustee, the statute of limitations will not begin running until the fiduciary relationship has ended.²⁹ The statute of limitations does not begin to run in actions for fraud until the fraud is discovered or, through reasonable diligence, ought to have been discovered.³⁰

{¶53} The “discovery rule”—the tolling of the statute of limitations until fraud is discovered—is not available to those who should have discovered fraud, but failed to discover it due to neglect or willful ignorance.³¹

{¶54} We believe that if the Cundalls had exercised reasonable diligence, they would have discovered any alleged fraud the U.S. Bank had perpetrated on them. In 1984, they knew that CIC had purchased Miller’s shares at a much higher price. They also knew that U.S. Bank was CIC’s commercial banker.

{¶55} We do not know why the Cundalls removed U.S. Bank as trustee from the Betty Lou Trust in 1996. But once that relationship ended, it was the Cundalls’ responsibility to investigate whether any fraud had taken place during the trusteeship. Therefore, the statute of limitation began to run in 1996, when U.S. Bank ceased to serve as trustee of the Betty Lou Trust, and the limitations period ended in 2000.

²⁸ R.C. 2305.09.

²⁹ *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675.

³⁰ *Id.*; *Wooten v. Republic Savings Bank*, 2nd Dist. No. 06-CA-24, 2007-Ohio-3804, at ¶43; *Harris v. Liston* (1999), 86 Ohio St.3d 203, 207, 714 N.E.3d 377.

³¹ *Cline v. Cline*, 7th Dist. No. 05 CA 822, 2007-Ohio-1391, at ¶23.

IX. Limitations and Presentment: Bud Koons

{¶56} The trial court dismissed Michael's claims and the Cundall defendants' cross-claims against the trustees for several of Bud's trusts and the personal representatives of Bud's estate because Michael had brought the suit outside the limitations period. Bud's representatives and the successor trustees argue that R.C. 2117.06 barred Michael and the Cundall defendants from bringing claims against Bud's estate.

{¶57} R.C. 2117.06 requires all claims against an estate to be presented within six months of the decedent's death.³² But the statute only applies to claims that pursue recovery against the estate. R.C. 2117.06(G) states that the six-month statute of limitations does not apply unless "any recovery on a claim * * * [comes] from the assets of an estate."

{¶58} If Michael and the Cundall cross-claimants plan to pursue recovery strictly against Bud's trusts, life insurance policies, pension plans, or other monies that have passed or will pass outside Bud's estate, the time limits in R.C. 2117.06 do not apply. As noted above, R.C. 2117.06(G) makes exceptions for plaintiffs who wish to recover from sources other than the estate. And Michael was not required to allege in his complaint that he was relying solely on the trusts for recovery rather than on the assets of Bud's estate.³³

{¶59} Many estate-planning devices ensure that property is passed outside of probate. Some of these are trusts, life insurance, pension plans, payable-on-death accounts, and advances made prior to death. Any property that

³² R.C. 2117.06(B).

³³ *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871, at ¶22.

passes outside of probate is not part of the estate.³⁴ If Michael and the Cundall cross-claimants prove their allegations against Bud, they may pursue recovery against any property that has passed or will pass outside of the estate.

{¶60} The personal representatives and successor trustees also argue that the Cundalls' claims were barred by the four-year statute of limitations. Not so. Michael filed well within the limitations period. He alleged that Bud, as the trustee of the Cundall Fund, had fallen below the standard of care and had breached his fiduciary duty. The statute of limitations for tortious breach of trust begins to run when the trustee ceases to serve as trustee.³⁵ Here, Bud served as the trustee of the Cundall Fund of the Grandparents Trust (and later the Cundall Trust) until he died in 2005, so the statute of limitations will expire in 2009.

{¶61} Thus R.C. 2117.06 did not prevent Michael and the Cundall cross-claimants from making a claim against Bud's estate, because they are pursuing recovery against property that will pass or has passed outside Bud's estate. And the four-year statute of limitations began running when Bud ceased to be the trustee of the Cundall Trust at his death in 2005.

X. Second Amended Complaint

{¶62} Michael filed the original complaint on March 3. He amended his complaint on March 24. On June 1, all the nonCundall defendants filed motions to dismiss. Michael sought to file a second amended complaint on July 18.

³⁴ Id.

³⁵ *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675. See, also, *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. 03AP-1114, 2004-Ohio-3484, at ¶29; *Hosterman v. First Natl. Bank & Trust Co.* (1946), 79 Ohio App. 37, 38, 68 N.E.2d 325.

{¶63} Civ.R. 15 provides that a party may amend its pleading once before a responsive pleading is filed. Otherwise, a party must obtain leave of the court to amend its complaint. The rule states that “[l]eave of court shall be freely given when justice so requires.” The rule encourages liberal amendment. “Where it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered timely and in good faith and no reason is apparent or disclosed for denying leave, the denial of leave to file such amended complaint is an abuse of discretion.”³⁶

{¶64} The trial court erroneously dismissed the case due to lack of a tender and determined that Michael’s motion to file a second amended complaint was futile. As discussed earlier, Michael was not required to tender back the consideration. We hold that the denial of leave for a second amendment was erroneous, and upon remand, the trial court should allow the amended complaint.

XI. Jurisdiction

{¶65} Michael and the Cundall cross-claimants contend that the trial court erred by dismissing the claims against out-of-state trust beneficiaries for lack of personal jurisdiction. The out-of-state Koons defendants argue that they had no minimum contacts with Ohio, that the Ohio long-arm statute did not reach them, that R.C. 5802.02 could not apply to them retroactively, and that Michael was attempting to use in rem jurisdiction as a “wormhole” to in personam

³⁶ *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113.

jurisdiction. Because we are convinced that Ohio has personal jurisdiction over all defendants, it is not necessary to discuss in rem jurisdiction—or wormholes.

{¶66} The Cundalls had the burden of establishing the trial court's jurisdiction.³⁷ In response to a motion to dismiss, the Cundalls were required only to make a prima facie case of jurisdiction.³⁸ We review the trial court's grant of the jurisdictional motion de novo.³⁹

{¶67} R.C. 5802.02 became effective January 1, 2007, four days before the trial court's entry of dismissal and ten months after the original complaint. The statute gives Ohio jurisdiction over both trustees and beneficiaries of a trust located in Ohio for any dispute involving the trust.⁴⁰ According to R.C. 5811.03,⁴¹ which describes the retroactive applicability of the newly enacted Ohio Trust Code, R.C. 5802.02 governs all judicial proceedings commenced prior to January 1, 2007 unless it would "substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties." (The statute also says that the new code "do[es] not affect an act done before the effective date of those chapters." The Koons defendants make much of this provision, but it is not applicable to the issue of jurisdiction in this case.)

{¶68} Retroactive application of R.C. 5802.02 would not substantially interfere with the judicial proceedings. This case is in its infancy. The record reflects that little, if any, discovery has been conducted related to the issues on appeal.

³⁷ *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165.

³⁸ *Id.* at 307.

³⁹ *Information Leasing Corp. v. Baxter*, 1st Dist. No. C-020029, 2002-Ohio-3930, ¶4.

⁴⁰ R.C. 5802.02(B).

⁴¹ R.C. 5811.03(A)(3).

{¶69} Nor would the retroactive application of R.C. 5802.02 prejudice the rights of the parties, because Ohio courts could have taken jurisdiction over the out-of-state Koons defendants even without the statute. They took the money, and with that came jurisdiction.

XII. Even Without the Statute, Jurisdiction is Proper

{¶70} The Cundalls had to demonstrate (1) that jurisdiction over the out-of-state trust beneficiaries was proper under Ohio's long-arm statute and applicable civil rule,⁴² and (2) that the exercise of personal jurisdiction over the out-of-state trust beneficiaries would comport with federal due-process requirements.⁴³

{¶71} Ohio's long-arm statute delineates those instances that render defendants amenable to the jurisdiction of Ohio.⁴⁴ Included among these provisions is a grant of jurisdiction when a person "[transacts] any business in this state."⁴⁵ Courts construe "transacting any business" broadly, and the phrase includes "having dealings with."⁴⁶ Courts resolve questions about the applicability of R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) on "highly particularized fact situations, thus rendering any generalization unwarranted."⁴⁷

{¶72} The Koons defendants are beneficiaries of trusts established and administered in Ohio. Clearly, the Koons defendants have dealings with Ohio—

⁴² R.C. 2307.382 and Civ.R. 4.3.

⁴³ *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 235, 1994-Ohio-229, 638 N.E.2d 541.

⁴⁴ R.C. 2307.382(A).

⁴⁵ R.C. 2307.382(A)(1).

⁴⁶ *Goldstein*, supra, at 236; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477.

⁴⁷ *United States Sprint Communications Co. Partnership v. K's Foods* (1994), 68 Ohio St.3d 181, 185, 1994-Ohio-504, 624 N.E.2d 1048.

they have accepted money from the trusts. Accepting funds from a trust with its situs in Ohio firmly establishes jurisdiction under Ohio's long-arm statute.

{¶73} Jurisdiction over the Koons defendants also comports with federal due-process requirements. In *Mullane v. Central Hanover Bank & Trust Co.*, the United States Supreme Court addressed a state's right to preside over issues concerning trusts: "[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."⁴⁸ Although this case only addressed closing a trust, it clearly should apply to the administration of trusts in general.

{¶74} The trial court also had jurisdiction over the Koons defendants under *International Shoe Co. v. Washington*⁴⁹ and its progeny. Due process requires that a nonresident defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."⁵⁰ The Supreme Court emphasized that the minimum-contacts analysis "cannot simply be mechanical or quantitative," and that whether due process is satisfied depends "upon the quality and nature of the activity."⁵¹

⁴⁸ (1950), 339 U.S. 306; 70 S. Ct. 652.

⁴⁹ (1945), 326 U.S. 310, 66 S.Ct. 154.

⁵⁰ *Id.* at 316.

⁵¹ *Id.* at 319.

{¶75} *International Shoe* provided some general guideposts for jurisdictional questions. Jurisdiction is firmly established when the defendant's activities are "[not only] continuous and systematic, but also give rise to the liabilities sued on."⁵² Continuous and systematic activities can also be "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."⁵³ Finally, even single acts committed within the forum can confer jurisdiction over a nonresident defendant "because of their nature and quality and the circumstances of their commission."⁵⁴

{¶76} We hold that a regular beneficiary of an Ohio-administered trust meets the requisite minimum contacts in Ohio to support personal jurisdiction under federal constitutional standards. By accepting distributions from an Ohio trust, the Koons defendants carried on activities in Ohio and benefited from its laws. These activities were of a continuous and systematic nature such that maintenance of this suit in Ohio does not offend traditional notions of fair play and substantial justice.

{¶77} The Supreme Court added another layer to the due-process analysis in *Asahi Metals Indus. Co. v. Superior Court*.⁵⁵ Through a "reasonableness" inquiry, a court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief.⁵⁶ It must also weigh the "interstate judicial system's interest in obtaining the most

⁵² Id. at 317.

⁵³ Id. at 318.

⁵⁴ Id.

⁵⁵ (1987), 480 U.S. 102, 108-109, 107 S.Ct. 1026.

⁵⁶ Id. at 113.

efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.”⁵⁷ In *Asahi*, these factors divested that court of jurisdiction, but in *Burger King v. Rudzewicz*, the Supreme Court explained that these factors may “serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”⁵⁸

{¶78} Here, the *Asahi* factors strengthen the reasonableness of Ohio’s jurisdiction over the Koons defendants. The interstate judicial system’s interest in obtaining the most efficient resolution of the controversy weighs heavily against the Koonses’ position. It is unclear whether Michael would be able to bring suit in any other forum. But even if that is possible, Ohio as the situs of the trust is the best-positioned state to fashion a potential remedy. The nonresident defendants are scattered throughout the country. The only reasonable site for this litigation is Ohio. We are aware of the burden that the nonresident defendants face by litigating in Ohio, but conclude that the *Asahi* factors operate against them in this case.

{¶79} Finally, it cannot be said that being an ongoing beneficiary of an Ohio-established-and-administered trust is a “random,” “fortuitous,” or “attenuated” contact, or the “unilateral activity of another party.”⁵⁹ As fittingly articulated in the official comment to Section 202 of the Uniform Trust Code, “[it seems] reasonable to require beneficiaries to go to the seat of the trust when

⁵⁷ *Id.*, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 100 S.Ct. 559.

⁵⁸ *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 477, 105 S.Ct. 2174.

⁵⁹ *Id.* at 474.

litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.”

{¶80} This is in keeping with the Supreme Court’s explanation of the role of foreseeability in the personal-jurisdiction analysis. “[The] foreseeability that is critical to due process analysis * * * is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”⁶⁰

XIII. But the Statute Applies

{¶81} Effective only days before the trial court rendered its opinion, R.C. 5802.02 codified what was already the law of personal jurisdiction as it related to trustees and beneficiaries of an Ohio trust. We agree with the Ohio legislature, as well as the other 19 other jurisdictions that have adopted the Uniform Trust Code,⁶¹ that the provision for personal jurisdiction over those persons who accept a distribution from a state-administered trust is constitutional.⁶² And we note

⁶⁰ *Burger King Corp.*, supra, at 475, quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

⁶¹ Kansas, Nebraska, Wyoming, New Mexico, District of Columbia, Utah, Maine, Tennessee, New Hampshire, Missouri, Arkansas, Virginia, South Carolina, Oregon, North Carolina, Alabama, Florida, Pennsylvania, and North Dakota.

⁶² Uniform Trust Code 202; R.C. 5802.02.

that we have found no court that has held this or any other provision of the UTC unconstitutional.⁶³

{¶82} Because Ohio's exercise of jurisdiction over the out-of-state defendants comports with the state's long-arm statute as well as due-process requirements, the retroactive application of R.C. 5802.02 does not prejudice the parties. Even without the statute, jurisdiction is proper in Ohio. Furthermore, the retroactive application of R.C. 5802.02 would not substantially interfere with the judicial proceedings. Thus, R.C. 5802.02 applies, and Ohio jurisdiction over the out-of-state Koons defendants in this case is proper.

XIV. Constructive Trust

{¶83} If the Cundalls are able to prove their allegations, they will be entitled to compensatory and perhaps punitive damages.

{¶84} The Koons defendants argue that the statute of limitations bars any claim for a constructive trust because the statute of limitations for a constructive trust begins to run on the date of the initial transfer. Not so. Statutes of limitation attach to causes of action.⁶⁴ That the remedy is a constructive trust is irrelevant because, as we have already stated, the Cundalls' cause of action arose when Bud ceased to be the trustee.

{¶85} A constructive trust is an equitable remedy that corrects unjust enrichment.⁶⁵ When a person owns legal title to property, but equity recognizes

⁶³ See, e.g., *In re Trust Created by Inman* (2005), 269 Neb. 376, 693 N.W.2d 514; *In re Harris Testamentary Trust* (2003), 275 Kan. 946, 69 P.3d 1109.

⁶⁴ *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113.

⁶⁵ *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, at ¶19.

that the person should not retain all or some of the benefit of that property, a court may impose a constructive trust, which converts the owner into a trustee.⁶⁶ A constructive trust is usually imposed when property has been obtained wrongfully.

{¶86} If the Cundalls are able to prove that Bud wrongfully acquired the CIC stock, and that his descendants and trusts are legal owners of property that rightfully belongs to the Cundalls, a constructive trust would be appropriate. When property is wrongfully obtained by the wrongdoer, and the wrongdoer subsequently transfers the property to third parties, a court will impose a constructive trust on that property.⁶⁷ Upon remand, the Cundalls will bear the burden of proving that the court should impose a constructive trust.⁶⁸

XV. Accounting

{¶87} Michael argues that the trial court erred by denying his request for an accounting of the trusts.

{¶88} By statute,⁶⁹ a trustee must provide reports to current beneficiaries. Since Michael is not a current beneficiary of any of the trusts administered by any of the defendants, the statute does not apply.

{¶89} But once the parties continue with discovery, Michael will have a right to any nonprivileged documents the parties have concerning the trusts.

⁶⁶ Id.

⁶⁷ Id. at ¶26.

⁶⁸ Id. at ¶20.

⁶⁹ R.C. 5808.13.

Civ.R. 26 allows parties to obtain discovery on any matter relevant to the action, as long as the material is not privileged.

XVI. Reversed, Except as to U.S. Bank

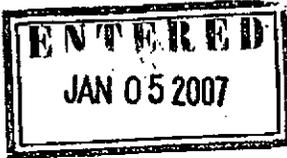
{¶90} For the foregoing reasons, we affirm the trial court's dismissal of U.S. Bank because the limitations period had run. We reverse all other aspects of the trial court's judgment and remand this case for further proceedings.

Judgment affirmed in part, and
reversed in part, and cause remanded.

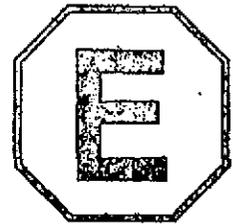
HENDON and DINKELACKER, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.



THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



MICHAEL K. CUNDALL, et al.,	:	Case No. A0602080
	:	
Plaintiffs,	:	Judge Ethna M. Cooper
	:	
v.	:	
	:	ENTRY GRANTING
U.S. BANK, N.A., TRUSTEE, et	:	DEFENDANTS' MOTIONS TO
al.,	:	DISMISS
	:	
Defendants.	:	

This matter is before the Court on Defendants' Motions to Dismiss. Having reviewed the Motions to Dismiss, Plaintiffs' Memorandum in Opposition, the Supplemental Memoranda, all pertinent pleadings, and having considered the oral argument of counsel presented to the Court on October 16, 2006, the Court finds the Motions to Dismiss well-taken for the reasons that follow.

I. BACKGROUND

This action arises from a 1984 sale of stock in a closely-held family corporation. In 1984, Plaintiff and his family sold all of their shares in the Koon-Cundall-Mitchell Corporation ("KCM") to Central Investment Company ("CIC").¹ In his First Amended Complaint, Plaintiff Michael Cundall alleges that his Uncle, John F. Koons, III ("Bud Koons"), used his power and influence in CIC and as the trustee appointed to various family trusts to "threaten and cajole" his sister's family, (the Cundall family), into providing "releases and/or consents" in connection with the sale of stock owned by the Cundall family and stock held in trust for their benefit.²

¹ KMC was a holding company whose sole asset was shares of CIC.

² A more detailed history of the Koons/Cundall families, the family corporation and the trusts at issue is provided in the First Amended Complaint, the parties' briefs, and oral argument on the Motion to Dismiss.

EXHIBIT B



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In addition, Plaintiffs allege that U.S. Bank, also a former trustee, breached its fiduciary duty by, among other things, knowingly concealing the true value of the stock in an attempt to mislead the Plaintiffs and failing to seek court approval for the transaction.

Plaintiffs further allege that through the alleged breach of their respective fiduciary duties, Defendant U.S. Bank and the deceased Bud Koons, engaged in conduct that unfairly benefited Koons beneficiaries to the detriment of Cundall beneficiaries. Consequently, in bringing this action for tortious breach of fiduciary duty, constructive trust, declaratory judgment, accounting and related relief, Plaintiffs have sued the personal representatives of the estate of Bud Koons, successor trustees of various Koons trusts and the beneficiaries of various trusts in addition to U.S. Bank.

* * *

At the heart of Plaintiffs' complaint are the stock sale and the accompanying releases allegedly obtained and "achieved through duress, coercion, overreaching and undue influence" by an uncle who used "various threats and cajoling"³ and a bank who allegedly concealed the true value of the stock in an effort to please its other clients, Bud Koons and CIC. Although Plaintiffs refer to a specific transaction and release in their First Amended Complaint, Plaintiffs fail to mention any operative dates or attach a stock purchase agreement or release to their complaint. Also significantly missing from the First Amended Complaint is an allegation that the Plaintiffs (or any Cundall) returned the consideration they were given in exchange for the release. As discussed below, because a releasor may not attack the validity of a release for fraud in the inducement unless he first

³ The Plaintiffs further claim that because of the discretionary powers of their uncle trustee, they were afraid to challenge him. (First Amend. Compl. at ¶ E.)

tenders back the consideration he received for making the release, all claims related to the 1984 stock sale and release are barred as a matter of law. *Haller v. Borrer Corp.* (Ohio 1990), 50 Ohio St.3d 10, 552 N.E.2d 207, (paragraph two of the Syllabus).

II. LAW

A. Ohio Civil Rule 12(B)(6) Standard

Civ. R. 12(B)(6) dismissal “motions are procedural in nature and test the sufficiency of the complaint. When ruling on a Civ.R. 12(B)(6) motion, courts consider all factual allegations in the complaint to be true and make all reasonable inferences in favor of the nonmoving party.” *Coors v. Fifth Third Bank*, 1 Dist. No. C-050927, 2006-Ohio-4505, ¶ 12, 2006 WL 2520322 (slip op.). Before this Court can grant a dismissal of a complaint, it must appear beyond doubt that the plaintiff can prove no set of facts warranting a recovery. *Id.* However, a plaintiff’s “factual allegations must be distinguished from unsupported conclusions. Unsupported conclusions are not deemed true, nor are they sufficient to withstand a dismissal motion.” *Id.*

Moreover, in considering a motion to dismiss for failure to state a claim, the mere submission of evidentiary material in support of a dismissal “does not require a court to convert the motion into one for summary judgment. A trial court has the power to exclude the extraneous evidence[.]” *Id.* at ¶ 10. While a court should not rely on evidence outside the complaint when resolving a Civ. R. 12(B)(6) motion, the court may consider materials that are referred to or incorporated in the complaint. *Id.* at ¶ 11, 13.

When ruling upon the dismissal motions in this case, the Court relies solely upon the First Amended Complaint, excluding from its review all extraneous evidence not referred to or incorporated in the complaint. Thus, the Court may consider the letters

from the Cundalls embodying the terms of the stock purchase agreement and releases attached to the Personal Representative's Motion to Dismiss as the stock purchase agreement and the release were referred to in the First Amended Complaint.

B. Release/Tender Rule

A release of a cause of action for damages is generally an "absolute bar to a later action on any claim encompassed within the release. To avoid that bar, the releasor must *allege* that the release was obtained by fraud and that he has tendered back the consideration received for his release." *Haller*, 50 Ohio St.3d 10, at 13 (emphasis added, internal citations omitted). Tender is required where the fraud alleged would render the release voidable. If, on the other hand, the fraud alleged would render the release void, no tender of consideration is required and none need be alleged. *Id.* citing *Picklesimer v. Baltimore & Ohio RR. Co.* (1949), 151 Ohio St. 1, 84 N.E.2d 214.

Whether a release of liability is void or voidable upon an allegation of fraud will hinge on the nature of the fraud alleged. "A release obtained by fraud in the factum is void *ab initio*, while a release obtained by fraud in the inducement is merely voidable." *Id.*

A release is obtained by fraud in the factum, and is void *ab initio*, "where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement." *Id.* In such cases, the releasor fails to understand the nature or consequence of the release as a result of "device, trick or want of capacity" and the releasor has no intention to sign such a release. *Haller*, 50 Ohio St.3d at 13 citing *Picklesimer*, 151 Ohio St. at 5.

However, a “release of liability procured through fraud in the inducement is voidable only, and can be contested only after a return or tender of consideration.” *Haller*, 50 Ohio St.3d at 14. Cases of fraud in the inducement are those in which the plaintiff admits that he released his claim for damages and received consideration therefore, but asserts that he was induced to do so by the defendant's fraud or misrepresentation. “‘The fraud relates not to the nature of the release, but to the facts inducing its execution.’ ... In that event, there is no failure of understanding of the party to be bound by the release ... Rather, the releasor claims that he was induced to grant the release upon the wrongful conduct or misrepresentation of the person so benefited. The misrepresentation may concern the economic value of the claim released, and wrongful conduct may include even coercion and duress.” *Haller*, 50 Ohio St.3d at 14 citing *Picklesimer*, *supra*, and *National Bank v. Wheelock* (1895), 52 Ohio St. 534, 40 N.E. 636. “Whether the fraud as alleged is in the factum or in the inducement is an issue of law for the court.” *Id.* at 14-15.

As recognized by the Ohio Supreme Court, the foregoing distinctions between fraud in the factum and fraud in the inducement reflect two well-settled principles of law: “First, the law favors the prevention of litigation by the compromise and settlement of controversies. Second, a releasor ought not be allowed to retain the benefit of his act of compromise and at the same time attack its validity when he understood the nature and consequence of his act, *regardless* of the basic nature of the inducement employed.” *Haller*, 50 Ohio St.3d at 14 (emphasis added).

The plaintiffs in *Haller*, like Plaintiffs here, did not allege that they failed to understand the release they signed. Rather, they alleged that the value of the

consideration paid was misrepresented to them and that their release was procured through duress. As the court noted in *Haller*, “neither cause constitutes fraud in the factum. They are purely matters of fraud in the inducement. The pleadings therefore set up an allegation of a settlement agreement and release that is only voidable, and in order to attack that release for fraud, the Hallers were first required to tender back the consideration they received.” *Id.*

Likewise, in *Lewis v. Mathes* (4 Dist.), 161 Ohio App.3d 1, 8, 2005-Ohio-1975, ¶ 17, 829 N.E.2d 318, the plaintiff alleged fraud in the inducement rather than fraud in factum when he sought to avoid the release he executed on the ground that the individual defendants and the Corporation misrepresented the Corporation's earnings and, therefore, misrepresented the value of his one-third interest in the Corporation.

III. ANALYSIS

Assuming there was fraud, as the Court must on a motion to dismiss, there is no question that, as a matter of law, the fraud alleged – coercion, duress, misrepresentation of value – is fraud in the inducement. Under established Ohio case law, Plaintiffs cannot bring suit on the released claims without having tendered the consideration the Cundalls received in the transaction in which they granted the releases. Such tender had to be made prior to filing suit and Plaintiffs were required to allege the fact of tender in the First Amended Complaint. Plaintiffs have done neither.

Notwithstanding the foregoing, Plaintiffs argue that the tender rule should not apply in this case for several reasons. First and foremost, Plaintiffs argue that the tender rule does not apply in this fiduciary duty case because “self-dealing by a trustee is presumptively fraudulent.” (Plaintiffs’ Suppl. Opp. Memo., p. 1.)

However, the Court has found no recognized exception to the tender rule announced by the Ohio Supreme Court in *Haller*. Nor, has the Court found any authority to suggest that it should look outside of the fraud in the factum/fraud in the inducement framework prescribed by the Ohio Supreme Court in *Haller* for a case involving a self-dealing trustee, particularly where, as here, the fraud alleged by Plaintiffs so clearly constitutes fraud in the inducement. Regardless of the basic nature of the inducement allegedly employed here (i.e. self-dealing by a trustee),⁴ there is simply no authority that would permit the Court to disregard Ohio Supreme Court precedent and so elevate the status of these Plaintiffs that they should somehow be permitted to keep the benefit of their bargain while challenging its validity at the same time.

Plaintiffs also argue that the tender rule should not apply to them because, as the beneficial owners, the “Cundalls already owned all the stock at issue” and since all that the Cundalls received was the value of their stock, there was no separate consideration for the release.” (Plaintiffs’ Suppl. Opp. Memo., p. 3, 4.) In *Lewis*, supra, the court rejected a strikingly similar argument. In that case, the plaintiff argued that he should not be required to return the \$68,000 consideration that he received in order to maintain his causes of action because (1) the monetary consideration he received was solely for the purchase of his stock at the value determined by the corporate valuation, and (2) he received no monetary consideration in exchange for the mutual release. *Lewis*, 2005-Ohio-1975. As the court in *Lewis* noted, in the absence of the stock purchase agreement and mutual release, the defendants were not obligated to buy the plaintiff’s shares at any

⁴ Although Plaintiffs allege that U.S. Bank breached its fiduciary duty in agreeing to the stock sale and release, the Court can perceive no basis for Plaintiff’s unsupported conclusion that U.S. Bank engaged in “self-dealing” when U.S. Bank stood to gain nothing of consequence as a result of the stock sale.

price. *Id.* at ¶ 28. Thus, the Plaintiff was required to return the consideration that he received to avoid the release and pursue his causes of action against the defendants. *Id.* at ¶ 30, 32.

Plaintiffs allege nothing in the First Amended Complaint to demonstrate that CIC was required or obligated to purchase the Cundalls' stock. Indeed, the premise of Plaintiffs' complaint is that the Cundalls were coerced into selling their stock – not that others were forced to purchase their stock. Furthermore, Plaintiffs do not allege or point to anything in the trust agreements that would necessarily preclude the Cundalls from selling their stock or CIC from purchasing it. On the contrary, nothing in the trust agreement prohibits the sale of family stock. The trust expressly authorizes the sale or exchange of any asset, without limitation.⁵

Plaintiffs cannot avoid the tender requirement because there is no preexisting obligation to sell or purchase the stock nor is there any other basis to sever the stock purchase and the releases. Akin to the situation in *Lewis*, the stock purchase agreement here (embodied in the letters from the Cundalls), specifically refers to and incorporates the releases signed by the Cundalls as a condition of the sale. Accordingly, the consideration received, the agreement to sell the stock, cannot be severed from the releases.

III. CONCLUSION

For the foregoing reasons, the failure to tender and to allege tender requires dismissal of all claims of all parties related to any claim encompassed in the releases. The Court is not aware of any circumstances that would necessarily foreclose the possibility that Plaintiffs or the Cundalls might tender the consideration received. Accordingly, the

⁵ See Grandparent's Trust, Article II and IV(3).

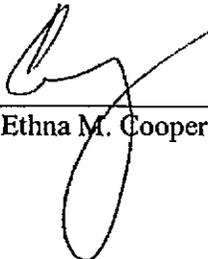
dismissal of the claims and cross-claims herein based on the failure to tender must be without prejudice.

In addition, for the reasons stated in the Defendants' respective briefs, the Court also finds merit in the Defendants' arguments to dismiss: (1) with prejudice the claims against U.S. Bank on statute of limitation grounds; (2) without prejudice the claims against out-of-state Koons beneficiaries for lack of personal jurisdiction; and, (3) with prejudice the claims against the personal representatives of the Koons Estate for failure to present the tort claims within the statutory period.

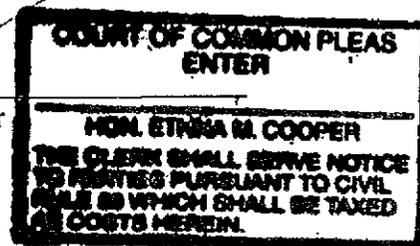
Because the proposed Second Amended Complaint does not allege tender, Plaintiffs' Motion for Leave to File a Second Amended Complaint is denied as futile. All other pending motions are denied as moot.

There is no just cause for delay.

IT IS SO ORDERED.



Judge Ethna M. Cooper



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