

IN THE SUPREME COURT OF OHIO

MICHAEL K. CUNDALL, et al., :
 :
 Plaintiffs, :
 :
 vs. :
 :
 U.S. BANK TRUSTEE, et al., :
 :
 Defendants. :

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

Court of Appeals
Case Nos. C070081
C070082

08-0314

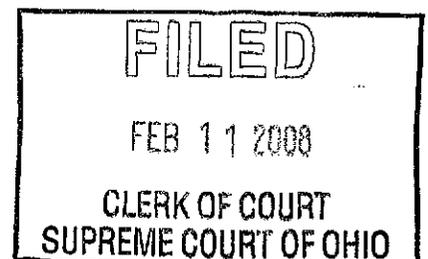
MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANTS-APPELLANTS CHRISTINA KOONS, NICHOLAS KOONS BAKER
AND CARSON NYE KOONS BAKER

Donald J. Mooney, Jr. (0014202) (COUNSEL OF RECORD)
Pamela K. Ginsburg (0071805)
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
513-698-5070
513-698-5071 (Fax)
dmooney@ulmer.com

COUNSEL FOR ATTORNEY FOR DEFENDANTS-
APPELLANTS CHRISTINA KOONS, NICHOLAS KOONS
BAKER AND CARSON NYE KOONS BAKER

Peter L. Cassady (0005562) (COUNSEL OF RECORD)
Beckman, Weil, Shepardson, LLC
The American Book Building
300 Pike Street, Suite 400
Cincinnati OH 45202

COUNSEL FOR DEFENDANTS-APPELLANTS CAROLINE
KOONS, KATHLEEN KOONS, MAURA KOONS, JEREMY
KOONS, DEBORAH KOONS GARCIA, JOHN F. KOONS, IV,
AND JAMES B. KOONS



James B. Helmer (0002878) (COUNSEL OF RECORD)
Julie W. Popham (0059371)
Robert M. Rice (0061803)
Erin M. Campbell (0079083)
Helmer, Martins, Rice & Popham
600 Vine Street, Suite 2704
Cincinnati OH 45202

OF COUNSEL:
Taft, Stettinius & Hollister, LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202

COUNSEL FOR DEFENDANT-APPELLANTS 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

Richard G. Ward (0037613) (COUNSEL OF RECORD)
Drew & Ward Co., L.P.A.
One West Fourth Street, Suite 2400
Cincinnati OH 45202
COUNSEL FOR PLAINTIFFS-APPELLEES
MICHAEL K. CUNDALL, INDIVIDUALLY
AND AS SUCCESSOR TRUSTEE

William H. Blessing (0006848) (COUNSEL OF RECORD)
Law Offices of William H. Blessing
119 E. Court Street, Suite 500
Cincinnati OH 45202

COUNSEL FOR DEFENDANT-APPELLEES MICHAEL K. CUNDALL, JR., COURTNEY FLETCHER CUNDALL AND HILLARY CUNDALL

Susan Grogan Faller, Esq. (0017777) (COUNSEL OF RECORD)
Frost Brown Todd, LLC
2200 PNC Center
201 East Fifth Street
Cincinnati OH 45202

COUNSEL FOR DEFENDANT-APPELLEE U. S. BANK,
PREDECESSOR TRUSTEE

Wijdan Jreisat, Esq. (00639550)(COUNSEL OF RECORD)
Katz, Teller, Brant & Hild
255 East Fifth Street, #2400
Cincinnati, Ohio 45202

COUNSEL DEFENDANT-APPELLEES, PETER B. CUNDALL,
SARA C. KERSTING, CAITLAN MIKULA, PETER CUNDALL, JR.,
KYLE KERSTING, ALEX KERSTING, AND JEFFREY KERSTING

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	5
<u>Proposition of Law No. 1</u> : An Ohio Common Pleas Court lacks personal jurisdiction over out-of-state defendants on claims for unjust enrichment where such defendants' only alleged contact with Ohio was the receipt of payments from Ohio.....	5
<u>Proposition of Law Number 2</u> : R.C. 5802.02(B) of the Ohio Trust Code cannot be applied retroactively to impose personal jurisdiction in a case filed before the statute's effective date to assert personal jurisdiction over out-of-state defendants in an action to recover past trust distributions	9
<u>Proposition of Law Number 3</u> : The six-year statute of limitations set by R.C. 2305.07 applies to claims for unjust enrichment, and begins to run at the time of the transaction giving rise to the alleged unjust enrichment.....	12
CONCLUSION.....	15
PROOF OF SERVICE.....	16
APPENDIX	<u>Appx. Page</u>
Opinion of the Hamilton County Court of Appeals (Dec. 28, 2007)	1
Judgment Entry of the Hamilton County Court of Appeals (Dec. 28, 2007)	30

TABLE OF AUTHORITIES

Cases

<i>Agricultural Ins. Co. v. Constantine</i> , (1944), 144 Ohio St.275, 58 N.E.2d 658	13
<i>Allen v. Deardoff</i> , (12 th Dist. 1921), 14 Ohio App. 16	14
<i>Asahi Metal Industries Co. Ltd. v. Superior Ct. of California</i> , (1987), 480 U.S. 102, 107 S.Ct. 1026, 92 L.Ed.2d 92.....	7
<i>Bielat v. Bielat</i> , 87 Ohio St.3d 350, 2000-Ohio-451, 721 N.E.2d 28	10, 11
<i>Binsack v. Hipp</i> , (6 th Dist. H-97-029, Jun. 5, 1998), 1998 Ohio App. LEXIS 2370.....	13
<i>Cundall v. U.S. Bank, N.A.</i> Ohio App. 1 Dist., 2007-Ohio-7067	2, 5, 6, 8, 12
<i>First American Bank of Virginia, N/A v. Reilly</i> , (Ind. Ct. App. 1990), 563 N.E.2d 142.....	8
<i>Goldstein v. Christiansen</i> , 70 Ohio St.3d 232, 1994-Ohio-229, 638 N.E.2d 541	6, 8
<i>Helicopteros Nacionales de Colombia, S.A. v. Hall</i> , (1984), 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404.....	7
<i>Hoover v. Society Bank of Eastern Ohio</i> , (N.D. Ohio Apr. 12, 1991), Case No. 5:90CV 1245, 1991 U.S. Dist LEXIS 19073	8
<i>Ignash v. First Service Federal Credit Union</i> , Franklin App. No. 1AP-1326, 2002-Ohio-4395	1, 13
<i>International Shoe Co. v. Washington</i> , (1945), 326 U.S. 310, 66 S.Ct.154, 90 L.Ed. 95	9
<i>Joyce v. General Motors Corp.</i> , (1990), 49 Ohio St. 3d 93, 551 N.E.2d 172	13
<i>Kentucky Oaks Mall v. Mitchell's Formal Wear, Inc.</i> , (1990), 53 Ohio St. 3d 73, 559 N.E. 2d 477	9
<i>Liberty Mutual Ins. Co. v. Indus. Comm.</i> , (1988), 40 Ohio St. 3d 109, 532 N.E. 2d 124	1, 13

<i>Lumbermans Mut. Cas. Co. v. Belsz,</i> 8 th Dist. Nos. 82903 and 82919, 2003-Ohio-7072	13
<i>Palm Beach Co. v. Dun & Bradstreet, Inc.,</i> (1995), 106 Ohio App.3d 167, 665 N.E.2d 718.....	13
<i>Peterson v. Teodosio,</i> (1973), 34 Ohio St.2d 161, 297 N.E.2d 113	14
<i>Ruple v. Hiram College,</i> (Ohio App. 8 th Dist. 1928), 35 Ohio App. 8	14
<i>Saler v. Irick,</i> (Ind. Ct. App. 2003), 800 N.E.2d 960.....	8
<i>Shaffer v. Heitner,</i> (1977), 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683.....	7
<i>State ex rel. Purdy v. Clermont Co. Bd. of Ed.,</i> (1996), 77 Ohio St.3d 338, 673 N.E.2d 1351	12
<i>State ex rel. Toma v. Corrigan</i> (2001), 92 Ohio St.3d 589, 752 N.E.2d 282	12
<i>U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.</i> (1994), 68 Ohio St.3d 181, 1994-Ohio-504, 624 N.E.2d 1048, 1051.....	6, 9
<i>Veazie v. McGugin,</i> (1883), 40 Ohio St. 365.....	14
Statutes	
R.C. 2305.012	13
R.C. 2305.07	12, 13
R.C. 2305.16	13
R.C. 2307.382(A)(1)-(9).....	6
R.C. 5801-5811.....	1
R.C. 5802.02	5, 9, 10, 11, 12
R.C. 5811.03(A)(3).....	10
R.C. 5811.03(A)(5).....	10

Other Authorities

Bogert, Trusts and Trustees, § 953 (2d ed.)..... 14

Rules

Civ. R. 4.3 6

Constitutional Provisions

Fourteenth Amendment to the United States Constitution 6, 10

Section 28, Article II, Ohio Constitution..... 10, 11

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

In addition to the issues of general interest raised by other defendants-appellants in their Memoranda in Support of Jurisdiction, this case also raises important issues implicating the ability of an Ohio court under the United States and Ohio Constitutions to exercise personal jurisdiction over out-of-state defendants whose contacts with Ohio are limited to occasional receipt of trust distributions from an Ohio trust. These issues include whether the newly adopted Ohio Trust Code, R.C. 5801-5811, violates the Ohio or United States Constitution if used to involve out-of-state beneficiaries in litigation filed before the Code's adoption.

As trusts become increasingly more common devices in estate planning or the preservation of family wealth, the frequency of litigation arising from the interpretation or enforcement of trusts undoubtedly will increase. Ohio families use trusts to provide the care or education of successive generations. As those generations move to different states or nations, the fundamental constitutional right to due process is implicated if out-of-state trust beneficiaries can be haled into an Ohio court every time a dispute arises that might implicate the trusts that could benefit them, or which challenge past distributions from such trusts. This case shows the need for clarity as to when an Ohio court can exercise such personal jurisdiction.

The case also raises an important question as to the interpretation of the statute of limitations applicable to a claim for unjust enrichment against innocent holders of property. R.C. 2305.07 applies a six-year statute of limitations to claims based on a "contract not in writing, express or implied." That statute has been applied by Ohio courts to claims for unjust enrichment.¹ But in this case, the court of appeals disregarded the six-year statute in declining to

¹ See *Ignash v. First Service Federal Credit Union*, Franklin App. No. 1AP-1326, 2002-Ohio-4395, ¶ 17, citing *Liberty Mutual Ins. Co. v. Indus. Comm.*, (1988), 40 Ohio St. 3d 109, 110-111, 532 N.E. 2d 124, 125.

dismiss a cross-claim for unjust enrichment against innocent beneficiaries, who were allegedly unjustly enriched more than 20 years before the claim was asserted.

Appellants Christina Koons (“Christina”) along with her children, Nicholas Koons Baker (“Nicholas”) and Carson Nye Koons Baker (“Carson”) (collectively referred to as the “Koons beneficiaries”) are beneficiaries of trusts established by Christina’s father, the late John F. Koons, III, (“Bud Koons”) or his parents, and are long time citizens of the State of Washington.² The Koons beneficiaries were named as defendants on claims in the amended complaint for declaratory judgment,³ and in a cross-claim for unjust enrichment⁴ that seeks to impose a constructive trust on trust distributions received in the past by the Koons beneficiaries.

The trial court found it did not have personal jurisdiction over these out-of-state beneficiaries. The court of appeals disagreed, finding that simply accepting money from an Ohio trust was enough to support the exercise of personal jurisdiction in Ohio. According to the court of appeals “they took the money, and with that came jurisdiction.”⁵ As explained later in this memorandum, there is no support for the exercise of personal jurisdiction based only on the occasional receipt by out-of-state defendants of payments from Ohio.

In addition, the failure of the court of appeals to apply the six-year statute of limitations to the unjust enrichment claim against innocent beneficiaries raises an important issue of public interest. The six-year statute protects trusts, trust beneficiaries or other persons who receive property in good faith through a trust or estate, from becoming entangled in litigation years later to recover that property. The six-year statute provides ample opportunity for those who seek to recover property on a claim of unjust enrichment to make their claims.

² T.d. 82.

³ T.d. 60.

⁴ T.d. 124.

⁵ *Cundall v. U.S. Bank, N.A.* (Ohio App. 1 Dist.), 2007-Ohio-7067, ¶ 69, Appdx. 1.

STATEMENT OF THE CASE AND FACTS

This case arises from trusts created in the 1970s and the sale in 1984 by certain trust beneficiaries of shares in Koons-Cundall-Mitchell (“KCM”), a holding company for stock of Central Investment Corporation (“CIC”). The amended complaint, filed March 24, 2006,⁶ alleges that plaintiff Michael Cundall (“Cundall”) and his family members were persuaded by the original trustee, Bud Koons, to approve the sale in 1984 of trust held shares in KCM.⁷ That claim is made despite the facts that the Cundall family had the assistance of their own legal counsel in 1984; that the Cundall family, and trusts benefiting them, received more than \$3.5 million in exchange for their KCM shares in 1984; and that they released Bud Koons in writing for any claims arising from such sale.⁸ Now, more than 20 years later, Cundall claims the Cundall family was harmed when assets of the company that had evolved since the 1984 transactions were sold “for approximately \$400 million.”⁹

Cundall alleges that Bud Koons breached his fiduciary duties by mishandling trust funds and misrepresented the value of the stock in 1984. Cundall named as defendants Christina, Nicholas and Carson, along with other members of the Koons family, because they are (or have been) beneficiaries of trusts which held stock in the company that purchased the Cundall family’s KCM shares in 1984.¹⁰ Cundall’s children, defendants Michael Cundall, Jr., Courtney Fletcher Cundall and Hillary Cundall (“the Cundall Children”) filed a cross-claim against the Koons beneficiaries on August 30, 2006.¹¹

⁶ T.d. 60.

⁷ T.d. 60, p. 7

⁸ T.d. 83, Ex. A.

⁹ T.d. 60, p. 8, ¶ I.

¹⁰ T.d. 60, ¶ 12.

¹¹ T.d. 124.

There are no allegations in either of the complaints that the Koons beneficiaries participated in or were even aware of the actions of Bud Koons in 1984. Count IV, the only claim in the amended complaint which encompasses Christina, Nicholas or Carson,¹² asserts that “Plaintiffs and Defendants are all entitled to a declaration of their rights and obligations under the trusts as such may be modified or rearranged by the court.” Count IV does not describe what rights plaintiff asserts and does not explicitly claim recovery of past distributions.

Count Three of the Cundall Children’s cross-claim alleges that in 1984 the Koons beneficiaries “received a benefit in the form of an increase in the value of the CIC stock owned by them, held for their benefit in Fund A, and held for their benefit in the Koons Trusts...,” and that “it would be unjust for the Koons Beneficiaries to retain the benefit without payment to the Cundall Beneficiaries...”¹³ The cross-claim seeks a constructive trust “on these proceeds for the benefit of the Cundall Beneficiaries, including Cross-Claimants,”¹⁴ which apparently would include the recovery from the Koons beneficiaries of past trust distributions they received.¹⁵ As a result, the cross-claim poses a threat to the personal assets of the out-of state-defendants who received distributions from the irrevocable trusts established more than six years ago.

Nicholas, Carson, and Christina, have lived in the State of Washington for many years.¹⁶ They do not conduct business or own any real estate in Ohio; Nicholas and Carson have only rarely visited the State of Ohio for occasions such as their grandfather’s funeral.¹⁷

They moved to dismiss the complaint and cross-claim, arguing, inter alia, that the court lacked personal jurisdiction over them as out-of-state defendants and that the claims were barred

¹² T.d. 60, ¶ 39

¹³ T.d. 124, p.10.

¹⁴ Id.

¹⁵ Cundall Children’s App. Brief, p. 11.

¹⁶ C. Koons Aff. ¶¶ 2-5, T.d 82.

¹⁷ Id. at ¶¶ 4-5.

by the statute of limitations.¹⁸ The trial court dismissed “without prejudice the claims against out-of-state Koons beneficiaries for lack of personal jurisdiction.”¹⁹ On December 28, 2007, the court of appeals reversed, finding that the trial court could exercise personal jurisdiction simply because defendants were beneficiaries of and had received distributions from an Ohio trust.²⁰

The court of appeals erred in ruling that receipt of trust funds alone confers jurisdiction on out-of-state defendants and that R.C. 5802.02(B) could be applied retroactively. The court of appeals also erred in holding that the statute of limitations had not expired on the cross-claimants’ unjust enrichment claim.

In support of their position on these issues, and in addition to the arguments in support of propositions of law offered by the other defendants-appellants asking the Court to accept jurisdiction in this case, the Koons beneficiaries present the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law Number 1: An Ohio Common Pleas Court lacks personal jurisdiction over out-of-state defendants on claims for unjust enrichment where such defendants’ only alleged contact with Ohio was the receipt of payments from Ohio.

The court of appeals found that the out-of-state Koons beneficiaries are subject to personal jurisdiction based on the simplistic premise that “they took the money [trust distributions or payment for personally held stock] and with that came jurisdiction.”²¹ No

¹⁸ T.d. 60 and T.d. 134.

¹⁹ T.d 182. p. 9.

²⁰ Appendix at 1.

²¹ *Cundall v. U.S. Bank, N.A.* (Ohio App. 1 Dist.), 2007-Ohio-7067, ¶ 69.

authority relied on by the court, however, allows the exercise of personal jurisdiction simply because an out-of-state defendant received a payment from a source within the forum state.

In determining whether an Ohio court has personal jurisdiction over a nonresident defendant, a court is “obligated” to apply a two-part test, determining (1) whether Ohio's long-arm statute, R.C. 2307.382 and the complementary civil rule, Rule 4.3 of the Ohio Rules of Civil Procedure, confer jurisdiction, and (2) whether granting jurisdiction comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.²² Only if permitted by Ohio’s Long-Arm Statute, and if constitutional due process requirements are met can an Ohio court exercise personal jurisdiction over a non-resident defendant.²³

Long-arm jurisdiction under R.C. 2307.382(A)(1)-(9) requires that any claim against Christina, Nicholas and Carson must arise from their “transacting any business in the state,” “causing tortious injury by any act or omission in this state,” or “having an interest in, using or possessing real property in this state.” The affidavit of Christina Koons demonstrates that the Koons beneficiaries have long resided in Washington, have not conducted business in Ohio, and own no real property in Ohio.²⁴ The court of appeals found that the mere *acceptance* of funds transmitted from Ohio constitutes “transacting any business in the state.”²⁵ However, neither this Court nor the United States Supreme Court has gone so far in finding a “minimum contact” from such passive, rather than purposeful, conduct by an out-of-state defendant.

The United States Supreme Court has found that the “constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains

²² *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-184, 1994-Ohio-504, 624 N.E.2d 1048, 1051; *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 235, 1994-Ohio-229, 638 N.E.2d 541, 543.

²³ *Id.*

²⁴ T.d. 82; Aff. ¶ 4-5.

²⁵ *Cundall v. U.S. Bank, N.A.* (Ohio App. 1 Dist.), 2007-Ohio-7067, ¶ 72.

whether the defendant *purposefully* established ‘minimum contacts’ in the forum state.”²⁶ Such “minimum contacts must have a basis in some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.”²⁷

Contrary to the court of appeals decision, jurisdiction cannot be based simply on the receipt by an out-of-state defendant of payments from Ohio. The exercise of personal jurisdiction is justified only “where the contacts proximately result from *actions* by the defendant *himself* that create a “substantial connection” with the forum state.”²⁸ As explained by the United States Supreme Court, the “substantial connection” between the defendant and the forum State necessary for a finding of minimum contacts must come about *by the action of the defendant purposefully directed toward the forum state.*”²⁹ The mere acceptance by an out-of-state defendant beneficiary of distributions from an Ohio trust, without more, hardly amounts to an act “purposefully directed toward” Ohio. Furthermore, only the acts of the *defendants*, and not some third party satisfy the jurisdictional requirement.³⁰ Thus, the United States Supreme Court has held that acceptance of positions as officers and directors of a corporation chartered in the forum state or owning stock or other interests in the corporation,³¹ or receiving checks from a bank in the forum state³² do not satisfy the minimum contacts requirement for jurisdiction. And at least one state’s courts have held that a bank’s receipt of trust assets transferred out of the

²⁶ *Asahi Metal Industries Co. Ltd. v. Superior Ct. of California* (1987), 480 U.S. 102, 108-109, 107 S.Ct. 1026, 1030, 92 L.Ed.2d 92, 102.

²⁷ *Asahi*, 480 U.S. at 112, quoting *Burger King v. Rudzewicz* (1985), 471 U.S. 462, 475.

²⁸ *Id.* (emphasis in original).

²⁹ *Id.* (internal citation omitted) (emphasis in original).

³⁰ *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), 466 U.S. 408,417, 104 S. Ct. 1868, 1873, 80 L. Ed. 2d 404, 412.

³¹ *Shaffer v. Heitner* (1977), 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683.

³² *Helicopteros*, 466 U.S. 408, 417-18.

forum state,³³ or a defendant's being named as a beneficiary on an annuity contract³⁴ is insufficient to satisfy the requirements for personal jurisdiction.

In this case, the Koons beneficiaries do not have sufficient contacts with the State of Ohio to justify the exercise of personal jurisdiction to support a judgment against them. The plaintiff and cross-claimants fail to offer any facts to establish a purposeful action by Christina, Nicholas and Carson "directed toward" Ohio. Nevertheless, the court of appeals found, without citation to any authority on point, that "the Koons defendants have dealings with Ohio – they have accepted money from the trusts. Accepting money from a trust with its situs in Ohio firmly establishes jurisdiction under Ohio's long-arm statute."³⁵ This finding simply ignores the plain language of the United States Supreme Court requiring plaintiff to demonstrate *an action purposefully directed at the forum state* to establish personal jurisdiction over an out-of-state defendant.

Likewise, the mere receipt of distributions by an out-of-state beneficiary from an Ohio trust would not cause a beneficiary reasonably to anticipate being "haled into court" in Ohio. As stated in *Hoover v. Society Bank of Eastern Ohio*,³⁶ "the mere creation of [a] trust in Ohio is not sufficient to invest this Court with personal jurisdiction over non-resident defendants."

The cases relied on by the court of appeals uniformly involved defendants which had *purposefully* transacted business in Ohio. For example, in *Goldstein v. Christiansen*,³⁷ a defendant Florida accounting firm had mailed financial statements to Ohio investors who later alleged fraud based on those financial statements. In *U.S. Sprint Communications Co. v. Mr. K's*

³³ *First American Bank of Virginia, N/A v. Reilly* (Ind. Ct. App. 1990), 563 N.E.2d 142.

³⁴ *Saler v. Irick* (Ind. Ct. App. 2003), 800 N.E.2d 960, 970-71 (the court found, however, there were sufficient contacts for jurisdiction over a separate claim pertaining to payable-on-death benefits from a decedent's bank account because the defendant had gone to the forum state, presented the proper documentation, and made deliberate efforts to receive payment.)

³⁵ *Cundall v. U.S. Bank, N.A.* (Ohio App. 1 Dist.), 2007-Ohio-7067, ¶ 72.

³⁶ (N.D. Ohio Apr. 12, 1991), Case No. 5:90CV 1245, 1991 U.S. Dist LEXIS 19073, *36.

³⁷ 70 Ohio St. 232, 1994-Ohio-229, 638 N.E. 2d 541.

Foods, Inc.,³⁸ the defendant New York Corporation had shipped products into Ohio and solicited sales through telephone calls into Ohio. In *Kentucky Oaks Mall v. Mitchell's Formal Wear, Inc.*³⁹ the defendant Georgia corporation had entered into a lease with an Ohio corporation, made phone calls into Ohio and mailed checks to Ohio. This Court, not surprisingly, found that all of these defendants were conducting business in Ohio and had such minimum contacts with Ohio that would lead them to expect that they could be "haled into court" in Ohio.

In contrast, Christina, Carson and Nicholas simply received occasional checks from Ohio trusts. They took no affirmative steps to make a business contact in Ohio. Cross-claimants have not shown the type of purposeful activities in Ohio by the Koons beneficiaries which "are continuous and systematic," as required under *International Shoe*⁴⁰ and its progeny to support a constitutional exercise of personal jurisdiction over an out of state defendant.

Proposition of Law Number 2: R.C. 5802.02(B) of the Ohio Trust Code cannot be applied retroactively to impose personal jurisdiction in a case filed before the statute's effective date to assert personal jurisdiction over out-of-state defendants in an action to recover past trust distributions.

To assert personal jurisdiction over the Koons beneficiaries, Cundall and the Cundall Children also rely on R.C. 5802.02(B), part of the new Ohio Trust Code, which took effect on January 1, 2007:

With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from the

³⁸ 68 Ohio St. 3d 181, 1994-Ohio-504, 624 N.E. 2d 1048.

³⁹ (1990), 53 Ohio St. 3d 73, 559 N.E. 2d 477

⁴⁰ *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 317, 66 S.Ct.154, 159, 90 L.Ed. 95, 102.

trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(emphasis added). This statute became effective long after the alleged cause of action arose and this action was filed. As argued in more detail in a separate memorandum filed by other Koons beneficiaries, R.C. 5802.02(B) cannot be applied retroactively to allow personal jurisdiction over out-of-state beneficiaries, particularly where the exercise of jurisdiction violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The new Ohio Trust Code (“OTC”) does not allow retroactive application in judicial proceedings that would “substantially interfere with the effective conduct of the judicial proceedings” or “prejudice the rights of the parties.”⁴¹ Nor may a provision of the OTC be applied to “affect an act done before the effective date of those chapters.”⁴² In this case, a statute that retroactively provides a court personal jurisdiction over out-of-state beneficiaries based on their receipt of distributions prior to January 1, 2007 is inconsistent with the OTC’s own provision limiting retroactive application. Such an exercise of jurisdiction retroactively would prejudice the Koons beneficiaries’ rights, interfere with proceedings months in process, and affect acts that occurred long before January 1, 2007.

Section 28, Article II of the Ohio Constitution prevents the retroactive application of R.C. 5802.02(B). In *Bielat v. Bielat*, this Court noted that the retroactivity clause “nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective]. . . .’”⁴³ The test for unconstitutional retroactivity depends on whether the General Assembly expressly intended the statute to apply

⁴¹ R.C. 5811.03(A)(3).

⁴² R.C. 5811.03(A)(5).

⁴³ 87 Ohio St.3d 350, 352-53, 2000-Ohio-451, 721 N.E.2d 28, 32 (citations omitted) (emphasis in original).

retroactively and, if so, whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial.”⁴⁴

Here, retroactive application would prejudice the rights of out-of-state beneficiaries and create “new burdens,” “new obligations, or new liabilities” for the Koons beneficiaries by allowing the Cundall children to “hale them into Court” for the repayment of prior trust distributions based on transactions that occurred in 1984. Further, the application of R.C. 5802.02 would be “substantive” because it would be used to attack “a past transaction,” i.e., past distributions of trust assets: “[A] retroactive statute is substantive, and therefore *unconstitutionally* retroactive – if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to past transaction.”⁴⁵

The Cundall children, if successful, would impose “new or additional burdens, duties, obligations, or liabilities” upon Christina, Nicholas and Carson that would require repayment of past trust distributions, violating Section 28, Article II of the Ohio Constitution.

Even if applied retroactively, R.C. 5802.02 cannot be construed so as to violate the constitutional requirements of due process, addressed earlier in this memorandum.⁴⁶

By its own terms, however, jurisdiction under R.C. 5802.02(B) applies only to claims “with respect to their interests in the trust,” not to distributions already received from the trusts and either already spent for things such as college tuition or expenses, or now among the personal assets of the Koons beneficiaries. The Court can avoid ruling that R.C. 5802.02 violated

⁴⁴ *Bielat*, 87 Ohio St.3d at 353 (emphasis in original).

⁴⁵ *Id.* at 354 (emphasis in original).

⁴⁶ See *State ex rel. Toma v. Corrigan* (2001), 92 Ohio St.3d 589, 752 N.E.2d 282, citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310; *State of Ohio v. Sinito* (1975), 43 Ohio St.2d 98, 101, 330 N.E.2d 896, 898.

the Ohio or United States Constitution through a proper construction of the statute. When there is a potential conflict between a statute and the Ohio or the United States Constitution, a court must first attempt to construe the statute so as to be compatible with constitutional requirements before ruling that the statute is unconstitutional.⁴⁷ To avoid the conflict with Constitutional due process requirements, R.C. 5802.02 should be construed to limit jurisdiction over out-of state beneficiaries only to those claims involving funds *still held in an Ohio Trust* (“their interests in the trust”), but not extending to a claim against the personal assets of out-of-state beneficiaries derived from past trust distributions. The court of appeals simply failed to address the express limitation of R.C. 5802.02 to the beneficiaries’ “interests in the trust” as opposed to their interest in distributions they had already received in the years before this action was brought.

Proposition of Law Number 3: The six-year statute of limitations set by R.C. 2305.07 applies to claims for unjust enrichment, and begins to run at the time of the transaction giving rise to the alleged unjust enrichment.

In holding that the statute of limitations had not expired on the claims for the creation of a constructive trust, the court of appeals failed to distinguish between causes of action asserted against different defendants. This resulted in a decision that applied the same statute of limitations for the claim of breach of fiduciary duty claim against Bud Koons to the separate claims of unjust enrichment asserted against the Koons beneficiaries. The court of appeals found (incorrectly) that the statute of limitations for a claim of fraud or breach of fiduciary duty against

⁴⁷ *State ex rel. Purdy v. Clermont Co. Bd. of Ed.* (1996), 77 Ohio St.3d 338, 345-46, 673 N.E.2d 1351, 1356.

Bud Koons and his representatives did not begin to run until 2005, when Bud Koons died and ceased acting as a trustee for one of the trusts at issue in this case.⁴⁸

In reaching its conclusion about the statute of limitations applicable to claims against Bud Koons, the court of appeals did not consider what statute of limitations applies to the claim of the Cundall children against the Koons beneficiaries for unjust enrichment.⁴⁹ The Cundall Children’s cross-claim for unjust enrichment against the Koons beneficiaries accrued in 1984, when Bud Koons allegedly “forced other Cundall family members to sell all of their [KCM] shares back to CIC for the same price.”⁵⁰

Ohio’s statute of limitations for a claim of unjust enrichment is six years from the date of the event which caused the unjust enrichment.⁵¹ Under Ohio law, the claim accrues on the date money or property is retained under circumstances in which it is unjust to do so.⁵² “There is no exception to measure the statute of limitations from the time the alleged unjust enrichment was

⁴⁸ *Cundall v. U.S. Bank, N.A.* (Ohio App. 1 Dist.), 2007-Ohio-7067, ¶ 52.

⁴⁹ While the trial court never reached the issue of the applicable statute of limitations in dismissing the claims against the Cundall beneficiaries, this Court may affirm dismissal of Count Three of the Cundall Children’s cross-claims against the Koons beneficiaries on independent grounds found in the record, including a lack of jurisdiction. *See Joyce v. General Motors Corp.* (1990), 49 Ohio St. 3d 93, 96, 551 N.E.2d 172, 174; *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St.275, 284, 58 N.E.2d 658, 663. Even if a Court of Appeals rejects a legal rationale for a decision, it may affirm the decision on independent grounds. *See Lumbermans Mut. Cas. Co. v. Belsz*, 8th Dist. Nos. 82903 and 82919, 2003-Ohio-7072, ¶ 33.

⁵⁰ T.d. 124, at ¶ 7

⁵¹ *See* R.C. 2305.07 (the statute of limitations for “a contract not in writing, express or implied”) and *Ignash v. First Service Federal Credit Union*, Franklin App. No. 01AP-1326, 2002-Ohio-4395, ¶ 17, citing *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St.3d 109, 110-111, 532 N.E.2d 124, 125.

⁵² *Palm Beach Co. v. Dun & Bradstreet, Inc.* (1995), 106 Ohio App.3d 167, 175, 665 N.E.2d 718 (where plaintiff alleged that the receipt of money was unlawful, the claim accrued when the overpayment occurred).

discovered, as there is for fraud.”⁵³ As a result, the claim expired in 1990, and is barred by the statute of limitations, depriving the trial court of subject matter jurisdiction over the claim.⁵⁴

Likewise, any remedy in the form of a constructive trust arising from alleged unjust enrichment is barred by the six-year statute of limitations. “If the cause of action in which imposition of a constructive trust is sought as a remedy is barred by a statute of limitation, the imposition of a constructive trust is likewise barred.”⁵⁵ Where a remedy of constructive trust is sought based on a claim that some innocent property owner has been unjustly enriched by the wrongful or unjustified act of another, the statute of limitations for claims against the property owner runs from the date of the allegedly wrongful transfer of property which creates the constructive trust. In this case that would be at the time of the 1984 stock sale.

“If 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.”⁵⁶ The Ohio Supreme Court has adopted this rule.⁵⁷ Other Ohio decisions affirm that the statute runs from the time of the wrongful transfer.⁵⁸ In this case, the statute would have expired in 1988.

Whether the claim against Bud Koons began to run in 1984 or at his death in 2005, the claim for unjust enrichment *against the Koons beneficiaries*, and for the creation of a constructive trust as to their past distributions, is barred by the applicable statute of limitations.

⁵³ *Binsack v. Hipp* (6th Dist. H-97-029, Jun. 5, 1998), 1998 Ohio App. LEXIS 2370, *17.

⁵⁴ See R.C. 2305.012. The Cundall Children argued below that they were minors in 1984 and therefore the statute was tolled. (T.d. 124, ¶ 7). However, under R.C. 2305.16, which tolls the statute due to minority, the claim must be presented within the limitations period once the age of majority is reached. The youngest Cross-Claimant turned 18 in 1995 (T.d. 135, Exs. A, B and C), so even with the benefit of tolling, the six-year limitations period expired in 2001.

⁵⁵ See *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113, 121,

⁵⁶ Bogert, *Trusts and Trustees*, § 953 (2d ed.)

⁵⁷ *Peterson v. Teodosio*, 34 Ohio St.2d at 172, citing Bogert’s *Trust and Trustees* § 953 (Rev. 2d ed.).

⁵⁸ See, e.g., *Veazie v. McGugin* (1883), 40 Ohio St. 365, 375-76 (statute runs from date the constructive trustee took possession of property and protects those claiming title through the

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The defendants-appellants Christina Koons, Nicholas Koons Baker and Carson Nye Koons Baker request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Donald J. Mooney, Jr., Counsel of Record


Pamela K. Ginsburg
COUNSEL FOR DEFENDANTS-APPELLANTS,
CHRISTINA KOONS, NICHOLAS KOONS
BAKER AND CARSON NYE KOONS BAKER

constructive trust); *Ruple v. Hiram College* (Ohio App. 8th Dist. 1928), 35 Ohio App. 8; *Allen v. Deardoff* (12th Dist. 1921), 14 Ohio App. 16, 19-20.

CERTIFICATE OF SERVICE

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

Richard G. Ward
Drew & Ward Co., L.P.A.
One West Fourth Street, Suite 2400
Cincinnati OH 45202
*Counsel For Plaintiffs- Appellants
Michael K. Cundall, Individually
And As Successor Trustee*

William H. Blessing
Law Offices of William H. Blessing
119 E. Court Street, Suite 500
Cincinnati OH 45202
*Counsel For Defendant-Appellants Michael K.
Cundall, Jr., Courtney Fletcher Cundall And
Hillary Cundall*

Peter L. Cassidy
Beckman, Weil, Shepardson, LLC
The American Book Building
300 Pike Street, Suite 400
Cincinnati OH 45202
*Counsel For Defendants-Appellees Caroline
Koons, Kathleen Koons, Maura Koons, Jeremy
Koons, Deborah Koons Garcia, John F. Koons,
IV And James B. Koons*

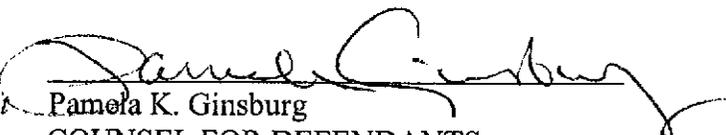
Susan Grogan Faller, Esq.
Frost Brown Todd, LLC
2200 PNC Center
201 East Fifth Street
Cincinnati OH 45202
*Counsel For Defendant-Appellee U. S. Bank,
Predecessor Trustee*

James B. Helmer
Julie W. Popham
Robert M. Rice
Erin M. Campbell
Helmer, Martins, Rice & Popham
600 Vine Street, Suite 2704
Cincinnati OH 45202

Wijdan Jreisat, Esq. (00639550)(COUNSEL
OF RECORD)
Katz, Teller, Brant & Hild
255 East Fifth Street, #2400
Cincinnati, Ohio 45202
*For Peter B. Cundall, Sara C. Kersting,
Caitlan Mikula, Peter Cundall, Jr., Kyle
Kersting, Alex Kersting, And Jeffrey Kersting*

OF COUNSEL:

Taft, Stettinius & Hollister, LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
*Counsel For Defendant-Appellants 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*


Pamela K. Ginsburg
COUNSEL FOR DEFENDANTS-
APPELLANTS, CHRISTINA KOONS,
NICHOLAS KOONS BAKER AND
CARSON NYE KOONS BAKER

489966v1
33097.00001

APPENDIX

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

MICHAEL K. CUNDALL, INDIVIDUALLY, : APPEAL NOS. C-070081
and MICHAEL K. CUNDALL, SUCCESSOR : C-070082
TRUSTEE, : TRIAL NO. A-0602080

Plaintiff-Appellant, : *OPINION.*

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. :

**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 Donsen, Jr., Successor Trustee, and Michael Caudill, Successor Trustee.

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

OHIO FIRST DISTRICT COURT OF APPEALS

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.

1. 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.

OHIO FIRST DISTRICT COURT OF APPEALS

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

OHIO FIRST DISTRICT COURT OF APPEALS

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, Pepsiamerica 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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.*

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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 Waltering* (1999), 1st Dist. No. C-970913.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.*

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.

OHIO FIRST DISTRICT COURT OF APPEALS

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).

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

{¶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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.

OHIO FIRST DISTRICT COURT OF APPEALS

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.



D76491719

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

ENTERED
DEC 28 2007

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

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

Plaintiff-Appellant,

: JUDGMENT ENTRY.

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.

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