IN THE SUPREME COURT OF OHIO

MICHAEL K. CUNDALL, et al.	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
Plaintiffs	:	
v.	:	Court of Appeals Case Nos. C070081 C070082
U.S. BANK, TRUSTEE, et al.	:	
Defendants	:	08-0314

MEMORANDUM IN SUPPORT OF JURISDCITION OF APPELLANTS 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

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FILED
FEB 11 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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EXPLAINATION 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 the other Defendants in their Memoranda in Support of Jurisdiction, this case also presents issues of first impression for this Court concerning interpretation of the new Ohio Trust Code ("OTC"),[1] effective January 1, 2007. Specifically, the Court of Appeals' decision raises concern over the OTC provisions' retroactivity and purported jurisdiction over the trust beneficiaries involved in this case. In addition to the OTC issues, the Court of Appeals also created an issue of general interest when it failed to hold that the statute of limitations for unjust enrichment had run.

Trusts are increasingly popular vehicles for estate planning, wealth management, and other needs. The prefatory note of the Uniform Trust Code states: "The primary stimulus to the Commissioners' drafting of the Uniform Trust Code is the greater use of trusts in recent years...This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin."[2]

There are innumerable trusts situated in Ohio and on any given day, undoubtedly, thousands of beneficiaries receive distributions from those trusts. The as-yet uninterpreted OTC, coupled with the Court of Appeals' decision in this case, create several issues of general interest and raise constitutional questions regarding the administration of trusts—areas in which trustees, beneficiaries and courts need guidance in order to interpret and carry out this new law's terms.

The OTC is based on the Uniform Trust Code ("UTC"). Twenty states have adopted the UTC, but there is very little case law throughout the United States construing its provisions,

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[1] Ohio Revised Code Chapters 5801 through 5811.

[2] Uniform Trust Code (2000), National Conference of Commissioners on Uniform State Laws, Prefatory Note.

especially those provisions that are at issue in this case. Accordingly, the jurisprudence of other states is unhelpful in providing interpretive guidance.

The OTC provisions at issue in this case are the following:

(1) O.R.C. § 5802.102(B), the jurisdictional provision of the OTC, which states: "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 trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust."

(2) O.R.C. § 5811.03(A)(3), the retroactive provision of the OTC, which states that the OTC "applies to judicial proceedings concerning trusts commenced before the effective date of those chapters unless the court finds that application of a particular provision of those chapters would *substantially interfere with the effective conduct of the judicial proceedings* or *prejudice the rights of the parties*, in which case the particular provision does not apply, and the superseded law applies." (Emphasis added.)

(3) O.R.C. § 5811.03(A)(5), which states that the new OTC does not affect an act done before the effective date of [the new OTC]."

(4) Official comment to section 1106 of the Uniform Trust Code, which states that "[t]his code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date."

Appellants take issue with the Court of Appeals' decision for several reasons. First, the Court of Appeals retroactively applied the OTC to this case and found jurisdiction by improperly bootstrapping the retroactive provisions of the OTC to the jurisdiction provision of the OTC. In

fashioning this forced result, the Court of Appeals conducted a superficial and conclusory "discussion," of the retroactive provisions of the OTC. The Court of Appeals held, in a rationale-deficient, one-two-three punch that (1) the "affect an act" portion of the OTC "is not applicable," (2) that retroactive application would not substantially interfere with the proceedings because the case was "in its infancy," and, (3) that the Koons Beneficiaries' rights were not prejudiced because the court had jurisdiction over them even without the OTC. Second, the Court of Appeals completely disregarded and failed to discuss the constitutional issues involved in the retroactive application of a statute. Finally, the Court of Appeals incorrectly applied Ohio's long-arm statute and due process requirements, and held that jurisdiction was proper even applying pre-OTC law.[3]

Receiving guidance on the proper interpretation of items 1 through 4 above are of extreme importance, not only to the Koons Beneficiaries and the issues in this case, but to other courts, trustees and beneficiaries alike, as well as for the orderly administration of all trusts throughout the state. With respect to item 1, it is important to clarify whether passively receiving limited distributions from a trust submits a beneficiary to personal jurisdiction within the state. Specifically, it is important to reconcile how such an isolated and unsolicited event meets Ohio long-arm and constitutional due process considerations that require "minimum contacts" and "purposeful availment" before personal jurisdiction will attach.

With respect to item 2, there is very little guidance available as to what the terms "substantially interfere" with judicial proceedings and "prejudice the rights of the parties" mean relative to the retroactive application of the OTC. The Court of Appeals held, without

[3] The Court of Appeals also ignored the fact that the Cundall Cross-Claimants/Appellees have no stake in this litigation, and, therefore, had no standing to sue. Any interest they had in Share B of the 1976 Grandparents' Trust was extinguished upon Bud's death in March 2005. (T.d. 135, pp. 13-14).

elaborating upon the meaning of the term, that keeping the beneficiaries as parties in the case would not "substantially interfere" with the case's judicial proceedings. It is difficult to understand how the Court of Appeals reached this conclusion considering the fact that, in doing so, the Court of Appeals is using the OTC to reinstate previously dismissed defendants into a previously dismissed case. This case was fully briefed and argued in the trial court prior to the OTC's effective date. Under the pre-OTC law the case was dismissed; now, with the OTC, it has new life. The Court of Appeals' decision creates interference that is nothing but substantial.

Furthermore, it is even more difficult to understand how the Court of Appeals' decision to retroactively apply the OTC to find personal jurisdiction does not "prejudice the rights" of the Koons Beneficiaries. By remaining parties to the litigation and being required to defend the case at hand, the Koons Beneficiaries and their assets are now exposed to potentially substantial personal liability. Their required participation in the case prejudices both their personal rights and their property rights. A survey of case law throughout states that have adopted the UTC indicates that this term has not been interpreted. Moreover, the comments to the Uniform Trust Code provide no instruction. Supreme Court guidance is necessary to interpret the meaning of these impactful terms.

With respect to item 3, the OTC states that it will not "affect an act done before the effective date of [the new OTC]." The Court of Appeals glossed over this argument in its decision by stating in a parenthetical that "[t]he statute also says that the new code 'do[es] not affect an act done before the effective date of those chapters.' The Koons Beneficiaries make much of this provision, but it is not applicable to the issue of jurisdiction in this case." The Court of Appeals, however, does not offer any justification or authority to explain its blanket

conclusion. This is probably because, again, no court has interpreted this term despite the fact that there is great public interest in doing so.

Moreover, as stated in item number 4, in acknowledging that the OTC cannot always be retroactively applied due to constitutional limitations, there exists an additional constitutional question regarding the retroactivity of the OTC. In the instant case, it works to create jurisdiction where none existed before. The Court of Appeals retroactively applied the OTC despite the fact that, as the comment to the UTC notes, such application must be done cautiously as there is a strong presumption in the Ohio and federal constitutions against the retroactive application of substantive laws. The Court of Appeals did not discuss or even mention the grave constitutional implications of retroactively applying the jurisdiction provisions in the instant case despite the substantive effect that such an application has on the Koons Beneficiaries. This deficiency is perhaps the most glaring error that the Court of Appeals made in this case and, thus, the greatest reason for this Court to accept jurisdiction in this case. It is dangerous for courts to plainly ignore such long-standing constitutional considerations without analysis or mention.

In addition to the OTC issues, the Court of Appeals also created an issue of general interest when it failed to hold that the statute of limitations for unjust enrichment had run. This failure adversely affects the Koons Beneficiaries and other similarly situated individuals because the running of the statute of limitations is another ground for dismissal in this case. Furthermore, the failure to dismiss these claims potentially places the Koons Beneficiaries' assets at risk since the remedy that the Cundalls seek is the imposition of a constructive trust. The public has a valid interest in ensuring that statutes of limitations, and in turn their interests, are protected and upheld, especially in cases where plaintiffs seek to recover damages from defendants after the statute of limitations has run.

STATEMENT OF THE CASE AND FACTS

The Appellants for this Memorandum are three of the four children and five of the seven grandchildren of John F. Koons, III ("Bud") (Bud's children and grandchildren are collectively referred to as the "Koons Beneficiaries").[4] As evidenced on the face of the Complaint, not one of the Koons Beneficiaries is an Ohio resident, and none of them have contacts with this state that justify personal jurisdiction.[5] Further, none of Plaintiff's Complaint, First Amended Complaint, Proposed Second Amended Complaint, nor any other pleading filed with the Court by Plaintiff or the Cross-Claimants, provided facts to suggest such jurisdiction.[6]

Plaintiff/Appellee Michael Cundall and his children, the Cross-Claimants/ Appellees, (respectively, "Plaintiff Cundall" and "Cross-Claimant Cundalls," or collectively, the "Cundalls") filed their claims in an attempt to unwind and renege on their consent to a transaction 22 years after it occurred.[7] These claims have been asserted against the Koons Beneficiaries because the Cundalls believe the Koons' assets are somehow tied to this decades-old transaction.

One of the claims against the Koons Beneficiaries is for unjust enrichment. As a result the Cundalls seek to impose a constructive trust against the Koons Beneficiaries' assets, wherever located. The Cundalls seek relief for unjust enrichment despite the fact that the statute of limitations for this claim has clearly run, even in the case of the Cross-Claimant Cundalls who were minors at the time of the transaction at issue.

Just four days after the OTC's effective date, the Trial Court dismissed the Cundalls' claims against the Koons Beneficiaries for lack of personal jurisdiction. The Cundalls appealed

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[4] Bud's other child and two grandchildren are separately represented in this action.
[5] (T.d. 77, p. 7-10); (T.d. 182, p. 9).
[6] (T.d. 2); (T.d. 60); (T.d. 156, pp. 4-74).
[7] (T.d.).

that decision and the Court of Appeals held that the jurisdiction provision of the OTC applied retroactively and that applying such would not substantially interfere with the judicial proceedings or prejudice the rights of the parties. The Court of Appeals further held that even applying pre-OTC law, there were grounds for jurisdiction against the beneficiaries though it failed to support this assertion. The Court glossed over the portion of the OTC that stated that the retroactive application must not "affect an act done before the effective date of the chapters." In addition, the Court completely ignored the constitutional analysis that is required before retroactively applying the OTC. Further, the Court of Appeals refused to dismiss the unjust enrichment claim against the Koons Beneficiaries despite the fact that the applicable six-year statute of limitations for that claim and the remedy of constructive trust had long-since run.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

In addition to the Propositions of Law offered by the other Defendants asking the Court to accept jurisdiction in this case, these Defendants offer the following Propositions of Law:

PROPOSITION #1: Out-of-state beneficiaries of an Ohio Trust who passively receive distributions from a trust are not subject to personal jurisdiction under the OTC or pre-OTC law.

When defendants are not residents of the state, the Ohio Supreme Court mandates that the court determine whether the state's "long arm" statute and applicable civil rule confer personal jurisdiction, and, if so, whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution.[8] Not one Koons Beneficiary is an Ohio resident, Ohio's long arm statute

[8] *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-84, 624 N.E.2d 1048, 1051.

and applicable Civil Rule do not confer personal jurisdiction, and there are insufficient minimum contacts to constitutionally confer jurisdiction upon the Koons Beneficiaries.

First, and most importantly in this case, Ohio's long arm statute does not confer personal jurisdiction because there exists no "purposeful availment," no action or affirmative conduct on the part of the Koons Beneficiaries.[9] Being a beneficiary of a trust is a passive event. It is a designation that happens to that beneficiary as a result of some other person's act. There is nothing purposeful that the beneficiary does in order to obtain that designation.

The Court of Appeals summarily held that "[a]ccepting funds from a trust with its situs in Ohio firmly establishes jurisdiction under Ohio's long-arm statute. In doing so, however, the Court, failed to cite any case law in support of its holding aside from the general and conclusory assertion that accepting a distribution from an Ohio trust means that you "have dealings with" the state. This assertion, however, is contrary to other case law in which courts have held that the mere creation of an Ohio trust "is not sufficient to invest [a] Court with personal jurisdiction over the non-resident defendants."[10] In light of this, and the active nature of the conduct required by the long-arm statute, it is difficult to see how the passive acceptance of what may have only been a single disbursement from a trust suddenly becomes a jurisdiction-submitting act for those beneficiaries. This is especially true in the case at hand, where the Cundalls are trying to hold the Koons Beneficiaries liable for something that happened over 20 years ago.

In addition to the failure of Ohio's long-arm statute, the U.S. Supreme Court and the Ohio Supreme Court have held that a non-resident defendant must have purposely established

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[9] O.R.C. § 2307.382.

[10] *Hoover v. Society Bank of Eastern Ohio N.A.*, 1991 U.S. Dist. LEXIS 19073, at *36 (*Hoover* involved an Ohio trust whose sole asset for many years was stock. The court dismissed two non-resident defendants for lack of personal jurisdiction and stated "Plaintiffs must demonstrate specific actions which fall within the parameters of Ohio's long arm statute sufficient to make the assertion of personal jurisdiction over the non-resident defendants constitutional").

"minimum contacts" with Ohio in order that jurisdiction over a defendant not violate his or her due process rights.[11] "The constitutional touchstone is whether the non-resident defendant purposely established contacts in Ohio so that the defendant should reasonably anticipate being haled into court there."[12]

The Court of Appeals held in this case that "a regular beneficiary of an Ohio-administered trust meets the requisite minimum contacts in Ohio to support personal jurisdiction." It further held that the distributions were of a "continuous and systematic nature" such that the "Koons Beneficiaries carried on activities in Ohio and benefited from its law." In so holding, the Court of Appeals improperly cited several cases in which businesses had initiated contact with or transacted business in Ohio. The *Goldstein*[13] case cited by the Court of Appeals involved the defendant mailing financial statements to Ohio investors; the *U.S. Sprint Communications*[14] case involved shipping products to Ohio and making solicitous telephone calls to Ohio; the *Kentucky Oaks*[15] case involved a lease with an Ohio corporation and mailing checks to Ohio. These cases are very different than the passive and unsolicited acceptance of distributions at issue here.

Furthermore, the Court of Appeals assumed that the Koons Beneficiaries had accepted multiple distributions from the trusts at issue. The Court incorrectly concluded, in a struggle to

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[11] *Int'l Shoe Co. v. Washington* (1945), 326 U.S. 310; *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 474; *State ex rel. Toma v. Corrigan* (2001), 92 Ohio St.3d 589, 593, 752 N.E.2d 281.
[12] *State ex rel. Toma*, 92 Ohio St.3d at 593.
[13] *Goldstein v. Christiansen* (1994), 70 Ohio St. 232, 1994 Ohio 229, 638 N.E.2d 541.
[14] *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 1994 Ohio 504, 624 N.E.2d 1048.
[15] *Kentucky Oaks Mall v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St. 3d 73, 559 N.E.2d 477.

find "minimum contacts" and, thus, jurisdiction, that there was an ongoing, elevated level of involvement in the trust amongst the beneficiaries that simply did not exist.

Enactment or application of the OTC does not change these due process requirements. Because they have not purposely established minimum contacts with Ohio, jurisdiction over the Koons Beneficiaries in this case will violate their due process rights regardless of whether the OTC or the pre-OTC law is applied.

PROPOSITION # 2: Using the new OTC jurisdiction provision to retroactively find jurisdiction over out-of-state trust beneficiaries who were previously dismissed for lack of jurisdiction substantially interferes with those judicial proceedings.

Retroactive application of this personal jurisdiction provision would substantially interfere with these judicial proceedings because the trial court dismissed the Koons Beneficiaries based on the law as it existed before the OTC's effective date, January 1, 2007. In its decision, the Court of Appeals only superficially "discussed" this and the other retroactive provisions of the OTC discussed in Propositions 3 and 4, below. Such dismissive treatment is contrary to the established tenets of statutory interpretation. Courts must give effect to the clear and unambiguous language that is used in a statute.[16] The Court of Appeals disregarded this requirement when it glossed over these OTC exceptions and summarily concluded that the exceptions did not apply with barely a mention, much less an explanation of its reasoning.

The law applied by the trial court was the law as it had stood for the decades at issue in this case, at the time Plaintiff Cundall filed his Complaint, and throughout the lower court's proceedings, until four days before the trial court issued its decision. Applying this new law on appeal would render the trial court proceedings irrelevant and would amount to the Cundalls

[16] *Bockover v. Ludlow Corp.* (1986), 23 Ohio St.3d 190, 194, 492 N.E.2d 149, 153.

getting a second bite of the apple under a new legal standard. It is difficult to imagine a greater interference with a judicial proceeding than reinstating it after dismissal.

PROPOSITION # 3: Using the new OTC jurisdiction provision to retroactively find jurisdiction over out-of-state trust beneficiaries who were previously dismissed for lack of jurisdiction prejudices the rights of those beneficiaries.

The OTC prohibits retroactive application of its personal jurisdiction section because the change in the law would prejudice the rights of the Koons Beneficiaries by subjecting them to the jurisdiction of the Ohio courts where they were not subject before. Prior to the OTC enactment, however, the acceptance of a distribution by any out-of-state beneficiary, without more, was insufficient to subject him or her to personal jurisdiction in Ohio.[17] Retroactive application of this section would prejudice the rights of the Koons Beneficiaries by purportedly creating personal jurisdiction where none existed before. Thus, by remaining parties to the litigation and being required to defend the case at hand, the Koons Beneficiaries and their assets are now exposed to potentially substantial personal liability. Remaining a party to the litigation prejudices the beneficiaries' personal rights and their property rights.

PROPOSITION # 4: Using the new OTC jurisdiction provision to retroactively find jurisdiction over out-of-state trust beneficiaries who were previously dismissed for lack of jurisdiction "affects an act done before the effective date of [the OTC]."

The OTC also states that the retroactive provisions must "not affect an act done before the effective date of those chapters."[18] Using the OTC's personal jurisdiction section to change

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[17] O.R.C. § 2307.382 (enumerating affirmative conduct required for a defendant to be reached by this long-arm statute); *Int'l Shoe Co. v. Washington* (1945), 326 U.S. 310; *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 474 (requiring purposeful establishment of sufficient minimum contacts); see also, (T.d. 182) (The trial court determined this court lacked personal jurisdiction over the Koons Beneficiaries, despite general allegations that they received distributions from trusts).

[18] O.R.C. § 5811.03(A)(5).

passive, innocuous pre-OTC "acts" (being a beneficiary and accepting distribution) to jurisdiction-submitting acts is specifically prohibited by the OTC. In simple terms, applying the OTC's personal jurisdiction provision retroactively not only affects, but completely alters the legal significance of these acts, all of which were done years before the effective date of the OTC.

PROPOSITION #5: Retroactive application of the OTC to create jurisdiction over out-of-state trust beneficiaries where none existed before is unconstitutional.

The OTC and its official comments readily recognize that in some circumstances, retroactive application would be unconstitutional. This reflects the general rule that a retroactive statute is unconstitutional, and therefore cannot be applied, if it alters property rights.[19]

The Ohio Constitution states: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."[20] As this Court held in *Rubermaid, Inc. v. Wayne Cty. Aud.*,[21] a retroactive statute is substantive and violates the state constitution if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations or liabilities as to a past transaction."

The United States Supreme Court has likewise established a deep-rooted presumption against retroactive legislation due to the effect it has on the rights of others.[22] In *Hughes Aircraft Co. v. U.S.*,[23] the Court specifically addressed this presumption in the context of jurisdictional statutes and unanimously provided the standard for when a jurisdictional statute cannot be

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[19] *Bielat v. Bielat* (2000), 87 Ohio St. 3d 350, 721 N.E.2d 28; *Hughes Aircraft Co. v. U.S.* (1997), 520 U.S. 939, 117 S.Ct. 1871.
[20] Ohio Const. Art. II § 28.
[21] 95 Ohio St.3d 358, 2002-Ohio-2338, 767 N.E.2d 1159.
[22] See e.g., *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 265, 114 S.Ct. 1483, 1497; *Hughes Aircraft Co. v. U.S.* (1997), 520 U.S. 939, 946, 117 S.Ct. 1871, 1876.
[23] 520 U.S. 939, 117 S.Ct. 1871. The same analysis applies to the retroactive application of a statute that concerns personal jurisdiction.

retroactively applied. The Court stated: "[The new statute at issue]...creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other."[24] Retroactive application of the jurisdictional statute in the instant case is also a statute that "confer[s] jurisdiction where before there was none."[25]

Applying the jurisdiction provision of the OTC retroactively to this case reveals that this provision is clearly substantive. Subjecting the Koons Beneficiaries to jurisdiction in Ohio to account for a past transaction where such jurisdiction did not previously exist, imposes new burdens, duties, obligations and potential liabilities upon the Koons Beneficiaries. Applying this statute would impermissibly impinge upon the substantive property rights of the Koons Beneficiaries and is therefore presumed unconstitutional under both U.S. and Ohio law.

In perhaps its most glaring omission, the Court of Appeals never even made mention of this important constitutional consideration. despite the fact that the practical effect upon the Koons Beneficiaries' is that their property rights may be changed. This change in the law, if applied, would subject the Koons and their property to claims that the Cundalls could not have asserted under the superseded law. Retroactively applying laws is something that cannot be taken lightly.

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[24] Id. at 951, 1878 (emphasis in original; citations omitted).

[25] *Republic of Austria v. Altmann* (2004), 541 U.S. 677, 721, 124 S.Ct. 2240, 2267 (Kennedy, J. dissenting, but specifically agreeing with majority opinion on the issue of retroactive application and citing *Hughes* at 951 with approval).

PROPOSITION # 6: The statute of limitations for unjust enrichment is six years, which begins to run on the date that the money or property was allegedly wrongfully retained. Any remedy for constructive trust that flows from unjust enrichment is unavailable when the underlying statute of limitations for unjust enrichment runs.

Statutes of limitations are put in place to ensure fairness to the defendant, encourage prompt prosecution of causes of action, suppress stale and fraudulent claims and avoid inconvenience engendered by delay.[26] The statute of limitations for unjust enrichment is six years[27] and has lapsed with respect to the claims of the Cross-Claimant Cundalls in this case because it began to run against them on the date that the money or property was allegedly wrongfully retained.[28]

The limitations period for any unjust enrichment claim by Cross-Claimants began to run in 1984 when the stock was sold back to CIC, and has long since lapsed.[29] Cross-Claimants were minors at the time of the stock sale, even if that fact tolled the statute of limitations until the Cross-Claimants were 18 years of age, the limitations period has still run. The youngest Cross-Claimant turned 18 in 1995, in which case, the six-year statute of limitations ran in 2001.[30]

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[26] *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727, 731.

[27] O.R.C. § 2305.07 ("An action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."). See also, *Ignash v. First Serv. Fed. Credit Union* (10 Dist.), unreported, Case No. 01AP-1326, 2002 WL 1938412, 2002-Ohio-4395.

[28] *LeCrone v. LeCrone* (10 Dist. 2004), unreported, Case No. 04AP-312, 2004 WL 2806387, 2004-Ohio-6526 (citations omitted).

[29] The same statute of limitations bans Plaintiff from pursuing his claim for unjust enrichment in Count Four of his Second Amended Complaint, which the Court of Appeals ordered the trial court to allow to be filed. See, Court of Appeals Opinion at 20.

[30] The Cross-Claimant Cundalls lack standing to bring the present action as their standing was based on their status as discretionary income beneficiaries of the Grandparents' Trust which status was extinguished when Bud died in March 2005, at which point their father, Plaintiff Cundall, became entitled to all the principal and income to which the Cross-Claimants could have had an interest (T.D. 60, pp. 40-41)

Any claim for relief of constructive trust is also barred by the statute of limitations. The statute of limitations for imposition of constructive trust as a claim for relief is four years under O.R.C. § 2305.09 and has lapsed. The limitations period for constructive trust begins to run from the time of the alleged unlawful transfer to the constructive trustee.[31] Since the stock was sold back to CIC in 1984, CIC became the constructive trustee of such stock and the limitations period for the constructive trust claim began to run on the date of the purchase and has long-since lapsed.

Furthermore, imposition of a constructive trust as a remedy for unjust enrichment is also time barred. The Supreme Court of Ohio held, "[i]f 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."[32] Thus, Appellees cannot recover by way of constructive trust because their claim for unjust enrichment is barred by the statute of limitations.

In the case at hand, the Court of Appeals refused to even consider the statute of limitations that applied to the unjust enrichment claims of the Cross-Claimant Cundalls against the Koons Beneficiaries.[33]

CONCLUSION

For the reasons discussed above, the case involves matters of public and great general interest and a substantial constitutional question. The Appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

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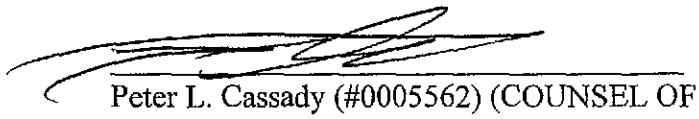
[31] See *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 297 N.E.2d 113; see also, *Veazie v. McGugin* (1883), 40 Ohio St. 365.

[32] *Peterson*, 34 Ohio St.2d at 172, 297 N.E.2d at 120.

[33] Though the trial court never reached the statute of limitations issue in dismissing the Koons Beneficiaries, this Court may affirm dismissal of the claims of the Cross-Cundalls for lack of subject matter jurisdiction, or other independent grounds found on the record. *Joyce v. General Motors Corp.* (1990), 49 Ohio St.3d 93, 96, 551 N.E.2d 172, 174.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy hereof has been served upon all counsel and parties of record, by ordinary U. S. Mail, this 8th day of February, 2008, as follows:

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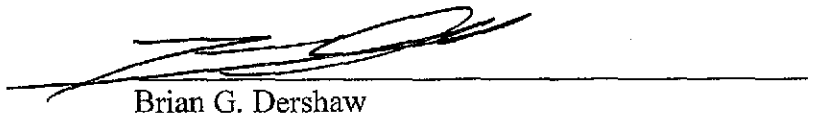

Brian G. Dershaw

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APPENDIX

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,	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.

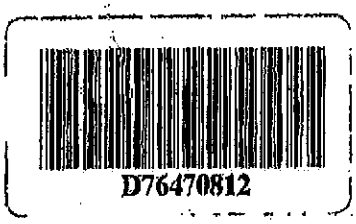
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

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



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

FILED
COURT OF APPEALS
DEC 28 2007
GREGORY HARTMANN
CLERK OF COURTS
HAMILTON COUNTY

MICHAEL K. CUNDALL, INDIVIDUALLY, and MICHAEL K. CUNDALL, SUCCESSOR TRUSTEE,	APPEAL NOS. C-070081 C-070082
	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,	PRESENTED TO THE CLERK OF COURTS FOR FILING DEC 28 2007 COURT OF APPEALS
Defendants-Appellees,	
PETER B. CUNDALL, et al.,	
Defendants,	
and	
MICHAEL K. CUNDALL, JR., COURTNEY FLETCHER CUNDALL, and HILLARY CUNDALL,	
Cross-Claimants/Defendants-Appellants.	

FILED
2007 DEC 28 A 8 06
GREGORY HARTMANN
CLERK OF COURTS
HAM. CNTY. OH

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, Firstar, 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. Borror 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.

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[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

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[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

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[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

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[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.

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[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 1386; *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]

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[21] *Birnbaum v. Birnbaum* (1986), 503 N.Y.S.2d 451, 117 A.D.2d 469, 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.

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[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

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[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.

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[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

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[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.

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[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.

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[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—

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[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]

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[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

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[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

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[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

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[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

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[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.

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[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.

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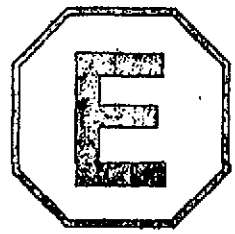


THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

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

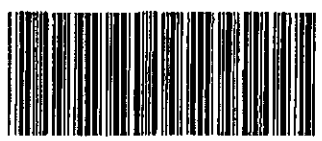
I. BACKGROUND

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. Borror 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

COURT OF COMMON PLEAS
ENTER
HON. ETHNA M. COOPER
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

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