

IN THE SUPREME COURT OF OHIO

MICHAEL K. CUNDALL, et al.

Plaintiffs

v.

U.S. BANK, TRUSTEE, et al.

Defendants

Case No. 08-0314

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

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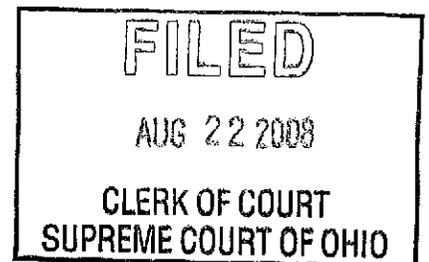
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## I. STATEMENT OF FACTS

Defendant/Appellants for this Merit Brief are three of the four children and five of the seven grandchildren of John F. Koons, III (“JFK”) (JFK’s children and grandchildren are collectively referred to as the “Koons Beneficiaries”).<sup>1</sup> 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.<sup>2</sup> These claims have been asserted against the Koons Beneficiaries because the Cundalls believe that the Koons’ assets are somehow tied to this decades-old transaction.<sup>3</sup>

In the early 1980’s, Plaintiff Cundall was a beneficiary and the Cross-Claimant Cundalls were discretionary income and contingent corpus beneficiaries of a trust established by Plaintiff Cundall’s grandparents/JFK’s parents (the “Grandparents’ Trust”).<sup>4</sup> The Grandparents’ Trust was separated into two portions: Fund A for the Koons Beneficiaries and Fund B for the Cundalls.<sup>5</sup> JFK was trustee of both funds.<sup>6</sup>

Fund B’s sole asset was shares of the family-controlled corporation, CIC.<sup>7</sup> In 1984, CIC purchased these shares as well as some shares owned by other Cundalls, trusts, and minority

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<sup>1</sup> JFK’s other child and two grandchildren are separately represented in this action. The interests of the Koons Beneficiaries represented by the undersigned are aligned and not in conflict with the interests of the Washington State Koons Beneficiaries that are represented by Ulmer and Berne in this action.

<sup>2</sup> Supp. 1-58, (T.d. 60). All references to the Supplement refer to the joint supplement submitted by these Defendants/Appellants and Defendants/Appellants Richard W. Caudill et al.

<sup>3</sup> Supp. 8, (T.d. 60, p. 8), Supp. 170, (T.d. 124, p. 8), Supp. 228-229.

<sup>4</sup> Supp. 7, 40-41, (T.d. 60, pp. 7, 40-41), Supp. 139 (T.d. 98, p. 3).

<sup>5</sup> Id.

<sup>6</sup> Supp. 37, (T.d. 60, p. 37), Supp. 139, (T.d. 98, p. 3), Supp. 169 (T.d. 124, p. 7).

<sup>7</sup> Supp. 169, (T.d. 124, p. 7).

shareholders.<sup>8</sup> With the full participation of counsel, Plaintiff Cundall executed “releases and/or consents” on his own behalf and on behalf of the then-minor Cross-Claimant Cundalls, waiving any potential conflict or other claim arising out of the transaction.<sup>9</sup>

JFK and the Koons Beneficiaries had some interest in CIC when it was sold to PepsiAmericas, Inc. in January 2005 for more than \$300 million.<sup>10</sup> Two months later, JFK died, ending his Trusteeship of Fund B (he had previously resigned as Trustee of Fund A).<sup>11</sup> JFK’s death also triggered the provision in the Grandparents’ Trust to terminate and wind up the affairs of the trust.<sup>12</sup> Plaintiff Cundall was appointed as Successor Trustee to JFK of Fund B in order to administer this process.<sup>13</sup>

The claim against the Koons Beneficiaries is essentially for unjust enrichment arising from an alleged unlawful transfer of the stock. As a result, the Cundalls seek to impose a constructive trust against the Koons Beneficiaries’ assets, wherever located. The factual heart of the Cundalls’ claim is that CIC’s February 1984 purchase of the Fund B shares of CIC stock was an “unlawful transfer.” The Cundalls now request this Court to impose a constructive trust over those shares, but they have enormous problems that they cannot overcome.

First, aside from not tendering back the consideration that they received for signing the complete release,<sup>14</sup> the Cundalls lack jurisdiction over the Koons beneficiaries. Not one of the Koons Beneficiaries is an Ohio resident, and none of them have contacts with this state that

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<sup>8</sup> Supp. 7, (T.d. 60, p. 7); Supp. 59-73 (Fund B actually owned shares of a holding company, KCM, which owned the CIC shares).

<sup>9</sup> Supp. 74-83, (Ex. B to T.d. 83); Supp. 7, (T.d. 60, p. 7); Supp. 149, (T.d. 98, p. 13); Supp. 217-226, (T.d. 135, pp. 3-4, 14); Supp. 170, (T.d. 124, p. 8).

<sup>10</sup> Supp. 8, (T.d. 60, p. 8); Supp. 170, (T.d. 124, p. 8).

<sup>11</sup> Supp. 9, (T.d. 60, p. 9).

<sup>12</sup> Supp. 40, (T.d. 60, p. 40).

<sup>13</sup> Supp. 9, (T.d. 60, p. 9).

<sup>14</sup> See Merit Brief of the Successor Trustees and Personal Representatives.

justify personal jurisdiction.<sup>15</sup> Further, not one pleading filed with the court by Plaintiff Cundall or the Cross-Claimant Cundalls provided facts to suggest such jurisdiction.<sup>16</sup> The imposition of the new Ohio Trust Code, effective January 1, 2007, including its retroactive jurisdiction provision, cannot overcome the Cundalls' jurisdictional deficiencies.

Second, the Cundalls' claims are barred by the relevant statute of limitations for unjust enrichment and constructive trust. Despite having the requisite knowledge of the allegedly improper transaction at the time it occurred,<sup>17</sup> the Cundalls waited 22 years to pursue this action against a variety of parties against whom they do not have a scintilla of evidence connecting them to the "unlawful transfer" of CIC shares.

The Koons Beneficiaries filed their Motion to Dismiss with the trial court in June of 2006<sup>18</sup> and the briefing and arguments were concluded later that year. The OTC took effect on January 1, 2007 and Judge Cooper granted the Motion to Dismiss on January 5, 2007.<sup>19</sup> 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.<sup>20</sup> The Cundalls appealed that decision.

The Court of Appeals incorrectly 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.<sup>21</sup> The Court of Appeals further held that even applying pre-OTC law, there were grounds for jurisdiction against the beneficiaries, though it

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<sup>15</sup> Appx. 37, (T.d. 182, p. 9); (T.d. 77, p. 7-10); see also, Supp. 1-58, (T.d. 60).

<sup>16</sup> See e.g., Supp. 1-58, (T.d. 60); Supp. 167-74 (T.d. 124, pp. 5-11); (T.d. 2); (T.d. 156, pp. 4-74) (The Proposed Second Amended Complaint was filed after all briefs were filed and oral arguments heard in the Trial Court).

<sup>17</sup> Supp. 6-7, (T.d. 60, pp. 6-7); Supp. 59-73 (Ex. A to T.d. 83); Supp. 86-87 (T.d. 74).

<sup>18</sup> (T.d. 77).

<sup>19</sup> Appx. 29, (T.d. 182).

<sup>20</sup> Id.

<sup>21</sup> Appx. 24-25, 27, *Cundall v. U.S. Bank* (1 Dist.), 174 Ohio App.3d 421, 440-41, 444-45, 882 N.E.2d 481, 495, 498, 2007-Ohio-7067, ¶¶ 65-69, 81-82.

failed to support this assertion.<sup>22</sup> It 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.”<sup>23</sup> In addition, the court completely ignored the constitutional analysis that is required before retroactively applying the OTC.<sup>24</sup> Further, the Court of Appeals refused to dismiss the claims against the Koons Beneficiaries despite the fact that the statutes of limitations for the claims had long-since run.<sup>25</sup>

The Cundalls have not alleged any wrongdoing against the Koons Beneficiaries, and they have not identified any distribution, property, or benefit that the Koons Beneficiaries received as a result of the allegedly fraudulent 1984 stock purchase.<sup>26</sup> Instead, with the benefit of hindsight, the Cundalls have brought the Koons Beneficiaries into court on a fishing expedition, in an attempt to reverse an informed decision that the Cundalls knowingly made decades ago. Their hope is to get a larger piece of the pie than they originally bargained for. The Koons Beneficiaries respectfully request that this Court affirm the trial court’s granting of the Defendants’ Motions to Dismiss.

## II. ARGUMENT

In addition to the arguments supporting the Propositions of Law offered by the other Defendant/Appellants in this case, these Defendant/Appellants offer the following arguments in support of their Propositions of Law.

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<sup>22</sup> Id. at ¶¶ 70-80.

<sup>23</sup> Id. at ¶ 67 .

<sup>24</sup> Id. at ¶¶65-82.

<sup>25</sup> Id. at ¶ 61.

<sup>26</sup> See generally Supp. 1-13 (T.d. 60), Supp. 167-173 (T.d. 124), (T.d. 77), (T.d. 135).

## **PROPOSITION OF LAW NO. I:**

**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.**

As the trial court correctly decided, it does not have personal jurisdiction over the Koons Beneficiaries as out-of-state beneficiaries of an Ohio Trust who did nothing more than passively receive distributions from that Trust.<sup>27</sup> The Cundalls have an end in mind—reaching all assets received by the Koons family in the sale to PepsiAmericas, regardless of the manner, ownership, place, and current physical location of the assets—but they skirt the means to get there. They have crafted their desired result, yet they ignore the jurisdictional details, hoping the court will do the same. What they end up with is an unconvincing, muddled mess.

Contrary to the Court of Appeals' conclusion, the Ohio Trust Code does not retroactively apply to this case and, thus, the court must apply pre-OTC law. Applying pre-OTC law fails because Ohio's long arm statute and Civil Rule 4.3(A) do not confer personal jurisdiction, and there are insufficient minimum contacts to constitutionally confer jurisdiction upon the Koons Beneficiaries. Both pre-OTC law and the law under the new OTC are discussed in turn.

### **A. INTERPRETING THIS CASE UNDER PRE-OTC LAW**

Personal jurisdiction cannot be assumed;<sup>28</sup> it is the foundation to justify the imposition of liability or obligations on one party in favor of another.<sup>29</sup> Therefore, when, as here, the Koons Beneficiaries are not residents of the state, this Court mandates:

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<sup>27</sup> Appx. 37.

<sup>28</sup> *Hoover v. Society Bank of Eastern Ohio N.A.* (N.D. Ohio Apr. 12, 1991), Case No. 5:90 CV 1245, 1991 U.S. Dist. LEXIS 19073, at \*36.

<sup>29</sup> *Hanson v. Denckla* (1958), 357 U.S. 235; see also Bogert's, *The Law of Trusts and Trustees* § 292 (stating that personal jurisdiction over a defendant is required before a court can impose a personal liability or obligation against that individual).

In determining whether a state court has personal jurisdiction over a [nonresident defendant], the court is obligated to engage in a two-step analysis. First, the court must 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.<sup>30</sup>

The Cundalls have the burden of demonstrating that a court has personal jurisdiction over the Koons Beneficiaries,<sup>31</sup> not only with respect to the Koons Beneficiaries' interests as beneficiaries of certain trusts, but also with respect to their individual interests in unidentified personal assets that the Cundalls seek to become part of a constructive trust.<sup>32</sup> They cannot meet this burden. Not one Koons Defendant is an Ohio resident, Ohio's long arm statute and Civil Rule 4.3(A) do not confer personal jurisdiction, and there are insufficient minimum contacts to constitutionally confer jurisdiction upon the Koons Beneficiaries. Additionally, due process considerations prevent the imposition of a constructive trust as does the court's lack of in rem jurisdiction over any assets owned by the Koons Beneficiaries and the Cundalls' lack of standing in this matter. Each of these prongs is discussed.

1. **Ohio's Long Arm Statute does not confer personal jurisdiction.**

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.<sup>33</sup> The statute lists the instances in

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<sup>30</sup> *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 185-85, 624 N.E.2d 1048, 1051, 1994-Ohio-504.

<sup>31</sup> *Jurko v. Jobs Europe Agency* (8 Dist. 1975), 43 Ohio App.2d 79, 86, 334 N.E.2d 478, 482 ("The Civil Rules provide...that an out-of-state defendant may move to quash service on the ground that he has less than minimal contacts with the forum state and to dismiss on lack of jurisdiction over his person"); *Key GMC Truck Sales, Inc. v. Newport National Bank* (Ohio App. 1 Dist. Mar. 5, 1980), unreported, Case No. C-780796, 1980 WL 352743.

<sup>32</sup> *Id.*

<sup>33</sup> Appx. 42, O.R.C. § 2307.382.

which jurisdiction is conferred.<sup>34</sup> Each instance requires some sort of active or affirmative conduct on the part of the defendant: transacting business, entering into a contract, causing an injury.<sup>35</sup> No such conduct exists that could avail the Koons Beneficiaries to the laws of Ohio.<sup>36</sup> Being a beneficiary of a trust is a passive event. It is a designation that happens to a beneficiary as a result of some other person's act. There is nothing purposeful that a beneficiary does in order to obtain that designation

But, 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.”<sup>37</sup> In doing so, however, it failed to cite any case law to support its holding aside from a general and conclusory assertion that accepting a distribution from an Ohio trust means that one has “dealings with” the state.<sup>38</sup>

In addition, this assertion 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.”<sup>39</sup> Furthermore, courts have held that a passive, beneficial interest does not satisfy the purposeful availment requirement of the long-arm statute.<sup>40</sup> In light of this, and the active nature of the conduct required by the long-arm statute, it

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<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> See generally *Wright v. Automatic Valve Co.* (1969), 20 Ohio St.2d 87, 253 N.E.2d 771.

<sup>37</sup> Appx. 25, *Cundall*, 174 Ohio App.3d at 442, 2007-Ohio-7067 at ¶ 72.

<sup>38</sup> Id.

<sup>39</sup> *Hoover*, 1991 U.S. Dist. LEXIS 19073, at \*36 (In this case involving an Ohio trust whose sole asset for many years was stock in an Ohio corporation, 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”).

<sup>40</sup> *Paccar Int’l, Inc. v. Commercial Bank of Kuwait, S.A.K.* (9 Cir. 1985), 757 F.2d 1058, 1063 (finding insufficient availment in status as beneficiary to line of credit from in-state branch of an interstate bank); *Mueller v. Mueller* (N.D. Ill. March 4, 2002), No. 02-C-488, 2002 U.S. Dist.

is difficult to see how the passive acceptance of disbursements 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.

**2. Ohio Civil Rule 4.3(A) does not confer personal jurisdiction.**

Second, Ohio Civil Rule 4.3(A) does not confer jurisdiction. This rule dictates that service on an out-of-state defendant is only permitted when the defendant's conduct caused "an event to occur out of which the claim that is the subject of the complaint arose."<sup>41</sup> Paralleling the language of the long-arm statute, service on an out-of-state defendant is only permitted when the defendant's conduct caused "an event to occur out of which the claim that is the subject of the complaint arose." Therefore, when there is insufficient conduct to confer jurisdiction under the long arm statute, there also cannot be proper service of process under Rule 4.3. Accordingly, service of process on the Koons Beneficiaries was insufficient and must be quashed.

**3. Due Process considerations prevent personal jurisdiction.**

Third, even if the long arm statute and Civil Rule 4.3(A) confer jurisdiction, the Koons Beneficiaries do not have sufficient contacts with Ohio to satisfy the constitutional due process requirement of the United States Constitution.<sup>42</sup> In addition to the failure of Ohio's long-arm statute, this Court, consistent with U.S. Supreme Court holdings, has held that a non-resident defendant must have purposely established "minimum contacts" with Ohio so that jurisdiction over a defendant does not violate his or her constitutional due process

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LEXIS 3457, at \*9-10 (denying jurisdiction over non-resident beneficiary to life insurance policy).

<sup>41</sup> Ohio Rules of Civil Procedure, Rule 4.3(A).

<sup>42</sup> Fourteenth Amendment of the United States Constitution.

rights.<sup>43</sup> “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.”<sup>44</sup>

The United States Supreme Court has repeatedly held that a non-resident defendant must have purposely established “minimum contacts” within a state before jurisdiction lies therein.<sup>45</sup> Ohio courts consider the following factors: “(1) established activity by non-resident in the forum state; (2) non-resident takes advantage of privileges and benefits of forum state; (3) non-resident solicits business through agents or advertising reasonably calculated to reach the forum state; (4) it is foreseeable that non-resident will litigate in the forum state; and (5) convenience to the litigants and fairness of requiring non-resident to come to the forum state.”<sup>46</sup> Not one factor applies to the Koons Beneficiaries. Most specifically, it is overwhelmingly unfair and inconvenient for the Koons Beneficiaries to be forced to defend an action that is substantively and factually deficient. This is especially true considering that the Cundalls’ underlying argument appears to be that, with the benefit of hindsight, they are unhappy with a transaction that occurred over 22 years ago. To exercise personal jurisdiction over the Koons Beneficiaries would violate their due process rights.

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.”<sup>47</sup> It further held that the distributions were of a “continuous and systematic nature”

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<sup>43</sup> *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, 285, 2001-Ohio-1289.

<sup>44</sup> *State ex rel. Toma*, 92 Ohio St.3d at 593, 752, N.E.2d at 285.

<sup>45</sup> *Int’l Shoe Co.*, 326 U.S. 310; *Burger King Corp.*, 471 U.S. at 474.

<sup>46</sup> *Klienfeld v. Link* (3 Dist. 1983), 9 Ohio App.3d 29, 30, 457 N.E.2d 1187, 1190.

<sup>47</sup> Appx. 26, *Cundall*, 74 Ohio App.3d at 497, 882 N.E.2d at 497, 2007-Ohio-7067 at ¶ 76.

such that the “Koons Beneficiaries carried on activities in Ohio and benefited from its law.”<sup>48</sup> In so holding, the Court of Appeals improperly cited several cases in which businesses had initiated contact with or transacted business in Ohio. The case *Goldstein v. Christiansen* that was cited by the Court of Appeals involved the defendant mailing financial statements to Ohio investors;<sup>49</sup> *U.S. Sprint Communications v. Mr. K’s Foods, Inc.* involved shipping products to Ohio and soliciting Ohio business by telephone;<sup>50</sup> *Kentucky Oaks Mall v. Mitchell’s Formal Wear, Inc.* involved a lease with an Ohio corporation and mailing checks to Ohio.<sup>51</sup> These cases are very different than the passive acceptance of distributions at issue here.

Furthermore, the Court of Appeals incorrectly concluded, in a struggle to find “minimum contacts” and, thus, jurisdiction, that there was an ongoing, elevated level of involvement in the trust amongst the beneficiaries that the pleadings do not support.<sup>52</sup> The mere creation of an Ohio trust “is not sufficient to invest [a] Court with personal jurisdiction over the non-resident defendants.”<sup>53</sup> Being beneficiaries of various trusts that happen to have a situs in Ohio and accepting distributions therefrom hardly constitute a purposeful establishment of contact with this state and therefore cannot be the “minimum contacts” necessary to comply with due process. The Cundalls bear the burden of establishing personal jurisdiction and yet, the

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<sup>48</sup> Id.

<sup>49</sup> Appx. 25, id. at ¶ 70 (citing *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 638 N.E.2d 541, 1994-Ohio-229).

<sup>50</sup> Appx. 25, id. at ¶ 71 (citing *U.S. Sprint Communications Co. v. Mr. K’s Foods, Inc.*, 68 Ohio St.3d 181, 624 N.E.2d 1048, 1994-Ohio-504).

<sup>51</sup> Appx. 25, id. at ¶ 71 (citing *Kentucky Oaks Mall v. Mitchell’s Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 559 N.E.2d 477).

<sup>52</sup> Appx. 26, id. at ¶ 76.

<sup>53</sup> *Hoover v. Society Bank of Eastern Ohio N.A.*, 1991 U.S. Dist. LEXIS 19073, at \*36 (In this case involving an Ohio trust whose sole asset for many years was stock in an Ohio corporation, 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”).

Cundalls' pleadings are devoid of any other facts that might suggest other, more purposeful contacts.

4. **Due process considerations prevent the imposition of a constructive trust.**

The Koons Beneficiaries' lack of minimum contacts with Ohio and, thus, the trial court's lack of personal jurisdiction over the Koons Beneficiaries is especially problematic with respect to the constructive trust relief that the Cundalls seek to impose upon unidentified assets of the Koons Beneficiaries. The Cundalls assert that Ohio has jurisdiction to impose a constructive trust, suggesting that either personal jurisdiction or in rem jurisdiction is sufficient, but they offer nothing to support their conclusions.<sup>54</sup> As Judge Cooper determined, there is no jurisdiction that would allow the Cundalls to seek a constructive trust against these Koons Beneficiaries in an Ohio court.<sup>55</sup>

The Cundalls state that the "trial court has personal jurisdiction over the Koons beneficiaries for the limited purpose of determining whether to impose a constructive trust over a portion of the distributions they received from the Ohio trust."<sup>56</sup> A court cannot have a "little bit" of personal jurisdiction for a "limited purpose." Personal jurisdiction either exists or it does not. If a court imposes a constructive trust, a judgment ruling on the status of those funds has the "tenor and effect" of a personal judgment.<sup>57</sup> And to properly effect a judgment, a court must have personal jurisdiction over the defendant.<sup>58</sup> For the purposes of this case, this means that the trial court must have personal jurisdiction over the Koons Beneficiaries before it can order a constructive trust over their assets.

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<sup>54</sup> See generally Supp. 1-58 (T.d. 60), Supp. 135-162 (T.d. 98), Supp. 163-174 (T.d. 124).

<sup>55</sup> Appx. 37.

<sup>56</sup> Supp. 228-229.

<sup>57</sup> *Dolce v. Lawrence* (Ohio App. 11), 1997 WL 286154 \*3.

<sup>58</sup> *Id.* (quoting *Rice v. Savings & Trust Co.* (1951), 155 Ohio St. 391, 401).

In *Dolce v. Lawrence*, the trial court granted a constructive trust and required the return of funds.<sup>59</sup> The appellate court, reversing, stated, “[e]ven though the trial court’s judgment appeared to make a ruling only as to the status of the property in question (i.e., imposing a constructive trust), the tenor and effect of the judgment entry was to order Mr. Gallese to return [the res of the constructive trust] to Ms. Dolce.”<sup>60</sup> The judgment entry was in the form of an in personam proceeding and, thus, required the trial court to have personal jurisdiction before imposing such an order.<sup>61</sup> It did not.

The Cundalls are seeking the exact same type of relief sought by Ms. Dolce – a trust over the Koons Beneficiaries’ assets. But, the trial court does not have personal jurisdiction, so their claim for constructive trust cannot be pursued.

**5. The court also lacks in rem jurisdiction to impose a constructive trust.**

Not only is there no personal jurisdiction over the Koons Beneficiaries as beneficiaries, but there is no in rem jurisdiction over the Koons Beneficiaries’ personal assets. Accordingly, due process prevents a court from utilizing in rem jurisdiction to impose a constructive trust over assets in this case because it lacks jurisdiction over the subject property.<sup>62</sup> The Court of Appeals incorrectly determined that the trial court had personal jurisdiction over all the Defendants, including the Koons Beneficiaries, and therefore, did not address the Cundalls’ attempts to convert in rem jurisdiction into personal jurisdiction. However, it is addressed it here, as this Court is reviewing the matter de novo.<sup>63</sup>

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<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> (T.d. 77, p. 7-11).

<sup>63</sup> *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 81, 814 N.E.2d 44, 48, 2004-Ohio-4362, ¶ 5.

If personal jurisdiction does not exist, then a constructive trust can only be based on in rem jurisdiction, and can only attach to the specific property that is located within the state and traceable to the alleged wrong.<sup>64</sup> Suggesting that distributions were from an Ohio trust, without more, glosses over the requirements for in rem jurisdiction. While an action in personam seeks a judgment against a person, an action in rem seeks a judgment against a particular piece of property or seeks to determine the status of that property.<sup>65</sup> Despite the Cundalls' suggestions to the contrary, in rem jurisdiction only reaches identifiable res located within Ohio. An in rem judgment is of no validity beyond the state granting it and cannot be enforced against out-of-state defendants over whom the court lacks personal jurisdiction.<sup>66</sup>

That there was once property in Ohio does not help the Cundalls because in rem jurisdiction is not static, nor does it exist in perpetuity. In rem jurisdiction that existed once upon a time does not justify presently imposing a constructive trust over every person who ever received a distribution from any trust, and everything that those people own, regardless of where the property came from, where that beneficiary or the property is located, and whether the Cundalls can trace the property back to the Grandparents' Trust.

The Grandparents' Trust was to be terminated and wound up over three years ago. The trial court lacks in rem jurisdiction over anything distributed from the Grandparents' Trust that is now located outside Ohio. To the extent any part of a distribution is still located within Ohio, the Cundalls must clearly trace the property back to the Grandparents'

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<sup>64</sup> *Rice v. Wheeling Dollar Sav. & Trust Co.* (1951), 155 Ohio St. 391, 401, 99 N.E.2d 301.

<sup>65</sup> *Moss v. Std. Drug Co.* (1953), 159 Ohio St. 464, 470, 50 O.O. 389, 112 N.E.2d 542.

<sup>66</sup> *Rice v. Wheeling Dollar Sav. & Trust Co.* (1951), 155 Ohio St. 391, 401, 99 N.E.2d 301; *Heald v. Goebel* (8 Dist. 1950), 89 Ohio App. 12, 17, 96 N.E.2d 208, 211; *Vukelic v. Super 8 Builders, Inc.* (7 Dist.), 1991 WL 66190 at \*4 (quoting 63 O. Jur.3d Judgments § 246); see also, *Buckeye Pipeline Co. v. Fee* (1900), 62 Ohio St. 543, 556-557, 57 N.E. 446, 448-449.

Trust, which is the asset that is the source of the alleged unlawful transfer.<sup>67</sup> The Cundalls have never presented facts to suggest that there are assets in Ohio that can be traced back to the Grandparents' Trust for in rem jurisdiction to exist.

It is worth noting that even if this Court finds that there is personal jurisdiction over the Koons Beneficiaries, it will be impossible for the Cundalls to sufficiently trace those funds that they seek constructive trust over to the Koons Beneficiaries' personal assets. This Court recently held that a constructive trust can only be imposed if the particular assets that were wrongfully transferred can be adequately traced from the time of transfer to the specific assets over which the constructive trust is to be placed.<sup>68</sup> The burden is on the claimant to produce clear and convincing evidence of the tracing.<sup>69</sup> The Cundalls have not even identified the personal assets of the Koons Beneficiaries over which they seek a constructive trust.

Rather the Cundalls make an incorrect inference that the 1984 stock sale to CIC is now traceable to some unidentified assets of the Koons Beneficiaries. No transfer of stock has been made to any trust for the benefit of any Koons Defendant or to the Koons Beneficiaries personally. In the instant case, because there is no personal jurisdiction, Plaintiff cannot pursue a judgment from any of the Koons Beneficiaries. And without personal jurisdiction, any portion of constructive trust funds traceable to any of the Koons Beneficiaries will be unenforceable.

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<sup>67</sup> *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 847 N.E.2d 405, 2006-Ohio-2418 (Requiring clear and convincing evidence of tracing the specific assets over which the constructive trust is to be placed back to the assets that were originally wrongfully acquired).

<sup>68</sup> *Id.* at ¶ 22.

<sup>69</sup> *Id.* at ¶ 23.

**6. The court also lacks jurisdiction because the Plaintiffs lack standing.**

Further complicating the jurisdiction issue is a lack of standing that the Cundalls have with respect to the various trusts that they allege are at issue. In fact, the Grandparents' Trust is the only trust by which there theoretically could be personal jurisdiction in Ohio under the OTC.<sup>70</sup> All of the Cundalls' claims arise out of the relationship between the Trustee and Beneficiaries of this Grandparents' Trust, and alleged misconduct with respect to that trust. Further, this is the only trust under which both the Cundalls and the Koons had any beneficial claim that would give them standing. The Cundalls have no standing to bring claims under other trusts where the Koons were beneficiaries but the Cundalls were not.

Further, the Cross-Claimant Cundalls especially lack standing to bring the present action as their standing was based on their status as discretionary income beneficiaries or contingent corpus beneficiaries of the Grandparents' Trust. Pursuant to Article II(C)(1) and (2) of that trust,<sup>71</sup> any interest that the Cross-Claimants had in Share B was extinguished upon JFK's death in March 2005. The trust explicitly provides that upon the later death of JFK or his sister, Betty Lou Cundall (who died much earlier), "the Trustee shall distribute Share B of the trust estate to the then living descendants of Betty Lou Cundall, per stirpes..."<sup>72</sup> Accordingly, upon JFK's death, Michael K. Cundall, Plaintiff herein, took all of his proportionate share of Share B and his children, the Cross-Claimant Cundalls, took nothing. As a result, they have no interest at stake in this litigation; therefore, they have no standing to pursue their stated claim.<sup>73</sup>

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<sup>70</sup> Supp. 36-48D.

<sup>71</sup> Supp.40-41, 1976 Grandparents Trust, pp. 5-6.

<sup>72</sup> Supp. 40, Article II(C)(2) of the Grandparents Trust, p. 6.

<sup>73</sup> Even if the 1984 transaction had never occurred and Fund B had continued to hold the shares until the company was sold in 2005, the Cross-Claimant Cundalls would have received the same amount as they did when the trust concluded by its terms in 2005—nothing. Furthermore, the Cross-Claimants never became beneficiaries of the 1977 Cundall Trust since that only would

**B. INTERPRETING THIS CASE UNDER THE NEW OTC.**

The Cundalls may have been relieved to learn of the passage of the new OTC, believing it would fix their otherwise incurable problem with personal jurisdiction over the Koons Beneficiaries. However, the passage of the new OTC provided only illusory help to the Cundalls. It does not provide jurisdiction in this case because it does not negate the basic due process requirements that are essential in every case.

Because they have not purposely established minimum contacts with Ohio, jurisdiction over the Koons Beneficiaries will violate their due process rights regardless of whether the OTC or the pre-OTC law is applied. Further, as discussed in the Propositions of Law below, the OTC, by its own terms prohibits retroactive application in this case. In fact, application of the OTC makes the Cundalls' case unsalvageable.

No statute can negate the basic due process requirements that are firmly imbedded in our state laws and U.S. Constitution. For an Ohio court to assert personal jurisdiction over a non-resident defendant, there must be both a statutory grant of such authority *and* the exercise of such authority must comply with the U.S. Constitution's due process requirement.<sup>74</sup> For the reasons stated above, lack of long-arm jurisdiction, lack of basis for service of process, and lack of minimum contacts, a court's exercise of jurisdiction over the Koons Beneficiaries would be unconstitutional.

This same essential analysis and result applies equally after the enactment of the OTC as it did before. None of the Koons Beneficiaries have established any contacts with Ohio

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have happened if their father, Michael K. Cundall, had died prior to his 35<sup>th</sup> birthday. However, their father, Plaintiff herein, is well past his 35<sup>th</sup> birthday.

<sup>74</sup> See *U.S. Sprint Communications*, 68 Ohio St.3d at 185-86, 624 N.E.2d at 1052-53, 1994-Ohio-504; also see generally, *Clifton Hills Realty Co. v. City of Cincinnati* (1 Dist. 1938), 60 Ohio App. 443, 21 N.E.2d 993, *State v. Cincinnati St. Ry. Co.* (1918), 97 Ohio St. 283, 309, 119 N.E. 735, 742-43.

for which they could reasonably anticipate being haled into court here. Because they have not purposely established minimum contacts with Ohio, jurisdiction over the Koons Beneficiaries on the basis of § 5802.02 will violate their due process rights.

The Cundalls' arguments that the trial court should retroactively apply the OTC so it can assert jurisdiction over the Koons Beneficiaries is also shortsighted because applying other new OTC provisions would ensure a pre-trial judgment in favor of the Koons Beneficiaries on other grounds. The OTC states that a trustee is not liable to a beneficiary who consented to conduct and released the trustee from liability and therefore, JFK is not liable to the Cundalls.<sup>75</sup> The OTC even endorses private settlement agreements, like the releases signed by Plaintiff Cundall, and provides that the trustee represents his/her own individual interests in negotiating these releases, and not those of the beneficiaries.<sup>76</sup> Finally, the new OTC also states that a parent may represent and bind his/her minor child<sup>77</sup> and that "[a]ny [private settlement agreement] shall be final and binding on the trustee...all beneficiaries, and their heirs, successors and assigns."<sup>78</sup>

In conclusion to this First Proposition of Law, the Koons Beneficiaries must be dismissed because Plaintiff has demonstrated neither personal nor in rem jurisdiction over them or their property. It is undisputed that not one of these Koons Beneficiaries resides in Ohio or has availed him or herself of the jurisdiction of a Hamilton County Court. The Cundalls' only argument is that there may be a constructive trust remedy that will engulf unidentified trusts with unknown res in which these Koons Beneficiaries may claim an interest. This vague and indiscernible notion is insufficient to support personal or in rem jurisdiction over them.

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<sup>75</sup> Appx. 50, O.R.C. § 5810.09.

<sup>76</sup> Appx. 43, O.R.C. § 5801.10.

<sup>77</sup> Appx. 47, O.R.C. § 5803.03(F); see also Appx. 48. O.R.C. § 5803.04 (stating that any person may bind a minor who has substantially identical interests to the representative).

<sup>78</sup> Appx. 43, O.R.C. § 5801.10(E).

Furthermore, the Cundalls lack the standing to assert such a claim for relief. Retroactively applying the new OTC jurisdiction provision does not dispose of these due process requirements. Because this Court lacks personal and in rem jurisdiction over these Koons Beneficiaries or any res, with or without the new OTC jurisdiction provision, they are entitled to be dismissed from this case.

**PROPOSITION OF LAW NO. II:**

**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.**

Section 5811.03(A)(3) of the Ohio Revised Code clearly states that the OTC does not apply to judicial proceedings concerning trusts commenced before the effective date of the OTC if 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.”<sup>79</sup> In those cases, the OTC does not apply, and the superseded law applies.<sup>80</sup>

In its decision, the Court of Appeals only superficially “examined” this and the other exceptions to the retroactive provisions of the OTC. It addressed this particular exception in a grand total of three sentences by stating:

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.<sup>81</sup>

This conclusion is incorrect. The case was not in its infancy. The case was filed in March 2006, with Plaintiff Cundall subsequently filing an amended complaint<sup>82</sup> and a motion

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<sup>79</sup> Appx. 51, O.R.C. § 5811.03(A)(3).

<sup>80</sup> Id.

<sup>81</sup> Appx. 25, *Cundall*, 174 Ohio App.3d at 441, 2007-Ohio-7067 at ¶ 72.

to file yet another amended complaint<sup>83</sup> in an attempt for him to cure the insurmountable defects with his case and the Koons Beneficiaries moving to dismiss the complaints against them.<sup>84</sup> Oral arguments were held on the Motion to Dismiss October 16, 2006 and the trial court ruled and dismissed the complaint on January 5, 2007.<sup>85</sup> The case was by all means concluded, with the Plaintiffs lacking the requisite jurisdiction necessary for the court to ever hear the case.

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 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.

The Court of Appeals' conclusion is not only incorrect, but, 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.<sup>86</sup> 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.<sup>87</sup>

**PROPOSITION OF LAW NO. III:**

**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.**

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<sup>82</sup> Supp. 1-58 (T.d. 60).

<sup>83</sup> (T.d. 101).

<sup>84</sup> (T.d. 135), (T.d. 77).

<sup>85</sup> Appx. 29 (T.d. 182).

<sup>86</sup> *Bockover v. Ludlow Corp.* (1986), 23 Ohio St.3d 190, 194, 492 N.E.2d 149, 153.

<sup>87</sup> Appx. 24, *Cundall*, 174 Ohio App.3d at 441, 2007-Ohio-7067 at ¶ 67.

The OTC prohibits retroactive application of its personal jurisdiction section when doing so would “prejudice the rights of the parties.”<sup>88</sup> “Prejudice,” from a legal perspective, means that the outcome would be different, but for the intervening action or event.<sup>89</sup> Here, retroactive application would prejudice the rights of the Koons Beneficiaries because they would not be subjected to jurisdiction and, thus liability, in this case but for the enactment of the retroactive jurisdiction provision of the Ohio Trust Code.

Prior to the OTC enactment, 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.<sup>90</sup> Therefore, retroactive application of this section would prejudice the rights of the Koons Beneficiaries because, in finding jurisdiction where none existed before, the Koons Beneficiaries remain parties to the litigation and are required to defend the case at hand. In turn, the Koons Beneficiaries and their assets are exposed to potentially substantial personal liability, thus prejudicing their personal rights and their property rights. Because of this prejudice, the superseded law must apply and the Koons Beneficiaries must be dismissed from the case for lack of jurisdiction.

The Cundalls are seeking to undo a transaction that occurred more than 22 years ago, and to which Plaintiff Cundall, on his behalf and on behalf of the Cross-Claimant Cundalls agreed at that time. As stated above, O.R.C. § 5802.02 is a departure from the law that applied

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<sup>88</sup> Appx. 51, O.R.C. § 5811.03(A)(3).

<sup>89</sup> *In re R.B.* (9 Dist.), slip copy, 2008 WL1849648, 2008-Ohio-1989.

<sup>90</sup> Appx. 42, 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, Appx. 37, (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).

to the Koons Beneficiaries for 22 years prior to the filing of this case. Further, Plaintiff Cundall filed his case almost a year before this statute's effective date. Allowing Plaintiff Cundall to wait more than 22 years to file his case and then to delay another year so as to have the benefit of a newly enacted statute that changes the personal jurisdiction analysis in his favor is highly prejudicial to the Koons Beneficiaries who are not subject to this Court's jurisdiction without this new statute.

**PROPOSITION OF LAW NO. IV:**

**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.”<sup>91</sup> The Cundalls seek to attach legal significance to the Koons' status as beneficiaries of the Grandparents' Trust to gain personal jurisdiction.<sup>92</sup> Using the OTC's personal jurisdiction section to change 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.

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<sup>91</sup> Appx. 51, O.R.C. § 5811.03(A)(5).

<sup>92</sup> Supp. 8, (T.d. 60, p. 8); Supp. 170, (T.d. 124, p.8).

**PROPOSITION OF LAW NO. V:**

**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. It states:

This 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.<sup>93</sup>

This reflects the general rule, by both state and federal standards, that a retroactive statute is unconstitutional if it alters property rights.<sup>94</sup>

The Ohio Constitution states: “The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts.”<sup>95</sup> As this Court has held on more than on occasion, an Ohio statute is unconstitutional if 1) “the General Assembly expressly intended the statute to apply retroactively,” and 2) the statute is substantive.<sup>96</sup> The Court went on to say that “a retroactive statute is substantive--and therefore *unconstitutionally* retroactive—if it

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<sup>93</sup> Comment to Section 1106 of the Uniform Trust Code (“UTC”). Uniform Trust Code comments apply equally to the Ohio Trust Code, as authoritative statements of the intent and application of the statute, except to the extent that Ohio has deviated from the UTC text. See comments of the National Conference of the Commissioners of Uniform State Laws. Also, see generally, Gradwohl, John M. and William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 Neb. L. Rev. 312, 322 (2003).

<sup>94</sup> *Bielat v. Bielat*, 87 Ohio St.3d 350, 721 N.E.2d 28, 2000-Ohio-451; *Hughes Aircraft Co. v. U.S.* (1997), 520 U.S. 939, 117 S.Ct. 1871.

<sup>95</sup> Appx. 39, Ohio Const. Art. II § 28.

<sup>96</sup> *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28, 33, 2000-Ohio-451; *Rubbermaid, Inc. v. Wayne Cty. Aud.*, 95 Ohio St.3d 358, 359, 767 N.E.2d 1159, 1162, 2002-Ohio-2338, ¶ 4 (a substantive statute is unconstitutionally retroactive, but a remedial retroactive statute does not violate Article II § 28 of the Ohio Constitution).

impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.”<sup>97</sup>

As applied to the Koons Beneficiaries, § 5802.02 is clearly an unconstitutionally retroactive statute in violation of the Ohio Constitution because application of § 5802.02 to this case reveals that this statute is clearly substantive. The Cundalls propose that § 5802.02 gives this Court jurisdiction over the Koons Beneficiaries so that they might seek damages from them for the alleged wrongdoings of 1984. Adopting the Cundalls’ argument would subject the Koons Beneficiaries to jurisdiction in Ohio to account for this past transaction where such jurisdiction did not previously exist. As this retroactive statute imposes new burdens, duties, obligations and liabilities as to this past transaction, 5802.02 is an unconstitutionally retroactive statute and must not be applied to the Koons Beneficiaries.

The United States Supreme Court also has a deep-rooted presumption against retroactive legislation due to the effect it has on the rights of others.<sup>98</sup> In *Hughes Aircraft Co. v. U.S.*,<sup>99</sup> the Court addressed this presumption in the context of jurisdictional statutes and unanimously provided the standard for when a jurisdictional statute cannot be retroactively applied. The Court stated:

[The new statute at issue] does not merely allocate jurisdiction among forums. Rather, it *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.<sup>100</sup>

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<sup>97</sup> *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d at 33 (emphasis in original).

<sup>98</sup> See e.g., *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 265, 114 S.Ct. 1483, 1497; *Hughes*, 520 U.S. at 946.

<sup>99</sup> 520 U.S. 939. While the Court’s analysis in *Hughes* concerned the retroactive application of a statute regarding subject matter jurisdiction, the same analysis applies to the retroactive application of a statute that concerns personal jurisdiction.

<sup>100</sup> *Id.* at 951 (emphasis in original; citations omitted).

The retroactive jurisdiction statute in the instant case is also a statute that “confer[s] jurisdiction where before there was none.”<sup>101</sup>

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.<sup>102</sup> 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.

In asking the Court to retroactively apply the OTC, the Cundalls seek to revive the trust, have all beneficiaries return all the distributions they received, and then re-allocate the assets, with larger distributions now being diverted to the Cundall family.<sup>103</sup> The practical effect of this is that the Koons Beneficiaries’ property rights may be changed, thus subjecting the Koons and their property to claims that the Cundalls could not have previously asserted.

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<sup>101</sup> *Republic of Austria v. Altmann* (2004), 541 U.S. 677, 721 (Kennedy, J. dissenting, but specifically agreeing with majority opinion on the issue of retroactive application and citing *Hughes* at 951 with approval).

<sup>102</sup> Appx. 7-29, *Cundall*, 174 Ohio App.3d 421, 882 N.E.2d 481, 2007-Ohio-7067.

<sup>103</sup> Note this would also contemplate either the Cundalls receiving funds from the Koons family Fund A, which is prohibited by the terms of the Grandparents’ Trust, or accounting back to the late 1970’s when the Trust was divided into Fund A (Koons) and Fund B (Cundall).

It is for these reasons that a Kansas Court of Appeals refused to retroactively apply a provision the Uniform Trust Code in *McCabe v. Duran*.<sup>104</sup> In *McCabe*, the successor trustee of a trust brought suit against the estate of the former trustee claiming that the former trustee engaged in self dealing and mishandled her obligations.<sup>105</sup> A jury issued a verdict against the estate and the attorney for the trustee asked the district court to grant double damages pursuant to a provision of the Uniform Trust Code that did not go into effect until after many of the wrongful acts had occurred.<sup>106</sup>

The trial court granted the double damages, but the Court of Appeals reversed. It reasoned that “[b]ecause substantive laws affect vested rights, they are not subject to retroactive legislation because doing so would constitute the taking of property without due process.”<sup>107</sup> The court then noted that “[the former trustee’s] property interests are at stake—namely the amount of money she (now through her estate) would be liable for beyond the amount misappropriated. Retroactively applying [the double damages provision] would impose the double-liability penalty on actions taken when no such penalty existed.”<sup>108</sup> Thus, the court reasoned, “[t]rustees would be subject to a penalty that was enacted well after any wrongdoing took place.”<sup>109</sup>

The court’s rationale in *McCabe* applies to the case at hand. Conferring jurisdiction to the Koons Beneficiaries and making the property of those beneficiaries potentially subject to a constructive trust puts the property interests of the Koons Beneficiaries at stake and,

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<sup>104</sup> *McCabe v. Duran* (Kan. App. 2008), 180 P.3d 1098.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1100.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

further, puts them at stake as the result of alleged actions that were taken by Bud Koons before the OTC went into effect.

**PROPOSITION OF LAW NO. VI:**

**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.**

The only alleged claim against the Koons Beneficiaries is for unjust enrichment arising from an alleged unlawful transfer of the stock. As a result of this alleged unjust enrichment as well as the alleged breach of fiduciary duty of JFK, the Cundalls seek to impose a constructive trust against the Koons Beneficiaries' property. The claim for unjust enrichment, and the constructive trust remedy are time-barred.

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.<sup>110</sup> In this case, the statutes of limitations for unjust enrichment, imposition of a constructive trust, as well as breach of fiduciary duty (under the terms of the new OTC that the Cundalls want applied to this case) have all lapsed.

The statute of limitations for unjust enrichment is six years<sup>111</sup> and begins to run on the date that the money or property was originally wrongfully obtained from the original transferee.<sup>112</sup> The claim for unjust enrichment was asserted by the Cross-Claimant Cundalls, who have always asserted that the unjust enrichment occurred when the stock was sold back to

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<sup>110</sup> *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727, 731.

<sup>111</sup> Appx. 40, O.R.C. § 2305.07; see also, *Ignash v. First Serv. Fed. Credit Union* (10 Dist.), unreported, 2002 WL 1938412, 2002-Ohio-4395, ¶ 3.

<sup>112</sup> *LeCrone v. LeCrone* (10 Dist.), unreported, 2004 WL 2806387, 2004-Ohio-6526, ¶ 20.

CIC in 1984.<sup>113</sup> The Cross-Claimants were minors at the time of the stock sale,<sup>114</sup> but 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,<sup>115</sup> in which case, the six-year statute of limitations ran in 2001.<sup>116</sup> 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.<sup>117</sup> This resulted in a decision that applied the same statute of limitations for the claim of breach of fiduciary duty against trustee Bud Koons to the separate claims of unjust enrichment asserted against the Koons Beneficiaries, who had no roles in the 1984 transactions and who never had any fiduciary responsibilities to the Cundalls. Applying this limitations period undermined the only claim that the Cross-Claimant Cundalls made against the Koons Beneficiaries.<sup>118</sup>

Finally, this Court has 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.”<sup>119</sup> Here, the Cundalls seek a constructive trust over the

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<sup>113</sup> 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 Appx. 28, *Cundall*, 174 Ohio App.3d at 445, 882 N.E.2d at 499, 2007-Ohio-7067 at ¶ 84.

<sup>114</sup> Supp. 224-226 (T.d.135).

<sup>115</sup> Supp. 226 (T.d. 135).

<sup>116</sup> 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 JFK 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. Supp. 40-41 (T.d. 60, pp. 40-41).

<sup>117</sup> Appx. 23-24, ¶¶ 56-61.

<sup>118</sup> 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.

<sup>119</sup> *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113,120.

Koons Beneficiaries' assets because of the alleged breaches of fiduciary duty and unjust enrichment. However, because both claims are time-barred, the constructive trust remedy is also unavailable.

In addition, although constructive trust is a remedy that seeks property from transferees, its application is also limited by statute and the statute has run. The statute of limitations for imposition of constructive trust as a claim for relief is four years under O.R.C. § 2305.09. Plaintiff Cundall was aware of the disparity of the price paid for the 3,104.5 shares and another nearly contemporaneous sale.<sup>120</sup> He even executed a release;<sup>121</sup> he was assisted by counsel;<sup>122</sup> he benefited by the transaction;<sup>123</sup> and, he admits that CIC bought the stock.<sup>124</sup>

CIC, therefore, became the constructive trustee and the four year statute of limitations immediately began to run. But, Plaintiff failed to timely redress his alleged injury so he has now manufactured claims on the bases of "self dealing," "unconscionable conduct," and "bad faith."<sup>125</sup> This thinly-veiled attempt to massage his way under a more favorable statute of limitations does not work.

### **III. CONCLUSION**

For the reasons discussed above, the Court of Appeals' decision is fundamentally wrong in its reasoning and in its dangerous implications upon these Koons Beneficiaries and similarly-situated beneficiaries throughout the state. The Court of Appeals' decision undermines the basic principals of jurisprudence, due process, limitations of action and the right to only get one bite of

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<sup>120</sup> Supp. 85-86, (T.d. 74, pp. 2-3).

<sup>121</sup> Supp. 74-75, (Exhibit B to T.d. 83, pp. 1-2).

<sup>122</sup> Supp. 87, (T.d. 74, p. 4).

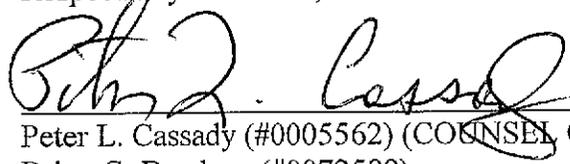
<sup>123</sup> Supp. 85-86, (T.d. 74, pp. 2-3).

<sup>124</sup> Supp. 6-7, (T.d. 60, pp. 6-7).

<sup>125</sup> Supp. 1-13, (T.d. 60, pp. 1-13).

the apple in any given case. The decision below must be reversed to promote the most fundamental notions of state and federal law.

Respectfully submitted,



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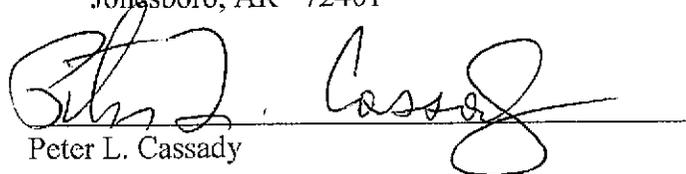
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# APPENDIX

IN THE SUPREME COURT OF OHIO

MICHAEL K. CUNDALL, et al.

Plaintiffs

v.

U.S. BANK, TRUSTEE, et al.

Defendants

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

Court of Appeals

Case Nos. C070081  
C070082

**08-0314**

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NOTICE OF APPEAL 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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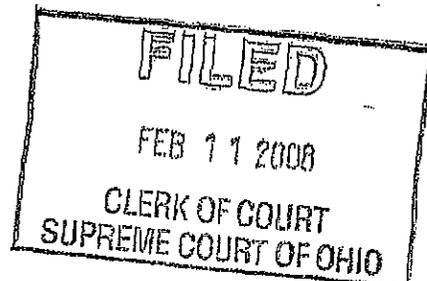
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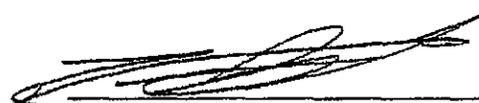
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**NOTICE OF APPEAL OF APPELLANTS DEBORAH KOONS GARCIA, JOHN F. KOONS IV, JAMES B. KOONS, CAROLINE M. KOONS, KATHLEEN M. KOONS, MAURA L. KOONS, JEREMY B. KOONS AND MORGAN N. KOONS**

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 hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case numbers C070081 and C070082 on December 28, 2007.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully Submitted,



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Brian G. Dershaw

ENTERED

DEC 28 2007

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

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

Plaintiff-Appellant,

vs.

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

Defendants-Appellees,

PETER B. CUNDALL, et al.,

Defendants,

and

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

Cross-Claimants/Defendants-  
Appellants.

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



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

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

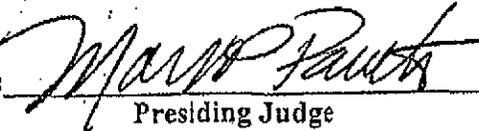
Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

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

To The Clerk:

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

By:

  
Presiding Judge

Westlaw

882 N.E.2d 481  
174 Ohio App.3d 421, 882 N.E.2d 481, 2007 -Ohio- 7067

Page I

▶

Cundall v. U.S. Bank  
Ohio App. 1 Dist., 2007.

Court of Appeals of Ohio, First District, Hamilton  
County.

CUNDALL et al., Appellant,  
v.  
U.S. BANK, N.A. et al., Appellees.  
Nos. C-070081, C-070082.

Decided Dec. 28, 2007.

**Background:** Trust beneficiaries filed action against trustee's estate, another trustee, and out-of-state beneficiaries for a breach of fiduciary duty, a constructive trust, a declaratory judgment, an accounting, and related relief. The Court of Common Pleas, Hamilton County, No. A-0602080, dismissed action. Resident beneficiaries appealed.

**Holdings:** The Court of Appeals, Mark D. Painter, J., held that:

- (1) plaintiff beneficiaries were not required, in alleging breach of fiduciary duty, to tender back the consideration they received for releasing trustees from liability in connection with the sale;
- (2) four-year limitations period began to run when trustees ceased to serve in that capacity;
- (3) plaintiff beneficiary was not required to allege in complaint that he was relying solely on the trusts for recovery, rather than on the assets of trustee's estate, in order to avoid six-month limitations period for claims against an estate;
- (4) statute giving personal jurisdiction to Ohio over both trustees and beneficiaries of a trust located in Ohio applied retroactively to present case;
- (5) exercise of personal jurisdiction over out-of-state beneficiaries comported with federal due-process requirements; and
- (6) constructive trust would be appropriate remedy if resident beneficiaries could make necessary proofs.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Fraud 184 ↪7

184 Fraud  
184I Deception Constituting Fraud, and Liability Therefor  
184k5 Elements of Constructive Fraud  
184k7 k. Fiduciary or Confidential Relations. Most Cited Cases  
Ordinary rules of fraud or undue influence do not apply where there is a fiduciary relationship.

[2] Fraud 184 ↪50

184 Fraud  
184II Actions  
184II(D) Evidence  
184k50 k. Presumptions and Burden of Proof. Most Cited Cases  
Fiduciaries have the burden of proving the perfect fairness and honesty of a transaction that was entered into during the fiduciary relationship.

[3] Fraud 184 ↪64(1)

184 Fraud  
184II Actions  
184II(F) Trial  
184k64 Questions for Jury  
184k64(1) k. In General. Most Cited Cases  
Whether a fiduciary has demonstrated the fairness of a transaction is a question of fact for a jury.

[4] Trusts 390 ↪172

390 Trusts  
390IV Management and Disposal of Trust Property  
390k172 k. Limitations of Authority Imposed in Creation of Trust. Most Cited Cases  
A trustee may not take advantage of liberal provi-

sions of a trust instrument to relieve himself from the legal responsibility of a fiduciary under the law. R.C. § 5808.02.

**[5] Fraud 184** ↪7

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k5 Elements of Constructive Fraud

184k7 k. Fiduciary or Confidential Relations. Most Cited Cases

Statutory and common law govern the rights and responsibilities of fiduciaries. R.C. § 5808.02.

**[6] Trusts 390** ↪189

390 Trusts

390IV Management and Disposal of Trust Property

390k188 Sale and Conveyance

390k189 k. Authority and Duty in General. Most Cited Cases

Trustees had the highest duty under common law to act solely in the beneficiaries' best interests, both in the sale of trust stock and in obtaining beneficiaries' signatures on documents releasing trustees from any liability for stock sale.

**[7] Trusts 390** ↪189

390 Trusts

390IV Management and Disposal of Trust Property

390k188 Sale and Conveyance

390k189 k. Authority and Duty in General. Most Cited Cases

**Trusts 390** ↪231(1)

390 Trusts

390IV Management and Disposal of Trust Property

390k231 Individual Interest in Transactions

390k231(1) k. In General. Most Cited Cases  
Trust beneficiaries alleging a breach of fiduciary

duty in connection with a sale of trust stock to trustee's own corporation were not required to tender back the consideration that they received for releasing that trustee and another trustee from any liability in connection with stock sale, as both trustees gained from the releases, and at least one trustee also gained from the sale.

**[8] Release 331** ↪24(2)

331 Release

331I Requisites and Validity

331k24 Right to Contest Validity

331k24(2) k. Necessity for Restoration of Consideration. Most Cited Cases

A beneficiary may, without tendering back the consideration given for the release, challenge a purported release of a fiduciary from liability concerning a transaction that occurred during the fiduciary relationship where the fiduciary has gained some benefit.

**[9] Trusts 390** ↪231(2)

390 Trusts

390IV Management and Disposal of Trust Property

390k231 Individual Interest in Transactions

390k231(2) k. Purchase of Property in General. Most Cited Cases

Argument that trust stock was purchased not by trustee but by corporation of which trustee who was chief executive officer (CEO) and majority shareholder would not preclude a finding, in action alleging that trustee breached his fiduciary duty, of self-dealing on part of trustee.

**[10] Pretrial Procedure 307A** ↪681

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak681 k. Matters Considered in General. Most Cited Cases

Trial court could, in ruling on motion to dismiss ac-

tion alleging a breach of fiduciary duty in connection with sale of trust stock to trustee's own corporation, consider documents specifically referred to in the complaint that released that trustee and another trustee from liability concerning the stock transaction. Rules Civ.Proc., Rule 12(B).

#### [11] Pretrial Procedure 307A ⚡681

##### 307A Pretrial Procedure

###### 307A.III Dismissal

###### 307A.III(B) Involuntary Dismissal

###### 307A.III(B)6 Proceedings and Effect

307Ak681 k. Matters Considered in General. Most Cited Cases

Trial court could not, in ruling on motion to dismiss for failure to state a claim an action alleging a breach of fiduciary duty in connection with trustee's sale of stock, consider letters concerning the stock transaction that were not incorporated into complaint or specifically referred to in complaint. Rules Civ.Proc., Rule 12(B)(6).

#### [12] Limitation of Actions 241 ⚡103(1)

##### 241 Limitation of Actions

###### 241.II Computation of Period of Limitation

241.II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

###### 241k101 Existence of Trust

241k103 Repudiation or Violation of Trust

241k103(1) k. In General. Most

###### Cited Cases

Four-year limitations period for bringing action for fraud and breach of fiduciary duty against trustee, in connection with trustee's alleged participation in and enabling of a sale of trust stock, began to run when trustee ceased to serve in that capacity. R.C. § 2305.09.

#### [13] Limitation of Actions 241 ⚡103(1)

##### 241 Limitation of Actions

###### 241.II Computation of Period of Limitation

241.II(F) Ignorance, Mistake, Trust, Fraud,

and Concealment or Discovery of Cause of Action

###### 241k101 Existence of Trust

241k103 Repudiation or Violation of Trust

241k103(1) k. In General. Most

###### Cited Cases

For a trustee, the statute of limitations for breach of a fiduciary duty and fraud will not begin running until the fiduciary relationship has ended. R.C. § 2305.09.

#### [14] Limitation of Actions 241 ⚡100(1)

##### 241 Limitation of Actions

###### 241.II Computation of Period of Limitation

241.II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

###### 241k98 Fraud as Ground for Relief

###### 241k100 Discovery of Fraud

241k100(1) k. In General. Most Cited Cases

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. R.C. § 2305.09.

#### [15] Limitation of Actions 241 ⚡100(11)

##### 241 Limitation of Actions

###### 241.II Computation of Period of Limitation

241.II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

###### 241k98 Fraud as Ground for Relief

###### 241k100 Discovery of Fraud

241k100(11) k. Diligence in Discovering Fraud. Most Cited Cases

The discovery rule tolling the statute of limitations for fraud until the fraud is discovered is not available to those who should have discovered fraud, but failed to discover it due to neglect or willful ignorance. R.C. § 2305.09.

#### [16] Limitation of Actions 241 ⚡192(.5)

##### 241 Limitation of Actions

241.V Pleading, Evidence, Trial, and Review

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241k186 Pleading in Avoidance of Defense  
241k192 Matters Avoiding Bar of Statute  
241k192(.5) k. In General. Most Cited

## Cases

Trust beneficiary who brought action against trustee's estate for breach of fiduciary duty was not required to allege in complaint that he was relying solely on the trusts for recovery rather than on the assets of trustee's estate in order to avoid six-month limitations period for claims against an estate. R.C. § 2117.06(G).

[17] Executors and Administrators 162 ↪  
225(1)

162 Executors and Administrators  
162VI Claims Against Estate  
162VI(B) Presentation  
162k225 Time for Presentation  
162k225(1) k. In General. Most Cited

## Cases

For purposes of six-month limitations period for claims against an estate, any property that passes outside of probate is not part of the estate. R.C. § 2117.06.

[18] Limitation of Actions 241 ↪103(1)

241 Limitation of Actions  
241II Computation of Period of Limitation  
241II(F) Ignorance, Mistake, Trust, Fraud,  
and Concealment or Discovery of Cause of Action  
241k101 Existence of Trust  
241k103 Repudiation or Violation of  
Trust  
241k103(1) k. In General. Most

## Cited Cases

Four-year limitations period for claim against trustee's estate for tortious breach of trust began to run when trustee ceased to serve in that capacity at his death. R.C. § 2305.09.

[19] Pleading 302 ↪236(1)

302 Pleading  
302VI Amended and Supplemental Pleadings

and Repleader  
302k233 Leave of Court to Amend  
302k236 Discretion of Court  
302k236(1) k. In General. Most Cited

## Cases

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. Rules Civ.Proc., Rule 15.

[20] Courts 106 ↪12(2.40)

106 Courts  
106I Nature, Extent, and Exercise of Jurisdiction  
in General  
106k10 Jurisdiction of the Person  
106k12 Domicile or Residence of Party  
106k12(2) Actions by or Against Non-  
residents; "Long-Arm" Jurisdiction in General  
106k12(2.40) k. Other Particular

## Types of Cases. Most Cited Cases

Statute giving jurisdiction to state over both trustees and beneficiaries of a trust located in Ohio applied retroactively in resident trust beneficiary's action against out-of-state beneficiaries, among others, involving trustee's alleged breach of fiduciary duty in connection with a sale of stock; retroactive application of statute would not substantially interfere with judicial proceedings because case was in its infancy and would not prejudice the rights of parties because state courts could have taken jurisdiction over out-of-state beneficiaries even without the statute. R.C. §§ 5802.02, 5811.03.

[21] Courts 106 ↪35

106 Courts  
106I Nature, Extent, and Exercise of Jurisdiction  
in General  
106k34 Presumptions as to Jurisdiction  
106k35 k. In General. Most Cited Cases  
Plaintiffs have the burden, on challenge by out-of-state defendants, of establishing the trial court's

personal jurisdiction.

**[22] Pretrial Procedure 307A ⚡684**

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak682 Evidence

307Ak684 k. Sufficiency and Ef-

fect. Most Cited Cases

Plaintiffs are required only to make a prima facie case of jurisdiction in response to a motion by out-of-state defendants to dismiss for lack of personal jurisdiction.

**[23] Appeal and Error 30 ⚡893(1)**

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate Court

30k893(1) k. In General. Most

Cited Cases

Appellate court reviews de novo the trial court's grant of a motion to dismiss for lack of personal jurisdiction.

**[24] Pretrial Procedure 307A ⚡650**

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)5 Particular Actions or Subject

Matter, Defects in Pleading

307Ak650 k. Property in General;

Deeds and Leases; Eminent Domain. Most Cited Cases

Trust beneficiaries who brought action against out-of-state beneficiaries, among others, in connection with a stock sale that allegedly breached trustees' fiduciary duties, were required, on motion to dismiss for lack of personal jurisdiction, to demonstrate (1) that jurisdiction over the out-of-state be-

neficiaries was proper under long-arm statute and applicable civil rule, and (2) that exercise of personal jurisdiction over out-of-state beneficiaries would comport with federal due-process requirements. U.S.C.A. Const.Amend. 14; R.C. §§ 2307.382, 5802.02; Rules Civ.Proc., Rule 4.3.

**[25] Courts 106 ⚡12(2.15)**

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k10 Jurisdiction of the Person

106k12 Domicile or Residence of Party

106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General

106k12(2.15) k. Transacting or Doing Business. Most Cited Cases

Courts construe broadly the phrase "transacting any business" as used in statute granting long-arm jurisdiction over a person who transacts any business in the state, and the phrase includes "having dealings with." R.C. § 2307.382(A)(1).

**[26] Courts 106 ⚡12(2.15)**

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k10 Jurisdiction of the Person

106k12 Domicile or Residence of Party

106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General

106k12(2.15) k. Transacting or Doing Business. Most Cited Cases

Questions about the applicability of long-arm jurisdiction provisions relating to persons transacting any business in the state are resolved on highly particularized fact situations, thus rendering any generalization unwarranted. R.C. § 2307.382(A)(1); Rules Civ.Proc., Rule 4.3(A)(1).

**[27] Courts 106 ⚡12(2.40)**

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction

## in General

106k10 Jurisdiction of the Person

106k12 Domicile or Residence of Party

106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General

106k12(2.40) k. Other Particular

Types of Cases. Most Cited Cases

Accepting funds from a trust with its situs in Ohio firmly establishes jurisdiction under Ohio's long-arm statute. R.C. § 2307.382(A)(1).

**[28] Constitutional Law 92**  **3965(1)**

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3965 Particular Parties or Circumstances

92k3965(1) k. In General. Most

Cited Cases

Decision of United States Supreme Court in *Mullane v. Cent. Hanover Bank & Trust Co.*, recognizing the right of state courts to determine the interests of all claimants, resident or nonresident, in connection with the closing of a trust, applies to administration of trusts in general for purposes of determining whether exercise of personal jurisdiction over nonresidents comports with federal due-process requirements. U.S.C.A. Const.Amend. 14.**[29] Constitutional Law 92**  **3965(7)**

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3965 Particular Parties or Circumstances

92k3965(7) k. Banks, Banking, and Finance. Most Cited Cases

**Trusts 390**  **254**

390 Trusts

390IV Management and Disposal of Trust Prop-

erty

390k245 Actions Between, By, or Against Trustees

390k254 k. Jurisdiction. Most Cited Cases Exercise of personal jurisdiction over out-of-state trust beneficiaries, in action involving an alleged breach of fiduciary duty in connection with a trustee's sale of trust stock, comported with federal due-process requirements; out-of-state beneficiaries, by accepting distributions from trust located in forum state, carried on activities in forum state and benefited from its laws, and those activities were of a continuous and systematic nature. U.S.C.A. Const.Amend. 14.

**[30] Constitutional Law 92**  **3964**

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-Residents in General.

Most Cited Cases

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. U.S.C.A. Const.Amend. 14.

**[31] Constitutional Law 92**  **3964**

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-Residents in General.

Most Cited Cases

Jurisdiction over nonresident defendant is firmly established, so as to comport with Due Process Clause, when the defendant's activities are not only continuous and systematic, but also give rise to the liabilities sued on. U.S.C.A. Const.Amend. 14.

**[32] Constitutional Law 92**  **3964**

92 Constitutional Law

## 92XXVII Due Process

## 92XXVII(E) Civil Actions and Proceedings

## 92k3961 Jurisdiction and Venue

## 92k3964 k. Non-Residents in General.

## Most Cited Cases

For due process purposes, continuous and systematic activities by a nonresident defendant can be so substantial and of such a nature as to justify suit against that defendant on causes of action arising from dealings entirely distinct from those activities. U.S.C.A. Const.Amend. 14.

[33] Constitutional Law 92  3964

## 92 Constitutional Law

## 92XXVII Due Process

## 92XXVII(E) Civil Actions and Proceedings

## 92k3961 Jurisdiction and Venue

## 92k3964 k. Non-Residents in General.

## Most Cited Cases

For due process purposes, 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. U.S.C.A. Const.Amend. 14.

[34] Constitutional Law 92  3965(1)

## 92 Constitutional Law

## 92XXVII Due Process

## 92XXVII(E) Civil Actions and Proceedings

## 92k3961 Jurisdiction and Venue

## 92k3965 Particular Parties or Circumstances

## Cited Cases

## 92k3965(1) k. In General. Most

## Cited Cases

A regular beneficiary of an Ohio-administered trust meets the requisite minimum contacts in Ohio to support personal jurisdiction under federal due-process standards. U.S.C.A. Const.Amend. 14.

[35] Constitutional Law 92  3964

## 92 Constitutional Law

## 92XXVII Due Process

## 92XXVII(E) Civil Actions and Proceedings

## 92k3961 Jurisdiction and Venue

## 92k3964 k. Non-Residents in General.

## Most Cited Cases

Through a "reasonableness" inquiry into whether exercise of personal jurisdiction over nonresident defendant comports with due process, a court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief; court must also weigh the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies. U.S.C.A. Const.Amend. 14.

[36] Constitutional Law 92  3965(7)

## 92 Constitutional Law

## 92XXVII Due Process

## 92XXVII(E) Civil Actions and Proceedings

## 92k3961 Jurisdiction and Venue

## 92k3965 Particular Parties or Circumstances

## Cited Cases

## 92k3965(7) k. Banks, Banking, and

## Finance. Most Cited Cases

Trusts 390  254

## 390 Trusts

## 390IV Management and Disposal of Trust Property

## 390k245 Actions Between, By, or Against

## Trustees

## 390k254 k. Jurisdiction. Most Cited Cases

For due process purposes, exercise of personal jurisdiction over nonresident trust beneficiaries was reasonable in action involving an alleged breach of fiduciary duty arising from trustee's sale of corporate stock to trustee's own corporation; while nonresident beneficiaries faced a burden by litigating in Ohio, Ohio as situs of trust was the best-positioned state to fashion a potential remedy, and being the beneficiary of an Ohio-established-and-administered trust was not a random, fortuitous, or attenuated contact with the state, or the unilateral activity of another party. U.S.C.A.

Const.Amend. 14.

[37] Constitutional Law 92 ↪ 3964

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3964 k. Non-Residents in General.

Most Cited Cases

The foreseeability that is critical to due process analysis of the exercise of personal jurisdiction over nonresident defendant is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. U.S.C.A. Const.Amend. 14.

[38] Constitutional Law 92 ↪ 3965(1)

92 Constitutional Law

92XXVII Due Process

92XXVII(E) Civil Actions and Proceedings

92k3961 Jurisdiction and Venue

92k3965 Particular Parties or Circumstances

92k3965(1) k. In General. Most

Cited Cases

Courts 106 ↪ 12(2.40)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106k10 Jurisdiction of the Person

106k12 Domicile or Residence of Party

106k12(2) Actions by or Against Non-residents; "Long-Arm" Jurisdiction in General

106k12(2.40) k. Other Particular

Types of Cases. Most Cited Cases

Statute providing for personal jurisdiction over those persons who accept a distribution from a state-administered trust is constitutional under Due Process Clause. U.S.C.A. Const.Amend. 14; R.C. § 5802.02.

[39] Limitation of Actions 241 ↪ 102(8)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k101 Existence of Trust

241k102 In General

241k102(8) k. Constructive Trust.

Most Cited Cases

Cause of action for constructive trust arose, for limitations purposes, when trustee who acquired trust stock in alleged violation of his fiduciary duty ceased to be the trustee, not on date of the initial transfer of that stock. R.C. § 2305.09.

[40] Trusts 390 ↪ 91

390 Trusts

390I Creation, Existence, and Validity

390I(C) Constructive Trusts

390k91 k. Nature of Constructive Trust.

Most Cited Cases

A constructive trust is an equitable remedy that corrects unjust enrichment.

[41] Trusts 390 ↪ 91

390 Trusts

390I Creation, Existence, and Validity

390I(C) Constructive Trusts

390k91 k. Nature of Constructive Trust.

Most Cited Cases

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.

[42] Trusts 390 ↪ 95

390 Trusts

390I Creation, Existence, and Validity

390I(C) Constructive Trusts

390k95 k. Fraud or Other Wrong in Acquisition of Property in General. Most Cited Cases

A constructive trust is usually imposed when property has been obtained wrongfully.

**[43] Trusts 390 ⇨102(1)****390 Trusts****390I Creation, Existence, and Validity****390I(C) Constructive Trusts****390k102 Breach of Duty by Person in Fiduciary Relation in General****390k102(1) k. In General. Most Cited****Cases**

Constructive trust would be appropriate remedy, in action by trust beneficiaries against trustee's estate and others for an alleged breach of fiduciary duty, if trust beneficiaries could prove that trustee wrongfully acquired stock owned by trust and that trustee's descendants and trusts were legal owners of property that rightfully belonged to the beneficiaries.

**[44] Trusts 390 ⇨95****390 Trusts****390I Creation, Existence, and Validity****390I(C) Constructive Trusts****390k95 k. Fraud or Other Wrong in Acquisition of Property in General. Most Cited Cases****Trusts 390 ⇨356(1)****390 Trusts****390VII Establishment and Enforcement of Trust****390VII(B) Right to Follow Trust Property or Proceeds Thereof****390k355 Trust Property Transferred to Third Persons****390k356 In General****390k356(1) k. In General. Most****Cited Cases**

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.

**[45] Trusts 390 ⇨291****390 Trusts****390VI Accounting and Compensation of Trustee****390k291 k. Who Entitled to Require Ac-****counting. Most Cited Cases**

Plaintiff who was not a current beneficiary of any trusts administered by defendants was not entitled to an accounting of the trusts in action involving an breach of fiduciary duty. R.C. § 5808.13.

**\*\*486** Drew & Ward and Richard G. Ward, Cincinnati, for appellant Michael K. Cundall.

William H. Blessing, Cincinnati, for appellants Michael K. Cundall Jr., Courtney Fletcher Cundall, and Hillary Cundall.

Frost Brown Todd, L.L.C., and Susan Grogan Faller, Cincinnati, for appellee U.S. Bank.

Beckman, Weil, Shepardson, L.L.C., Peter L. Casady, and Brian G. Dershaw, Cincinnati, for 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.

Ulmer & Berne, L.L.P., Donald J. Mooney Jr., and Pamela K. Ginsburg, Cincinnati, for appellees Christina Koons, Nicholas Koons Baker, and Carson Nye Koons Baker.

Taft, Stettinius & Hollister, L.L.P., and Helmer, Martins, Rice & Popham, James B. Helmer Jr., Julie W. Popham, Robert M. Rice, and Erin M. Campbell, Cincinnati, for 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.

**MARK D. PAINTER, Judge.**

**\*428** {¶ 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. **\*429** 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 \*\*487 be separate for accounting and distribution purposes. The trust document specifically prevented Bud from distributing the income or principal of the trust either to Bud directly or for his benefit. But it gave Bud the power to sell any assets of the trust for cash "without being subject to the laws of the state or nation," whatever that may mean.

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

{¶ 5} In 1983, Bud offered to purchase the Cundall family's shares of CIC stock, including the shares

that were in the Cundall Fund and the Betty Lou Trust. Bud's first offer, for \$155 per share, was refused. Shortly thereafter, CIC purchased company stock from another shareholder, Lloyd Miller, at \$328 per share.

{¶ 6} Michael alleged that Bud had approached him and his siblings-the beneficiaries of the Cundall Fund-and told them that he would stop distributing dividends and that the CIC shares would be worth nothing if they did not sell. (As sole trustee for the Grandparents Trust, Bud had the unfettered power to distribute income or principal as he saw fit.) In 1984, the Cundall family sold \*430 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 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 \$3,009.74 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, because 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.

\*\*488 {¶ 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.

## \*431 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

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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. \*432 Bank-the trustee of the Betty Lou Trust-from all liability stemming from the transaction.

{¶ 20} The trial court, relying on *Haller v. Borrer Corp.*,<sup>FN1</sup> 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.

FN1. (1990), 50 Ohio St.3d 10, 552 N.E.2d 207.

{¶ 21} *Haller* was a personal-injury tort case. The Ohio Supreme Court laid out \*\*489 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 he should get more.

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

[1] {¶ 23} But "[o]rdinary rules of fraud or undue influence do not apply where there is a fiduciary relationship." <sup>FN2</sup>

FN2. *Muth v. Maxton* (1954), 53 O.O. 263,

119 N.E.2d 162.

{¶ 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*,<sup>FN3</sup> 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.

FN3. 161 Ohio App.3d 1, 2005-Ohio-1975, 829 N.E.2d 318.

\*433 [2][3] {¶ 26} In this case, both U.S. Bank and Bud were trustees, and thus they were in fiduciary relationships with the Cundalls.<sup>FN4</sup> Therefore, both U.S. Bank and Bud had undertaken a duty of loyalty. The duty of loyalty arises not from a provision in the trust, but on account of the trustee-beneficiary relationship.<sup>FN5</sup> The duty of loyalty requires a trustee who has a personal stake in a transaction to adhere to a particularly high standard of behavior.<sup>FN6</sup> The duty of loyalty is " 'the essence of the fiduciary relationship.' " <sup>FN7</sup> Fiduciaries have the burden of proving the "perfect fairness and honesty" of a transaction that was entered into during the fiduciary relationship.<sup>FN8</sup> Whether the fiduciary has demonstrated the fairness of a transaction \*\*490 is a question of fact for a jury.<sup>FN9</sup>

FN4. *O'Neill v. O'Neill*, 169 Ohio App.3d 852, 2006-Ohio-6426, 865 N.E.2d 917, at ¶ 8.

FN5. 3 Scott, Trusts (5th Ed.2007) 1077, Section 17.2.

FN6. Id.

FN7. Boxx, Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code (2002), 67 Mo.L.Rev. 279, 280, quoting Shepherd, The Law of Fiduciaries (1981), 48.

FN8. *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, 34 O.O. 490, 71 N.E.2d 510.

FN9. (1949), 85 Ohio App. 497, 40 O.O. 384, 89 N.E.2d 159.

{¶ 27} Fiduciaries have a duty to “administer the trust solely in the interests of the beneficiaries.” FN10 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.” FN11

FN10. 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.

FN11. *Meinhard v. Salmon* (1928), 249 N.Y. 458, 464, 164 N.E. 545.

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

[4][5] {¶ 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 him[self] \*434 from the legal responsibility of a fiduciary under the law.” FN12 Statutory and common law govern the rights and responsibilities of fiduciaries.FN13 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,FN14 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.

FN12. *In re Estate of Binder* (1940), 137 Ohio St. 26, 43-44, 17 O.O. 364, 27 N.E.2d 939.

FN13. *Biddulph v. Delorenzo*, 8th Dist. No. 83808, 2004-Ohio-4502, 2004 WL 1902725, at ¶ 27.

FN14. R.C. 5810.09.

[6] {¶ 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.FN15 Perhaps they did. But it is their burden to so prove.

FN15. See, also, Restatement of the Law 2d, Trusts (1992), Sections 170 and 206.

{¶ 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." <sup>FN16</sup>  
And any direct dealings between a trustee and a beneficiary are "viewed with suspicion." <sup>FN17</sup>

FN16. 857 Horwood and Wolven, Tax Management: Estates, Gifts and Trusts: Managing Litigation Risks of Fiduciaries (2007), A-18.

FN17. Bogert, Trusts & Trustees, (2d Ed.1995) 542, Section 943.

{¶ 33} Many jurisdictions have held that transactions between a fiduciary and a beneficiary entered into during the fiduciary relationship are presumptively fraudulent.<sup>FN18</sup> Other jurisdictions have held that \*\*491 releases will not be upheld if one party is at a disadvantage because it has depended on the fiduciary to protect its interests,<sup>FN19</sup> or if the release protects the fiduciary against fraud, violates public policy, or relieves the fiduciary of a duty imposed by law.<sup>FN20</sup>

FN18. 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, 503 N.Y.S.2d 451, quoting *In re Rees' Estate* (1947), 72 N.Y.S.2d 598, 599.

FN19. *Gugel v. Hiscox* (1910), 122 N.Y.S. 557, 138 A.D. 61.

FN20. *United States v. United States Cart-ridge 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 Constr.* (1978), 224 Kan. 320, 330, 582 P.2d 1111; *Mid-America Sprayers, Inc. v. United States Fire Ins. Co.* (1983), 8 Kan.App.2d 451, 455, 660 P.2d 1380; *Ganley Bros. v. Butler Bros. Bldg. Co.*

(1927), 170 Minn. 373, 212 N.W. 602, 603.

**\*435 VI. Releases Are Highly Suspect**

[7][8] {¶ 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.

{¶ 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." <sup>FN21</sup>

FN21. *Birnbaum v. Birnbaum* (1986), 503 N.Y.S.2d 451, 117 A.D.2d 409, quoting *In re Rees' Estate* (1947), 72 N.Y.S.2d 598, 599.

{¶ 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.<sup>FN22</sup>

FN22. See, e.g., *Atwater v. Jones*, supra; *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, 2003 WL 1240142, at ¶ 29-30; *Schoch v. Bloom* (1965) 5 Ohio Misc. 155, 158, 33 O.O.2d 330, 212 N.E.2d 428; *In re Guardianship of Marshall* (May 26, 1998), 12th Dist. Nos. CA96-11-239 and CA96-11-244, 1998 WL 265010; 3 Scott, Trusts (5 Ed.2007) 1078, Section 17.2.

\*436 [9] {¶ 39} We are aware of the argument that because Bud did not himself \*\*492 purchase the shares-they were purchased by the corporation that he was CEO and majority shareholder of-it was not technically self-dealing. This court has previously, and correctly, rejected that argument.<sup>FN23</sup>

FN23. *In re Trust U/W of Woltering* (1999), 1st Dist. No. C-970913, 1999 WL 163759.

{¶ 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.<sup>FN24</sup> When determining the validity of a dismissal under the rule, we accept as true all factual allegations in the complaint.<sup>FN25</sup>

FN24. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶ 5.

FN25. Id.

{¶ 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.

[10] {¶ 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.

{¶ 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).<sup>FN26</sup> This court has held that a trial court may consider documents that are referred to or incorporated in the complaint.<sup>FN27</sup> In \*437 this case, the complaint specifically referred to the releases. Therefore, the releases were properly considered by the trial court.

FN26. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, 2 O.O.3d 393, 358 N.E.2d 526, paragraph one of the syllabus.

FN27. *Coors v. Fifth Third Bank*, 1st Dist. No. C-050927, 2006-Ohio-4505, 2006 WL 2520322, at ¶ 11.

[11] {¶ 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 whether it had jurisdiction over the case, it did so properly. The court could consider only 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\*\*493 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

[12] {¶ 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 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 \*438 and because CIC had purchased back its stock back from another person for a higher price several months before the Cundalls sold their stock.

[13][14] {¶ 52} The statute of limitations for breach of a fiduciary duty and fraud is four years.FN28 For a trustee, the statute of limitations will not begin running until the fiduciary relationship has ended.FN29 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.FN30

FN28. R.C. 2305.09.

FN29. *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 29 O.O. 399, 58 N.E.2d 675.

FN30. *Id.*; *Wooten v. Republic Savs. Bank*, 172 Ohio App.3d 722, 2007-Ohio-3804, 876 N.E.2d 1260, at ¶ 43; *Harris v. Liston* (1999), 86 Ohio St.3d 203, 207, 714 N.E.2d 377.

[15] {¶ 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.FN31

FN31. *Cline v. Cline*, 7th Dist. No. 05 CA 822, 2007-Ohio-1391, 2007 WL 901579, at

¶ 23.

{¶ 54} We believe that if the Cundalls had exercised reasonable diligence, they would have discovered any alleged fraud that 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 limitations 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.

#### *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.<sup>FN32</sup> But the statute applies only to claims that \*439 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."

FN32. R.C. 2117.06(B).

[16] {¶ 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.<sup>FN33</sup>

FN33. *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871, 2006 WL 3199281, at ¶ 22.

[17] {¶ 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 passes outside of probate is not part of the estate.<sup>FN34</sup> 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.

FN34. *Id.*

[18] {¶ 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.<sup>FN35</sup> 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.

FN35. *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 29 O.O. 399, 58 N.E.2d 675. See, also, *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. 03AP-1114, 2004-Ohio-3484, 2004 WL 1470806, at ¶ 29; *Hosterman v. First Natl.*

*Bank & Trust Co.* (1946), 79 Ohio App. 37, 38, 34 O.O. 328, 68 N.E.2d 325.

{¶ 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 \*\*495 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.

**\*440 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 non-Cundall defendants filed motions to dismiss. Michael sought to file a second amended complaint on July 18.

[19] {¶ 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. "[W]here 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."<sup>FN36</sup>

FN36. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 63 O.O.2d 262, 297 N.E.2d 113.

{¶ 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**

[20] {¶ 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 jurisdiction. Because we are convinced that Ohio has personal jurisdiction over all defendants, it is not necessary to discuss in rem jurisdiction-or wormholes.

[21][22][23] {¶ 66} The Cundalls had the burden of establishing the trial court's jurisdiction.<sup>FN37</sup> In response to a motion to dismiss, the Cundalls were required only to make a prima facie case of jurisdiction.<sup>FN38</sup> We review the trial court's grant of the jurisdictional motion de novo.<sup>FN39</sup>

FN37. *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 14 OBR 371, 471 N.E.2d 165.

FN38. *Id.* at 307, 14 OBR 371, 471 N.E.2d 165.

FN39. *Information Leasing Corp. v. Baxter*, 1st Dist. No. C-020029, 2002-Ohio-3930, 2002 WL 1769453, ¶ 4.

{¶ 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 \*441 statute gives Ohio jurisdiction over both trustees and beneficiaries of a trust located in Ohio for any dispute involving the trust.<sup>FN40</sup> According to R.C. 5811.03,<sup>FN41</sup> 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" \*\*496 or preju-

dice 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.)

FN40. R.C. 5802.02(B).

FN41. R.C. 5811.03(A)(3).

{¶ 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.

{¶ 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*

[24] {¶ 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,<sup>FN42</sup> and (2) that the exercise of personal jurisdiction over the out-of-state trust beneficiaries would comport with federal due-process requirements.<sup>FN43</sup>

FN42. R.C. 2307.382 and Civ.R. 4.3.

FN43. *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 235, 638 N.E.2d 541.

[25][26] {¶ 71} Ohio's long-arm statute delineates those instances that render defendants amenable to the jurisdiction of Ohio.<sup>FN44</sup> Included among these provisions is a grant of jurisdiction when a person "[transacts] any business in this state." FN45 Courts construe "transacting any business"

broadly, and the phrase includes "hav[ing] dealings [with]." <sup>FN46</sup> Courts resolve questions about the applicability<sup>442</sup> of R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) on "highly particularized fact situations, thus rendering any generalization unwarranted."<sup>FN47</sup>

FN44. R.C. 2307.382(A).

FN45. R.C. 2307.382(A)(1).

FN46. *Goldstein*, supra, at 236, 638 N.E.2d 541; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477.

FN47. *United States Sprint Communications Co. Partnership v. K's Foods* (1994), 68 Ohio St.3d 181, 185, 624 N.E.2d 1048.

[27] {¶ 72} The Koons defendants are beneficiaries of trusts established and administered in Ohio. Clearly, the Koons defendants have dealings with Ohio—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.

[28] {¶ 73} Jurisdiction over the Koons defendants also comports with federal due-process requirements. In *Mullane v. Cent. 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."<sup>FN48</sup> Although this case addressed only closing a trust, it clearly should apply to the administration of trusts in general.

FN48. (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

\*\*497 [29][30] {¶ 74} The trial court also had jurisdiction over the Koons defendants under *Internatl. Shoe Co. v. Washington*<sup>FN49</sup> 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."<sup>FN50</sup> The Supreme Court emphasized that the minimum-contacts analysis "cannot be simply mechanical or quantitative," and that whether due process is satisfied depends "upon the quality and nature of the activity."<sup>FN51</sup>

FN49. (1945), 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95.

FN50. *Id.* at 316, 66 S.Ct. 154, 90 L.Ed. 95.

FN51. *Id.* at 319, 66 S.Ct. 154, 90 L.Ed. 95.

[31][32][33] {¶ 75} *Internatl. 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."<sup>FN52</sup> 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 \*443 entirely distinct from those activities."<sup>FN53</sup> 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."<sup>FN54</sup>

FN52. *Id.* at 317, 66 S.Ct. 154, 90 L.Ed. 95.

FN53. *Id.* at 318, 66 S.Ct. 154, 90 L.Ed. 95.

FN54. *Id.*

[34] {¶ 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.

[35] {¶ 77} The Supreme Court added another layer to the due-process analysis in *Asahi Metal Indus. Co. v. Superior Court*.<sup>FN55</sup> 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.<sup>FN56</sup> It must also weigh the " 'interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several [s]tates in furthering fundamental substantive social policies.' " <sup>FN57</sup> 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."<sup>FN58</sup>

FN55. (1987), 480 U.S. 102, 108-109, 107 S.Ct. 1026, 94 L.Ed.2d 92.

FN56. *Id.* at 113, 107 S.Ct. 1026, 94 L.Ed.2d 92.

FN57. *Id.*, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490.

FN58. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528.

[36] {¶ 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 \*\*498 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 \*444 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." FN59 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 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."

FN59. *Id.* at 474, 105 S.Ct. 2174, 85 L.Ed.2d 528.

[37] {¶ 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." FN60

FN60. *Burger King Corp.*, 471 U.S., at 475, 105 S.Ct. 2174, 85 L.Ed.2d 528, quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297, 100 S.Ct. 559, 62 L.Ed.2d 490.

### XIII. But the Statute Applies

[38] {¶ 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, FN61 that the provision for personal jurisdiction over those persons who accept a distribution from a state-administered trust is constitutional. FN62 And we note that we have found no court that has held this or any other provision of the UTC unconstitutional. FN63

FN61. 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.

FN62. Uniform Trust Code 202; R.C. 5802.02.

FN63. 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.

\*445 {¶ 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 \*\*499 compensatory and perhaps punitive damages.

[39] {¶ 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.<sup>FN64</sup> 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.

FN64. *Peterson v. Teodosio*, 34 Ohio St.2d at 172, 63 O.O.2d 262, 297 N.E.2d 113.

[40][41][42] {¶ 85} A constructive trust is an equitable remedy that corrects unjust enrichment.<sup>FN65</sup> 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.<sup>FN66</sup> A constructive trust is usually imposed when property has been obtained wrongfully.

FN65. *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, at ¶ 19.

FN66. *Id.*

[43][44] {¶ 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.<sup>FN67</sup> Upon remand, the Cundalls will bear the burden of proving that the court should impose a constructive trust.<sup>FN68</sup>

FN67. *Id.* at ¶ 26.

FN68. *Id.* at ¶ 20.

**\*446 XV. Accounting**

[45] {¶ 87} Michael argues that the trial court erred by denying his request for an accounting of the trusts.

{¶ 88} By statute,<sup>FN69</sup> a trustee must provide reports to current beneficiaries. Because Michael is not a current beneficiary of any of the trusts administered by any of the defendants, the statute does not apply.

FN69. R.C. 5808.13.

{¶ 89} But once the parties continue with discovery, Michael will have a right to any nonprivileged documents the parties have concerning the trusts. Civ.R. 26 allows parties to obtain discovery on any matter relevant to the action, as long as the material is not privileged.

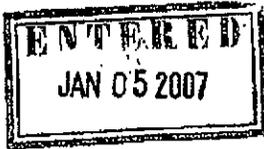
**XVI. Reversed, Except as to U.S. Bank**

{¶ 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.  
Ohio App. 1 Dist., 2007.  
Cundall v. U.S. Bank  
174 Ohio App.3d 421, 882 N.E.2d 481, 2007 - Ohio- 7067

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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").<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> KMC was a holding company whose sole asset was shares of CIC.

<sup>2</sup> 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.



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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"<sup>3</sup> 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

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

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

## II. LAW

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

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

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

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

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

**B. Release/Tender Rule**

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

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

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

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

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

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

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

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

### III. ANALYSIS

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

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

However, the Court has found no recognized exception to the tender rule announced by the Ohio Supreme Court in *Haller*. Nor, has the Court found any authority to suggest that it should look outside of the fraud in the factum/fraud in the inducement framework prescribed by the Ohio Supreme Court in *Haller* for a case involving a self-dealing trustee, particularly where, as here, the fraud alleged by Plaintiffs so clearly constitutes fraud in the inducement. Regardless of the basic nature of the inducement allegedly employed here (i.e. self-dealing by a trustee),<sup>4</sup> 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

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<sup>4</sup> 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.<sup>5</sup>

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

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<sup>5</sup> See Grandparent's Trust, Article II and IV(3).

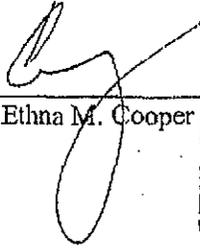
dismissal of the claims and cross-claims herein based on the failure to tender must be without prejudice.

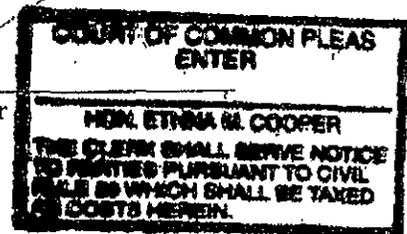
In addition, for the reasons stated in the Defendants' respective briefs, the Court also finds merit in the Defendants' arguments to dismiss: (1) with prejudice the claims against U.S. Bank on statute of limitation grounds; (2) without prejudice the claims against out-of-state Koons beneficiaries for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

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

There is no just cause for delay.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Judge Ethna M. Cooper



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**C**

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

Article II. Legislative (Refs & Annos)

→ **O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts**

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Current through 2008 File 129 of the 127th GA (2007-2008), apv. by 8/5/08, and filed with the Secretary of State by 8/5/08.

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXIII. Courts--Common Pleas

§ Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)

§ Limitations--Contracts

→ 2305.07 Contract not in writing

Except as provided in sections 126.301 and 1302.98 of the Revised Code, 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.

CREDIT(S)

(1993 H 152, eff. 7-1-93; 129 v 13; 1953 H 1; GC 11222)

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Title XXIII. Courts--Common Pleas

Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Amos)

Limitations--Torts

→ 2305.09 Four years; certain torts (later effective date)

<Note: See also version(s) of this section with earlier effective date(s).>

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud, except when the cause of action is a violation of section 2913.49 of the Revised Code, in which case the action shall be brought within five years after the cause thereof accrued;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1304.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code;

(E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

CREDIT(S)

(2008 H 46, eff. 9-1-08; 2004 H 161, eff. 5-31-04; 1994 S 147, eff. 8-19-94; 129 v 13, eff. 7-1-62; 1953 H 1; GC 11224)

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Title XXIII. Courts--Common Pleas

▣ Chapter 2307. Civil Actions (Refs & Annos)

▣ Long-Arm Statute

→ **2307.382 Personal jurisdiction**

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
- (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.
- (8) Having an interest in, using, or possessing real property in this state;
- (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

CREDIT(S)

(1988 H 90, eff. 9-9-88; 1976 H 1358; 131 v H 406)

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Title LVIII. Trusts

Chapter 5801. General Provisions (Refs & Annos)→ 5801.10 Parties to agreements; effect on creditor rights (later effective date)

&lt;Note: See also version(s) of this section with earlier effective date(s).&gt;

(A) As used in this section, "creditor" means any of the following:

- (1) A person holding a debt or security for a debt entered into by a trustee on behalf of the trust;
- (2) A person holding a debt secured by one or more assets of the trust;
- (3) A person having a claim against the trustee or the assets of the trust under section 5805.06 of the Revised Code;
- (4) A person who has attached through legal process a beneficiary's interest in the trust.

(B) The parties to an agreement under this section shall be all of the following, or their representatives under the representation provisions of Chapter 5803. of the Revised Code, except that only the settlor and any trustee are required to be parties to an amendment of any revocable trust:

- (1) The settlor if living and if no adverse income or transfer tax results would arise from the settlor's participation;
- (2) All beneficiaries;
- (3) All currently serving trustees;
- (4) Creditors, if their interest is to be affected by the agreement.

(C) The persons specified in division (B) of this section may by written instrument enter into an agreement with respect to any matter concerning the construction of, administration of, or distributions under the terms of the trust, the investment of income or principal held by the trustee, or other matters. The agreement may not effect a termination of the trust before the date specified for the trust's termination in the terms of the trust, change the interests of the beneficiaries in the trust except as necessary to effect a modification described in division (C)(5) or (6) of this section, or include terms and conditions that could not be properly approved by the court under Chapters 5801. to 5811. of the Revised Code or other applicable law. The invalidity of any provision of the agreement does not affect the validity of other provisions of the agreement. Matters that may be resolved by a private settlement agreement include, but are not limited to, all of the following:

- (1) Determining classes of creditors, beneficiaries, heirs, next of kin, or other persons;
- (2) Resolving disputes arising out of the administration or distribution under the terms of the trust, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the terms of the trust;
- (3) Granting to the trustee necessary or desirable powers not granted in the terms of the trust or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the

terms of the trust or, if inconsistent with the express provisions or purposes of the terms of the trust, are necessary for the due administration of the terms of the trust;

(4) Modifying the terms of the trust, if the modification is not inconsistent with any dominant purpose or objective of the trust;

(5) Modifying the terms of the trust in the manner required to qualify the gift under the terms of the trust for the charitable estate or gift tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by the Internal Revenue Code and regulations promulgated under it in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(6) Modifying the terms of the trust in the manner required to qualify any gift under the terms of the trust for the estate tax marital deduction available to noncitizen spouses, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the Internal Revenue Code [EN1] and regulations promulgated under it in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(7) Resolving any other matter that arises under Chapters 5801. to 5811. of the Revised Code.

(D) No agreement shall be entered into under this section affecting the rights of a creditor without the creditor's consent or affecting the collection rights of federal, state, or local taxing authorities.

(E) Any agreement entered into under this section that complies with the requirements of division (C) of this section shall be final and binding on the trustee, the settlor if living, all beneficiaries, creditors who are parties to the agreement, and their heirs, successors, and assigns.

(F) Notwithstanding anything in this section, in division (D) of section 5803.03 of the Revised Code, or in any other rule of law to the contrary, a trustee serving under the terms of the trust shall only represent its own individual or corporate interests in negotiating or entering into an agreement subject to this section. No trustee serving under the terms of the trust shall be considered to represent any settlor, beneficiary, or the interests of any settlor or beneficiary in negotiating or entering into an agreement subject to this section.

(G) Any party to a private settlement agreement entered into under this section may request the court to approve the agreement, to determine whether the representation as provided in Chapter 5803. of the Revised Code was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

(H) If an agreement entered into under this section contains a provision requiring binding arbitration of any disputes arising under the agreement, the provision is enforceable.

(I) Nothing in this section affects any of the following:

(1) The right of a beneficiary to disclaim under section 5815.36 of the Revised Code;

(2) The termination or modification of a trust under section 5804.10, 5804.11, 5804.12, 5804.13, 5804.14, 5804.15, or 5804.16 of the Revised Code;

(3) The ability of a trustee to divide or consolidate a trust under section 5804.17 of the Revised Code.

(J) Nothing in this section restricts or limits the jurisdiction of any court to dispose of matters not covered by agreements under this section or to supervise the acts of trustees appointed by that court.

(K) This section shall be liberally construed to favor the validity and enforceability of agreements entered into under it.

(L) A trustee serving under the trust instrument is not liable to any third person arising from any loss due to that trustee's actions or inactions taken or omitted in good faith reliance on the terms of an agreement entered into under this section.

(M) This section does not apply to any of the following:

(1) A charitable trust that has one or more charitable organizations as qualified beneficiaries;

(2) A charitable trust the terms of which authorize or direct the trustee to distribute trust income or principal to one or more charitable organizations to be selected by the trustee, or for one or more charitable purposes described in division (A) of section 5804.05 of the Revised Code, if any of the following apply:

(a) The distributions may be made on the date that an agreement under this section would be entered into.

(b) The distributions could be made on the date that an agreement under this section would be entered into if the interests of the current beneficiaries of the trust terminated on that date, but the termination of those interests would not cause the trust to terminate.

(c) The distributions could be made on the date that an agreement under this section would be entered into if the trust terminated on that date.

CREDIT(S)

(2008 H 499, eff. 9-12-08; 2006 H 416, eff. 1-1-07)

[FN1126 U.S.C.A. § 2056a.

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Title LVIII. Trusts

Chapter 5802. Judicial Proceedings

→ 5802.02 Jurisdiction over trustee and beneficiary

(A) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(B) 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.

(C) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

CREDIT(S)

(2006 H 416, eff. 1-1-07)

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Title LVIII. Trusts

Chapter 5803. Representation

→ 5803.03 Representation by fiduciaries and parents (later effective date)

<Note: See also version(s) of this section with earlier effective date(s).>

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute, all of the following apply:

- (A) A guardian of the estate may represent and bind the estate that the guardian of the estate controls.
- (B) A guardian of the person may represent and bind the ward if a guardian of the estate has not been appointed.
- (C) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.
- (D) Except as provided in division (F) of section 5801.10 of the Revised Code, a trustee may represent and bind the beneficiaries of the trust.
- (E) A personal representative of a decedent's estate may represent and bind persons interested in the estate.
- (F) A parent may represent and bind the parent's minor or unborn child if neither a guardian for the child's estate or a guardian of the person has been appointed. If a minor or unborn child is not represented by a parent under this division, another person may represent and bind the minor or unborn child under section 5803.04 of the Revised Code if the requirements of that section are met.

CREDIT(S)

(2008 H 499, eff. 9-12-08; 2006 H 416, eff. 1-1-07)

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Title LVIII. Trusts

Chapter 5803. Representation

→ 5803.04 Representation by person with substantially identical interest

Unless otherwise represented, a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

CREDIT(S)

(2006 H 416, eff. 1-1-07)

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Title LVIII. Trusts

Chapter 5810. Remedies for Breach of Trust→ 5810.05 Limitation of action against trustee (later effective date)

&lt;Note: See also version(s) of this section with earlier effective date(s).&gt;

(A) A beneficiary may not commence a proceeding against a trustee for breach of trust more than two years after the date the beneficiary, a representative of the beneficiary, or a beneficiary surrogate is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary, the representative of the beneficiary, or the beneficiary surrogate of the time allowed for commencing a proceeding against a trustee.

(B) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the representative of the beneficiary knows of the potential claim or should know of the existence of the potential claim.

(C) If division (A) of this section does not apply, notwithstanding section 2305.09 of the Revised Code, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within four years after the first of the following to occur:

- (1) The removal, resignation, or death of the trustee;
- (2) The termination of the beneficiary's interest in the trust;
- (3) The termination of the trust;
- (4) The time at which the beneficiary knew or should have known of the breach of trust.

(D) Nothing in Chapters 5801. to 5811. of the Revised Code limits the operation of any principle of law or equity, including the doctrines of laches, unclean hands, estoppel, and waiver, that can bar claims.

CREDIT(S)

(2008 H 499, eff. 9-12-08; 2006 H 416, eff. 1-1-07)

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Title LVIII. Trusts

Chapter 5810. Remedies for Breach of Trust

→ 5810.09 Beneficiary's consent, release, or ratification

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee or, at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

CREDIT(S)

(2006 H. 416, eff. 1-1-07)

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## Title LVIII. Trusts

Chapter 5811. Miscellaneous Provisions→ 5811.03 Application to existing relationships

(A) Except as otherwise provided in Chapters 5801. to 5811. of the Revised Code, all of the following apply:

(1) Chapters 5801. to 5811. of the Revised Code apply to all trusts created before, on, or after their effective date.

(2) Chapters 5801. to 5811. of the Revised Code apply to all judicial proceedings concerning trusts commenced on or after their effective date.

(3) Chapters 5801. to 5811. of the Revised Code apply 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.

(4) Any rule of construction or presumption provided in Chapters 5801. to 5811. of the Revised Code applies to trust instruments executed before the effective date of those chapters unless there is a clear indication of a contrary intent in the terms of the trust.

(5) Chapters 5801. to 5811. of the Revised Code do not affect an act done before the effective date of those chapters.

(B) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Chapters 5801. to 5811. of the Revised Code, that statute continues to apply to the right even if it has been repealed or superseded.

CREDIT(S)

(2006 H 416, eff. 1-1-07)

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