

IN THE SUPREME COURT OF OHIO

MICHAEL K. CUNDALL, et al.,	:	On Appeal from the
	:	Hamilton County Court
	:	of Appeals, First
Plaintiffs,	:	Appellate District
	:	
v.	:	Court of Appeals
	:	Case Nos. C 070081
U.S. BANK, TRUST, et al.,	:	C 070082
	:	
Defendants.	:	08-0314

MEMORANDUM IN RESPONSE TO JURISDICTION
 OF APPELLEES MICHAEL CUNDALL, JR., COURTNEY FLETCHER CUNDALL
 and HILLARY CUNDALL

William H. Blessing (#006848) (COUNSEL OF RECORD)
 119 East Court Street, Suite 500
 Cincinnati, Ohio 45202
 Telephone: 513-621-9191
 Telecopier: 513-621-7086
 bill@blessing-attorneys.com

ATTORNEY FOR APPELLEES, MICHAEL CUNDALL, JR., COURTNEY
 FLETCHER CUNDALL, AND HILLARY CUNDALL

Peter L. Cassady (#0005562) (COUNSEL OF RECORD)
 Brian D. Dershaw (#0072589)
 Beckman Weil Shepardson LLC
 300 Pike Street, Suite 400
 Cincinnati, OH 45202
 Telephone: 513-621-2100
 Telecopier: 513-621-0106
 petercassady@beckman-weil.com

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ATTORNEYS FOR APPELLANTS DEBORAH KOONS GARCIA, JOHN F. KOONS,
 IV, JAMES B. KOONS, CAROLINE M. KOONS, KATHLEEN M. KOONS, JEREMY
 B. KOONS, AND MORGAN N. KOONS

Donald J. Mooney, Jr. (#0014292) (COUNSEL OF RECORD)
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202
Telephone: 513-698-5070
Telecopier: 513-698-5071
Dmooney@ulmer.com

ATTORNEY FOR APPELLANTS CHRISTINA N. KOONS, NICHOLAS KOONS
BAKER, AND CARSON NYE KOONS BAKER

James B. Helmer, Jr. (#0002878) (COUNSEL OF RECORD)
Julie W. Popham (#0059371)
Robert M. Rice (#0061803)
Erin M. Campbell (#0079083)
Helmer, Martins, Rice & Popham, Co. LPA
600 Vine Street, Suite 2704
Cincinnati, OH 45202
Telephone: 513-421-2400
Telecopier: 513-421-7902
jhelmer@fcalawfirm.com

ATTORNEYS FOR APPELLANTS RICHARD W. CAUDILL, EXECUTOR; KEVEN
E. SHELL, ANCILLARY ADMINISTRATOR; RICHARD W. CAUDILL, SUCCESSOR
TRUSTEE; KEVEN E. SHELL, SUCCESSOR TRUSTEE; WILLIAM P. MARTIN II,
SUCCESSOR TRUSTEE; D. SCOTT ELLIOTT, SUCCESSOR TRUSTEE; G. JACK
DONSON, JR., SUCCESSOR TRUSTEE; AND MICHAEL CAUDILL, SUCCESSOR
TRUSTEE

Wijdan Jreisat
Katz Teller Brant & Hild
255 E. Fifth Street, Suite 2400
Cincinnati, OH 45202
Telephone: 513-721-4532
Telecopier: 513-762-2100
wjreisat@katzteller.com

ATTORNEY FOR APPELLEES PETER B. CUNDALL, PETER B. CUNDALL, JR.,
KATIE MIKULA, SARA C. KERSTING, KYLE KERSTING, ALEX KERSTING,
AND JEFFREY KERSTING

Susan Grogan Faller (#0017777) (COUNSEL OF RECORD)
Frost Brown Todd LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, OH 45202
Telephone: 513-651-6941
Telecopier: 513-651-6981
sfaller@fbtlaw.com

ATTORNEY FOR APPELLEE U.S. BANK, PREDECESSOR TRUSTEE

Richard G. Ward (#0037613) (COUNSEL OF RECORD)
Drew & Ward Co., LPA
One West Fourth Street, Suite 2400
Cincinnati, OH 45202
Telephone: 513-621-8210
Telecopier: 513-621-5444
nward@drewlaw.com

ATTORNEY FOR APPELLEES MICHAEL CUNDALL, INDIVIDUALLY AND AS
SUCCESSOR TRUSTEE

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**STATEMENT AS TO WHY THIS IS NOT A CASE OF PUBLIC OR GREAT
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CONSTITUTIONAL QUESTION**

Plaintiff-Appellee Michael Cundall (“Michael”) filed his complaint in this action in his capacity as beneficiary and successor trustee of a trust.¹ This Statement is being filed on behalf of Michael’s children, Michael Cundall, Jr., Courtney Fletcher Cundall, and Hillary Cundall (“Cross-Claimants”).² Two groups of Defendant-Appellants have filed Memoranda in Support of Jurisdiction in this case: the Koons Beneficiaries³ and the Koons Estate/Trustees.⁴

A. The Koons Beneficiaries Memorandum.

The Koons Beneficiaries, who live outside of Ohio, take issue with the Court of Appeals decision that the trial court has personal jurisdiction over them to decide issues relating to their receipt of distributions from an Ohio-administered trust. They assert that the Court of Appeals decision raises important public and constitutional issues relating to the interpretation of the new Ohio Trust Code.⁵ They argue that the Court of Appeals retroactively applied the Code to impose personal jurisdiction over them and that this application was improper because Ohio courts would otherwise lack jurisdiction over them.

¹ Complaint, T.d. 2.

² The complaint named all current and contingent beneficiaries of the trust as defendants. Cross-Claimants were named defendants and filed an Answer and Cross-Claim. T.d. 124.

³ Memorandum in Support of Jurisdiction 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 (“Koons Beneficiaries Memorandum”).

⁴ Memorandum in Support of Jurisdiction of Defendant-Appellants Richard W. Caudill, Executor, Keven E. Shell, Ancillary Administrator, Richard W. Caudill, Successor Trustee, Keven E. Shell, Successor Trustee, William P. Martin II, Successor Trustee, D. Scott Elliott, Successor Trustee, G. Jack Donson, Jr. Successor Trustee, and Michael Caudill, Successor Trustee. (“Koons Estate/Trustee Memorandum”).

⁵ Koons Beneficiaries Memorandum, at 1-6.

The Court of Appeals did not rely on the Ohio Trust Code in finding that the trial court had jurisdiction over the Koons Beneficiaries. It applied well established Ohio and federal constitutional law to find that “a regular beneficiary of an Ohio-administered trust meets the requisite minimum contacts in Ohio to support personal jurisdiction under federal constitutional standards.”⁶

The Court of Appeals’ retroactive application of the Ohio Trust Code’s personal jurisdiction section to the Koons Beneficiaries as a secondary basis for imposing jurisdiction over them rests upon its finding that they would be subject to the personal jurisdiction of Ohio courts under existing law and therefore would not be prejudiced by a retroactive application of the Code.⁷ This decision does not create jurisdiction where none existed before, but merely recognizes the Ohio Trust Code’s codification of long standing common law principles. The decision therefore raises no issues of general public or constitutional interest.

The Koons Beneficiaries also argue that Court of Appeals decision regarding the statute of limitations applicable to the Cundalls’ constructive trust remedy was in error.⁸ They argue that separate statute of limitations accrual dates apply to the Cundalls’ claim

⁶*Cundall v. US Bank*, 1st Dist. Nos. C-070081, 82, 2007-Ohio-7067 at ¶76. The Court of Appeals relied on the following authority: R.C. §2307(A) and Civ. R. 4.3 (cited at ¶71); *Asahi Metals Indus. Co. v. Superior Court* (1987), 480 U.S. 102, 108-09, 107 S. Ct. 1026 (cited at ¶77); *Mullane v. Central Hanover Bank & Trust Co.*(1950), 339 U.S. 306, 70 S. Ct. 652 (cited at ¶73); *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S. Ct. 154 (cited at ¶74); *Goldstein v. Christensen*, 70 Ohio St. 3d 232, 235, 1994-Ohio-229, 638 N.E.2d 541 (cited at ¶71); *United States Sprint Communication Co. Partnership v. Mr. K’s Foods* (1994), 68 Ohio St.3d 181, 185, 1994-Ohio-504, 624 N.E.2d 1048 (cited at ¶71); *Kentucky Oaks Mall Co. v. Mitchell’s Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477 (cited at ¶71).

⁷ *Cundall*, 2007-Ohio-7067 at ¶69, citing R.C. 5802.02.

⁸ Koons Beneficiaries Memorandum, at 14-15. The Koons Estate/Trustees also make this argument in their Memorandum, at 13-15.

that the trustee tortiously breached his fiduciary duty and to the constructive trust remedy they seek to impose upon those unjustly enriched by his tortious actions. In effect, they argue that the remedy expired before the cause of action expired. The Court of Appeals decision raises no issues of general public interest because it is in accord with existing Ohio law that a constructive trust is an equitable remedy and that statutes of limitations are determined by the cause of action rather than by the form of remedy.

B. The Koons Estate/Trustees Memorandum

The trial court dismissed the Cundalls' case primarily because they had not tendered back the money they had received from a stock transaction in 1984.⁹ The Koons Estate/Trustees argue that existing Ohio law required this tender.¹⁰ They assert that the Court of Appeals' decision declining to require a tender when a trustee has allegedly breached its duty by self-dealing presents a case of public and general interest "because, under the First District's ruling, no one is bound by an agreement to release their fiduciary" and the case "impacts all trustees, joint venturers, majority and controlling shareholders, directors, agents, partners, attorneys, and all other fiduciaries."¹¹

The First District's decision was limited to whether tender would be required to challenge a release of the trustee of an express trust who has engaged in an alleged breach of fiduciary duty by self-dealing.¹² The Court of Appeals noted: "We have found no Ohio cases -- or any cases from *anywhere* -- directly on point on the tender issue, probably

⁹ *Cundall*, 2007-Ohio-7067 at ¶20.

¹⁰ Koons Estate/Trustee Memorandum, at 1-5, citing *Haller v. Borrer Corporation* (1990), 50 Ohio St.3d 10, 552 N.E.2d 207.

¹¹ Koons Estate/Trustee Memorandum, at 1; See *Cundall*, 2007-Ohio-7076 at 25.

¹² *Cundall*, 2007-Ohio-7067 at ¶19- ¶40.

because no one has been clever or audacious enough to propose such a theory.”¹³ The decision does not address and therefore does not conflict with cases involving the other types of fiduciary relationships cited by the Koons Estate/Trustees and accordingly does not present any issues of great general interest. The decision also comports with the rule under Ohio law that if there is no question that at least the amount originally paid upon the execution of a release is owed, there is no reason to require repayment of the original amount when the release is challenged and an additional amount is sought.

STATEMENT OF THE CASE AND FACTS

In 1976 John F. Koons, Sr. and Ethel Bolan Koons set up a trust (the “Grandparents Trust”) for the benefit of their two children, John F. Koons III (“Bud”) and Betty Lou Cundall.¹⁴ They deposited 6,309 shares of their closely-held business, Central Investment Corporation (“CIC”), into the Trust and directed that one-half of those shares should be held in Fund A for the benefit of Bud and his children and grandchildren (who include the Koons Beneficiaries and the beneficiaries of the trusts held by the Koons Trustees), and the other half should be held in Fund B for the benefit of Betty Lou Cundall and her children and grandchildren (the “Cundall Beneficiaries”). Bud was trustee of the Grandparents Trust until his death on March 3, 2005.¹⁵

¹³ *Cundall*, 2007-Ohio-7067 at ¶24.

¹⁴ Cross Claim, T.d. 124, at ¶6.

¹⁵ Cross Claim, T.d. 124, at ¶6. In its opinion, the Court of Appeals stated that Michael had alleged that Bud had approached him and his siblings and “told them that he would stop distributing dividends and that the CIC shares would be worth nothing if they did not sell” and “Bud had the unfettered power to distribute income or principal as he saw fit.” The court noted also that this \$210 purchase price was \$118 less per share than what another shareholder, Lloyd Miller, had received for his shares. *Cundall*, 2007-Ohio-7067 at ¶6.

In 1984, when he was CEO and majority shareholder of CIC as well as the trustee of the Grandparents Trust, Bud sold all of the Fund B CIC shares back to CIC for \$210/share and also forced other Cundall family members to sell all of their CIC shares back to CIC for the same price.¹⁶ U. S. Bank, as Trustee of the Betty Lou Cundall Trust dated August 10, 1977, for the benefit of the Cundall Beneficiaries (the “1977 Cundall Trust”), also sold CIC shares held by the 1977 Cundall Trust back to CIC for this price.¹⁷ No court approval of the sale was sought or obtained; the price paid was for less than the fair value of the stock; Bud used fraud, duress and undue influence to obtain the Cundall family’s consent to the sale; the sale violated a material purpose of the Grandparents Trust to hold the CIC shares for the benefit of Betty Lou Cundall’s family until the death of the last to die of Betty Lou and her brother Bud; and Bud and the other Koons family members, including the Koons Beneficiaries, were unjustly enriched by the sale by reason of the corresponding increase in the value of their CIC shares.¹⁸

As beneficiaries of Fund A and of the other Ohio trusts subsequently established for their benefit, the Koons Beneficiaries have had substantial contacts with the State of Ohio, including receiving disbursements from these trusts and dividends from CIC, engaging Ohio accountants, filing Ohio tax returns, and engaging in business transactions with financial institutions within the State of Ohio.¹⁹

¹⁶ Cross Claim, T.d. 124, at ¶7.

¹⁷ Id.

¹⁸ Cross Claim, T.d. 124, at ¶7.

¹⁹ Second Amended Complaint, T.d. 156, at ¶i-xi. Michael filed a Motion for Leave to file a Second Amended Complaint, which was denied by the trial court. The trial court’s denial was reversed by the Court of Appeals, which held that on remand the trial court should allow the Second Amended Complaint. *Cundall*, 2007-Ohio-7067 at ¶64.

Cross-Claimants are Cundall Beneficiaries who were minors at the time of the sale.²⁰ They did not have guardians ad litem appointed for them and were otherwise unrepresented.²¹ In January, 2005, all of the outstanding shares of CIC stock, including the shares held in Fund A, were sold to PepsiAmericas, Inc.²²

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The Court of Appeals decision regarding the personal jurisdiction of Ohio courts over the Koons Beneficiaries regarding issues relating to their receipt of distributions from an Ohio-administered trust does not present issues of public or general interest or involve a substantial constitutional question.

In holding that the Koons Beneficiaries were subject to the jurisdiction of the Ohio trial court, the Court of Appeals relied on the provision of Ohio's long arm statute granting jurisdiction when a person "[transacts] any business in this state."²³ The court ruled: "A regular beneficiary of an Ohio-administered trust meets the requisite minimum contacts in Ohio to support personal jurisdiction under federal constitutional standards."²⁴ In adopting this proposition of law, the court reasoned that "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 systemic nature such that maintenance of this suit in Ohio does not offend traditional notions of fair play and substantial justice."²⁵

²⁰ Cross Claim, T.d. 124, at Preamble.

²¹ Id.

²² Cross Claim, T.d. 124, at ¶8. As the Court of Appeals recognized in its Opinion, PepsiAmericas bought CIC for approximately \$340 million. At the time of Bud's death in 2005, the Cundall Trust was valued at \$536,431. *Cundall*, 2007-Ohio-7067 at ¶8, ¶10.

²³ R.C. 2307.382(A)(1). *Cundall*, 2007-Ohio-7067 at ¶71.

²⁴ *Cundall*, 2007-Ohio-7067 at ¶76.

²⁵ *Cundall*, 2007-Ohio-7067 at ¶76.

The court reasoned further that under the “reasonableness” inquiry mandated under *Asahi Metals Indus. Co. v. Superior Court*,²⁶ “the interstate judicial system’s interest in obtaining the most efficient resolution of the controversy weighs heavily against the Koons’ 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 possible remedy.”²⁷

The Koons Beneficiaries argue that the Court of Appeals ruling 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,’” citing only *Hoover v. Society Bank of Eastern Ohio N.A.*²⁸ In *Hoover*, the court held that two officers of two corporate trustees were not subject to the personal jurisdiction of an Ohio court where the plaintiffs had not presented any evidence of the officers’ Ohio contacts or activities. The court held, however, that the Ohio court had personal jurisdiction over Caddey, the individual out-of-state trustee, because “the fact that the corporate trustee was an Ohio corporation located in Canton, Ohio and that the trust was established in Ohio indicates that Caddey would have been on notice that he

²⁶ (1987) 480 U.S. 102, 108-09, 107 S.Ct. 1026.

²⁷ *Cundall*, 2007-Ohio-7067 at ¶78. The court’s reasoning is also consistent with well-established Ohio common law principles recognizing the inherent authority of a court to impose a constructive trust remedy that will apply not only to trust assets that happen to remain in this state but also to all out of state trust assets that were distributed from the Ohio trust. See *Ferguson v. Owens* (1994), 9 Ohio St.3d 223, 225, 459 N.E.2d 1293; *Soeder v. Burton* (Dec. 2, 1988), 11th Dist. No. 1361, 1988 Ohio App. LEXIS 4759.

²⁸ Koons Beneficiaries Memorandum, at 8, citing *Hoover v. Society Bank of Eastern Ohio N.A.* (April 2, 1991), S. Dist. No. 5:90 CV 1245, 1991 U.S. Dist. LEXIS 19073, at *36.

might be hailed into court in Ohio and suggests that an assertion of in personum jurisdiction by this court over defendant Caddey is constitutionally permissible.”²⁹

The Court of Appeals ruling in this case is entirely consistent with *Hoover*. The fact that the Grandparents Trust and the other Ohio trusts established for the benefit of the Koons Beneficiaries from the distributions from the Grandparents Trust are Ohio trusts formed by Ohio grantors; some of the trustees are Ohio trustees located in or residing in Ohio; and CIC is an Ohio corporation indicates that the Koons Beneficiaries would have been on notice that they might be hailed into court in Ohio and suggests that an assertion of in personum jurisdiction by Ohio courts over them is constitutionally permissible.

Proposition of Law No. 2: The Court of Appeals decision regarding the personal jurisdiction of Ohio courts over the Koons Beneficiaries regarding issues relating to their receipt of distributions from an Ohio-administered trust correctly interpreted the Ohio Trust Code and does not present issues of public or general interest or involve a substantial constitutional question.

Section 5802.02(B) of the Ohio Trust Code provides for Ohio court jurisdiction over the Koons Beneficiaries. While it did not rely on the Ohio Trust Code in deciding that the trial court had personal jurisdiction over the Koons Beneficiaries,³⁰ the court stated that R.C. 5811.03, which describes the retroactive applicability of R.C. 5802.02, provides that 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.”³¹ The court stated that retroactive application of the Code would not substantially interfere with the judicial proceedings

²⁹ *Hoover*, 1991 U.S. Dist. LEXIS 19073, at *40.

³⁰ *Cundall*, 2007-Ohio-7067 at ¶69 - ¶80.

³¹ *Cundall*, 2007-Ohio-7067 at ¶67.

because the case is in its infancy, little, if any discovery has been conducted, and the rights of the parties would not be prejudiced because Ohio courts could have taken jurisdiction over the Koons Beneficiaries even without the statute.³²

The Koons Beneficiaries argue that retroactive application of the statute “would prejudice the rights of the Koons Beneficiaries by purportedly creating personal jurisdiction where none existed before.”³³ Their argument ignores the court’s explicit statement that personal jurisdiction exists independent of the statute. Moreover, the Code is only one of the two bases for the Court’s decision that Ohio courts have jurisdiction over the Koons Beneficiaries. Accordingly, this case does not involve any issues of public or great general interest or substantial constitutional questions relating to the retroactive application of the Ohio Trust Code.

Proposition of Law No. 3: The Court of Appeals’ recognition that a constructive trust is a remedy and that a statute of limitations is to be determined by the cause of action rather than by the remedy is in accord with Ohio law. The court’s ruling supports Ohio’s existing policy of providing a remedy for a continuing breach of fiduciary duty by a trustee.

The Court of Appeals stated that “[t]he statute of limitations for tortious breach of trust begins to run when the trustee ceases to serve as trustee.”³⁴ It held that the four-year

³² *Cundall*, 2007-Ohio-7067 at ¶68-¶69.

³³ Koons Beneficiaries Memorandum, at 11 (Proposition #3). The Koons Beneficiaries make a similar argument in Proposition #5, at 12-13. They also argue in Proposition # 4 that retroactive application of the Code would “affect[] an act done before the effective date of [the OTC]” in violation of R.C. 5811.03(A)(5). (Koons Beneficiaries Memorandum, at 11-12). This argument once again presupposes that no personal jurisdiction exists without retroactive application of the Ohio Trust Code. The Court of Appeals noted that R.C. 5811.03(A)(5) did not even apply to the issue of jurisdiction in this case. *Cundall*, 2007-Ohio-7067 at ¶67.

³⁴ *Cundall*, 2007-Ohio-7067 at ¶60, citing *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675; *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. 03AP-1114, 2004-Ohio-3484, at ¶29; *Hosterman v. First Nat’l. Bank & Trust Co.* (1946), 79 Ohio App. 37, 38, 68 N.E.2d 325.

statute of limitations began running when Bud ceased to be trustee at his death in 2005.³⁵ The court rejected the Koons' argument that the statute of limitations for a constructive trust began to run on the date of the initial transfer in 1984, reasoning that statutes of limitations attach to causes of action and a constructive trust is a remedy that corrects unjust enrichment: "When a person owns legal title to property, but equity recognizes 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."³⁶ Under the Court of Appeal's reasoning, if the Cundalls are able to prove that Bud wrongfully acquired the CIC stock and that his descendents are now the legal owners of property that rightfully belongs to the Cundalls, a constructive trust would be appropriate.³⁷

In an attempt to separate the constructive trust remedy the Cundalls seek to impose upon those unjustly enriched by Bud's breach of trust from the Cundalls' tortious breach of trust claims against him, the Koons argue that the limitations period for a constructive trust begins to run from the time of the "alleged unlawful transfer to the constructive trustee"³⁸ and "imposition of a constructive trust as a remedy for unjust enrichment is also time barred."³⁹ They assert that the statute began running in 1984, or at the latest, 2001, when the youngest Cundall turned eighteen.⁴⁰

³⁵ *Cundall*, 2007-Ohio-7067 at ¶61.

³⁶ *Cundall*, 2007-Ohio-7067 at ¶84-¶85.

³⁷ *Cundall*, 2007-Ohio-7067 at ¶86.

³⁸ Koons Beneficiaries Memorandum, at 15, citing *Peterson v. Teodosio* (1973) 34 Ohio St.2d 161, 297 N.E. 2d 113, which actually held that: "In Ohio, statutes of limitation attach to causes of action and not to the remedial form in which the action is brought." *Id.* at 172.

³⁹ Koons Beneficiaries Memorandum, at 15. See Koons Estate/Trustee Memorandum, at 13.

⁴⁰ Koons Beneficiaries Memorandum, at 14-15.

Their argument is not in accord with Ohio law. Under Ohio law, “[a] constructive trust is an equitable remedy imposed to prevent fraud or unjust enrichment.”⁴¹ “[T]he statute of limitations is determined by the cause of action rather than by the form of remedy.”⁴² In *Bergholtz Coal Holding Company v. Dunning*, the court held that even though the remedy for the plaintiff rested on the equitable creation of a resulting trust, the twenty-one year statute of limitations for actions to quiet title rather than the ten year statute of limitations for equitable actions governed.⁴³

The Koons’ reasoning also subverts the rationale for the rule providing that claims against trustees do not accrue until termination of the trusteeship.⁴⁴ The rationale for delaying the accrual date is founded on the assumption that the “beneficiary has far less reason to know of any breach, and any deleterious consequences thereof, during the administration of the trust than he does after the trust has terminated and the trust res has been surrendered to him.”⁴⁵ If claims against a trustee do not accrue until termination of his trusteeship, the equitable means for reversing the trustee’s unlawful transfers of property should also not accrue until that date.

⁴¹ *Brate v. Hurt*, 12th Dist. Nos. CA2006-11-139, CA2007-01-007, 2007-Ohio- 6571, at ¶26. See *Glick v. Dolin*, (1992) 80 Ohio App. 3d 592, 609 N.E.2d 1338.

⁴² *Bergholtz Coal Holding Company v. Dunning*, 11th Dist. No. 2004-L-209, 2006-Ohio-3401. See *Peterson*, 34 Ohio St.2d at 172. The case cited by the Koons Estate/Trustees in support of their argument, *Ruple v. Hiram College*, (1928) 35 Ohio App. 8, 171 N.E. 417, found that the only possible trust relationship between the parties would have been a constructive trust relationship. The *Ruple* court’s statements about the applicable statute of limitations, therefore, were made in the context of claims made in the absence of an express trust.

⁴³ *Bergholtz Coal Holding Company*, 2006-Ohio-3401 at ¶42- ¶43. See also *Barthelmas v. Barthelmas* (January 7, 1999), 4th Dist. No. 97 CA 48, 1999 Ohio App. LEXIS 68 (reversing trial court’s granting of summary judgment on statute of limitation grounds where plaintiff sought to impose constructive trust on trust proceeds 27 years after trustee allegedly breached fiduciary duty).

⁴⁴ *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675

⁴⁵ *Cassner*, 2004-Ohio-3484, at ¶38.

Under the rule advocated by the Koons, any wrongful transfers of property made by a trustee during the term of a trusteeship would not be recoverable after four years, regardless of whether the trustee continued to act as trustee, as Bud did during the entire 21 period from the 1984 transfer until his death in 2005.

Proposition of Law No. 4: The Court of Appeals decision regarding the inapplicability of the tender rule to this case is based on the unique relationship between the trustee of an express trust and his beneficiaries and the trustee's duty to refrain from self-dealing. The decision does not apply to releases obtained by other fiduciaries and is consistent with the rule that tender is not required if at least the amount paid is owed.

In *Haller v. Borrer Corporation*,⁴⁶ the court held that if a release obtained in the course of the settlement of intentional tort claims against a former employer is procured by fraud in the factum, the release is void and tender is not required, but if it is procured by fraud in the inducement, the release is voidable and the party is required to tender any consideration received in return for the release before filing suit. The Court of Appeals held that the differentiation of types of fraud in *Haller* did not apply here because *Haller* was a personal injury case involving an arms-length transaction where there was no fiduciary relationship between the parties.⁴⁷ The court declined to create a tender requirement "when a fiduciary has allegedly breached its duty by self-dealing."⁴⁸

The Koons Estate/Trustees argue that the Court of Appeals ruling is inconsistent with *Haller* and with rulings from the Eighth and Fourth Districts applying the tender rule to cases involving suits by minority shareholders who had entered into settlement

⁴⁶ (1990), 50 Ohio St. 3d 10, 552 N.E.2d 207

⁴⁷ *Cundall*, 2007-Ohio-7067 at ¶21- ¶22.

⁴⁸ *Cundall*, 2007-Ohio-7067 at ¶25.

agreements with majority shareholders.⁴⁹ They also cite cases from other jurisdictions involving law partners and joint venturers.⁵⁰

The Court of Appeals based its decision, however, on its views regarding the unique duty owed by a trustee to the beneficiaries of a trust: “Self-dealing – when trustees use the trust property for their own personal benefit – is considered ‘particularly egregious behavior.’ And any direct dealings between a trustee and a beneficiary are ‘viewed with suspicion.’”⁵¹ The court reasoned that a trustee has a duty of loyalty arising from the trustee-beneficiary relationship, and that the duty of loyalty requires a trustee who has a personal stake in a transaction to adhere to a particularly high standard of behavior.⁵² The court noted that “when a fiduciary – or an entity connected with a fiduciary – ends up with property originally in the trust, bells ring and sirens wail.”⁵³

Given the narrow basis for the court’s decision, there is no reason why the decision should conflict with the decisions of the Eighth and Fourth Districts or be extended, as the Koons Estate/Trustees suggest, to “joint venturers, majority and controlling shareholders, directors, agents, partners, attorneys, and all other fiduciaries.”⁵⁴

⁴⁹ Koons Estate/Trustee Memorandum, at 5-9, citing *Weisman v. Blaushild*, 8th Dist. No. 88815, 2008-Ohio-219; *Lewis v. Mathes* 4th Dist., 161 Ohio App.3d 1, 2005-Ohio-1975.

⁵⁰ Koons Estate/Trustee Memorandum, at 9. The Koons Estate/Trustees’ assumption that the court’s narrow holding may be applied to all fiduciary relationships is analogous to the assumption made by the trial court in *Cassner* 2004-Ohio-3484, at ¶43, where the trial court applied the cause-of-action accrual date applicable to ordinary non-trust-related breaches of fiduciary duty to a breach of fiduciary claim against a trustee. In reversing the trial court, the Court of Appeals recognized that causes of action against trustees are unique.

⁵¹ *Cundall*, 2007-Ohio-7067 at ¶32 (citations omitted).

⁵² *Cundall*, 2007-Ohio-7067 at ¶26.

⁵³ *Cundall*, 2007-Ohio-7067 at ¶31.

⁵⁴ Koons Estate/Trustee Memorandum, at 1. In a related argument, the Koons Estate/Trustees argue in their Proposition of Law No. 2 that the Court of Appeals erred in stating that a presumption of fraud applied to the trustee’s self-dealing. Koons

The Court of Appeals decision is also consistent with the rule under Ohio law that if there is no question that at least the amount originally paid upon the execution of a release is owed, there is no reason to require repayment of the original amount when the release is challenged and an additional amount is sought.⁵⁵ There can be no question that the Cundalls are owed at least the amount they received from the stock sale in 1984. The Koons are not arguing that the CIC stock was worth less than the amount the Cundalls were paid. Ohio law does not compel them to repay this amount before challenging the release and seeking an additional amount.

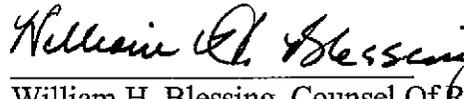
CONCLUSION

The Court of Appeals decision does not present issues of general public interest because it is consistent with existing Ohio law. Cross-Claimants respectfully request that the Court deny jurisdiction.

Estate/Trustees Memorandum, at 9-10. The Court of Appeals decision is consistent with Ohio law, which provides that self-dealing transactions by a fiduciary are presumed to be invalid. *Rudloff v. Efstathiadis Fletcher*, 11th Dist. No. 2002-T-0119, 2003 Ohio 6686, at ¶10; *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, at ¶30; *Trust of Broh-Kahn v. Broh-Kahn* (March 24, 1988), 8th Dist. No. 53606, 1988 Ohio App. LEXIS 1088; See *Yost v. Wood* (July 11, 1988), 5th Dist. No. 7357, 1988 Ohio App. LEXIS 2791, *8 (“Constructive fraud often exists where the parties to a contract have a special confidential or fiduciary relation which gives one the opportunity to take undue advantage of or exercise undue influence over another.”)

⁵⁵ *In Re Gray's Estate* (1954), 162 Ohio St. 384, 123 N.E.2d 408 (holding that successor fiduciary was not required to tender back the amount received from surety before pursuing its remedies because there was no dispute that at least the amount previously paid was due); *Hoppel v. Hoppel* (June 6, 1990), 7th Dist. No. 88-C-59, 1990 Ohio App. LEXIS 2246, *4-*5 (holding that where the plaintiff had previously obtained a payment and was entitled to it irrespective of the validity of the settlement, there was no reason why the plaintiff should be compelled to repay the payment to the defendant when requesting recession of the settlement.)

Respectfully submitted,



William H. Blessing, Counsel Of Record
ATTORNEY FOR APPELLEES,
MICHAEL CUNDALL, JR., COURTNEY
FLETCHER CUNDALL, AND HILLARY
CUNDALL

Certificate of Service

I certify that a copy of this Memorandum in Response to Jurisdiction was sent by ordinary U.S. mail to

Peter L. Cassady
Brian D. Dershaw
Beckman Weil Shepardson LLC
300 Pike Street, Suite 400
Cincinnati, OH 45202

Donald J. Mooney, Jr.
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202

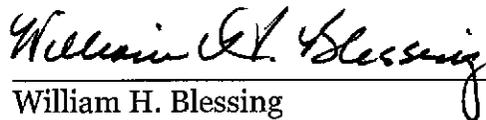
James B. Helmer, Jr.
Julie W. Popham
Robert M. Rice
Erin M. Campbell
Helmer, Martins, Rice & Popham
600 Vine Street, Suite 2704
Cincinnati, OH 45202

Wijdan Jreisat
Katz Teller Brant & Hild
255 E. Fifth Street, Suite 2400
Cincinnati, OH 45202

Susan Grogan Faller
Frost Brown Todd LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

Richard G. Ward
Drew & Ward Co., LPA
One W. Fourth Street, Suite 2400
Cincinnati, OH 45202

On March 7, 2008.


William H. Blessing

ATTORNEY FOR APPELLEES,
MICHAEL CUNDALL, JR., COURTNEY
FLETCHER CUNDALL, AND HILLARY
CUNDALL