

IN THE SUPREME COURT OF OHIO

Michael K. Cundall, et. al. :
 :
 :
 Plaintiffs, :
 :
 : Case No. 2008-0314
 :
 vs. :
 :
 :
 U.S. Bank, N.A, :
 : On Appeal from the
 Predecessor Trustee, et al. :
 : Hamilton County Court
 : of Appeals, First
 : Appellate District
 :
 Defendants. :

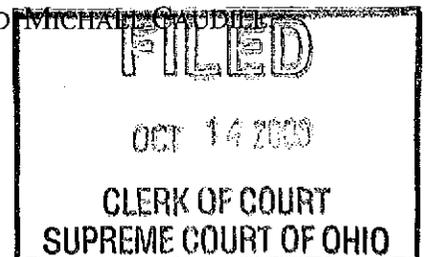
REPLY BRIEF OF DEFENDANTS-PETITIONERS

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TABLE OF CONTENTS

	<u>Page</u>
I. TABLE OF AUTHORITIES	i
II. REPLY TO RESPONDENTS' STATEMENT OF THE CASE AND STATEMENT OF FACTS	1
III. REPLY IN SUPPORT OF DEFENDANTS-PETITIONERS' PROPOSITIONS OF LAW	4
 <u>Proposition of Law No 1:</u>	
A plaintiff who alleges that a release was obtained by fraud in the inducement must tender back the consideration received in exchange for the release before suing the released party over the released claims, even if the released party owed fiduciary duties to the plaintiff	4
 A) In <i>Weisman</i> and <i>Lewis</i> , Ohio Courts Applied the Tender Rule to Releasors to Whom Fiduciary Duties Were Owed Who Had Less Protections than the Cundalls	4
B) Trustees Owe No Unique Duties Excusing Beneficiaries From The Tender Rule	5
C) Allowing a Set-Off Instead of Requiring Tender Defeats the Purpose of the Tender Rule	6
D) The Tender Rule Does Not Allow Self-Dealing Trustees To Escape The Consequences Of Their Actions; Cross-Claimants Waived This Argument	6
E) The Limited Exception To The Tender Rule Where The Releasee Owes Money To The Releasor Does Not Apply Here Because No One Owed the Cundalls Money	7
F) Impossibility Is Not an Exception to the Tender Rule; Tender Was Not Impossible; Michael Cundall Waived This Argument	9
G) Tender Is to Put the Defendant in Status Quo Ante, Not the Plaintiff .	9
H) Failure to Obtain Court Approval Is Not an Exception to the Tender Requirement, Nor Was Court Approval Needed	10

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Barthelmas v. Barthelmas</i> (4th Dist. Jan. 7, 1999), 1999 Ohio App. LEXIS 68	19
<i>Bebout v. Bodle</i> (1882), 38 Ohio St. 500	7
<i>Bergholtz Coal Holding Co. v. Dunning</i> , 11 Dist. No. 2004-L-209, 2006 Ohio 3401	20
<i>Biddulph v. DiLorenzo</i> , 8th Dist. No. 83808, 2004 Ohio 4502	11, 16, 17
<i>Bonnieville Towers Condo. Owners Ass'n v. Andrews</i> , 8th Dist. No. 89838, 2008 Ohio 1833	13
<i>Brate v. Hurt</i> , 12th Dist., 174 Ohio App. 3d 101, 2007 Ohio 6571	20
<i>Cassner v. Bank One</i> , 10th Dist. No. 03AP-1114, 2004 Ohio 3484	10, 19
<i>Cent. Nat'l Bank v. Brewer</i> (Cuyahoga C.P. 1966), 8 Ohio Misc. 409	11, 13
<i>Cleveland Trust Co. v. Eaton</i> (1970), 21 Ohio St.2d 129	16
<i>Craggett v. Adell Ins. Agency</i> (8th Dist. 1993), 92 Ohio App. 3d 443	18
<i>Cross v. Ledford</i> (1954), 161 Ohio St. 469	18
<i>Cundall v. U.S. Bank</i> (Hamilton Cty. C.P.), No. A 0507295	2, 10
<i>Cundall v. U.S. Bank</i> , 1st Dist. Nos C-070081, C-070082, 2007 Ohio 7067	6, 16, 18

<i>Lewis v. Mathes</i> , 4th Dist., 161 Ohio App. 3d 1, 2005 Ohio 1975.....	4, 5, 8
<i>Long v. Long</i> (1919), 99 Ohio St. 330	13
<i>Manhattan Life Ins. Co. v. Burke</i> (1903), 69 Ohio St. 294	7, 8, 10
<i>Marshall v. Silsby</i> , 11th Dist. No. 2004-L-094, 2005 Ohio 5609.....	14
<i>Maust v. Bank One</i> (10th Dist. 1992), 83 Ohio App. 3d 103	10
<i>McAdams v. McAdams</i> (1909), 80 Ohio St. 232	18
<i>Palm Beach v. Dun & Bradstreet, Inc.</i> (1st Dist. 1995), 106 Ohio App.3d 167	20
<i>Parrott v. Parrott</i> (Montgomery C.P. 1918), 29 Ohio Dec. 152	13
<i>Peterson v. Teodosio</i> (1973), 34 Ohio St. 2d 161	19
<i>Picklesimer v. Baltimore & Ohio Rd. Co.</i> (1949), 151 Ohio St. 1	10, 15
<i>Randall v. Randall</i> (S.D. Fla. 1944), 60 F.Supp. 308	13
<i>State ex rel. Lien v. House</i> (1944), 144 Ohio St. 238	19
<i>State ex rel. Porter v. Cleveland Dep't of Pub. Safety</i> (1998), 84 Ohio St. 3d 258.	6, 9, 15
<i>United States v. Gordin</i> (S.D. Ohio 1922), 287 F. 565	13

REPLY TO RESPONDENTS' STATEMENT OF THE CASE AND STATEMENT OF FACTS

Michael Cundall and his adult children do not dispute that they did not satisfy the tender rule, which has been the law of Ohio for over 100 years. Instead, they ask this Court to affirm the First District's decision to create, for the first time, an exception to this century-old rule whenever the released party is a fiduciary to the releasor.

But such an exception would devour both the tender rule and the valid and longstanding public policy reasons behind it for a myriad of commercial and private settlements of disputes. Such an exception would also create uncertainty for numerous transactions and promote fraud on the part of those providing releases in exchange for bargained-for settlements who could later elect to challenge such settlements while retaining the bargained-for benefit.¹

Maintaining the tender rule provides both stability to out-of-court dispute resolutions and proper guidance to the trial courts of this State. This stability comes with little costs because aggrieved releasors can still maintain attacks on settlements after tender.

This lawsuit is an important example of the damage to settled property rights that can occur when the tender rule is ignored. The Cundalls enjoyed millions of dollars in proceeds from selling their stock in 1984. Claiming they were entitled to more money, twenty-two years later Plaintiff-Respondent Michael K. Cundall ("Plaintiff") brought this lawsuit against the personal representatives of his deceased uncle John F. (Bud) Koons III's estate, the successor trustees of trusts established by Bud Koons and his family (together "Defendants-Petitioners"), as well as Bud Koons' family members. And claiming an unspecified interest in their father's share,

¹ Defendants-Petitioners' Merit Brief ("Merit Brief") at 22-23. *See Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, 2003 Ohio 5849, ¶ 43 ("The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs . . . Those affected by the law come to rely upon its consistency.")

Plaintiff's adult children, Cross-Claimants-Respondents Michael Cundall Jr., Courtney Cundall, and Hillary Cundall ("Cross-Claimants") filed cross-claims against Defendants-Petitioners.

Though the Cundalls have enjoyed the proceeds that they obtained in return for both their release and their stock for decades, they waited until Bud Koons' death to file suit over claims that they released with legal representation.² Those claims were believed to be long settled and released by contract. But now the First District has permitted the Cundalls a chance to eradicate settled property rights without even requiring them to have first tendered the consideration used to purchase their releases. Defendants-Petitioners must now defend this case without the funds used to purchase the Cundalls' releases—funds the Cundall can use to prosecute this case.

Plaintiff and his lawyer Richard G. (Nick) Ward contrived this \$300 million dollar lawsuit using Defendants' confidential and privileged documents and information while the Wards were simultaneously working for and billing Defendants.³ That misuse continues.⁴

The Wards' side-switching behavior demanded full airing in our Merit Brief because in

² Plaintiffs' Memo. in Opposition to Defendants' Motions to Dismiss at 13, Supp. 149; 2/16/1984 Schwartz, Manes & Ruby invoice, Supp. 97. Admissions of counsel—here as contained in Plaintiff's opposition to the Motions to Dismiss—may be considered by a court in connection with a Rule 12(b)(6) motion to dismiss. 5A Wright and Miller, Federal Practice and Procedure Civil 3d § 1364 at 475.

³ Richard H. (Dick) Ward and Drew & Ward were not former counsel as Respondents repeatedly misstate, but rather current counsel to Defendants-Petitioners when the Cundall lawsuit was filed. 7/25/2006 Keven E. Shell Affidavit at ¶ 10, Supp. 177; 10/12/2006 Shell Aff. at ¶ 3, 4, Supp. 212; T.d. 146, 10/12/2006 G. Jack Donson Aff. at ¶ 29-30. Plaintiff claims that Dick Ward was really acting as trustee of Trust B instead of helping his son and law partner Nick Ward put together the Cundall lawsuit in March, 2005. That position is a litigation construct. In his suit to be appointed successor trustee of Trust B, Plaintiff represented to the court that all the nominated successor trustees of Trust B, including Dick Ward, declined. Complaint, ¶ 12, filed 9/2/2005 *Cundall v. U.S. Bank* (Hamilton Cty. C. P.), No. A 0507295. See also T.d. 149, 10/12/2006 Sealed Donson Aff. at ¶ 60 & James J. Ryan Aff. at ¶ 11.

⁴ Plaintiff filed in this Court the sealed affidavit of Dick Ward, longtime counsel for Defendants, which contains privileged and confidential information belonging to Bud Koons. Cundall Supp. V. II at 13-16, 27-28.

forming its opinion the First District evidently relied on a limited part of the factual record – a part that, without context, grossly distorts the true events.⁵ Tellingly, Plaintiff spends pages attempting to explain Dick Ward’s actions, but the facts in our Merit Brief are left undisputed:

- 1) John and Ethel Koons were well aware that the only asset of the Grandparents Trust was CIC stock and that the sole trustee of the Grandparents Trust, their son Bud Koons, was a large shareholder and President of CIC;
- 2) The Cundalls desired the sale of their KCM stock so that they could obtain a higher rate of return on their trust assets and cash for their immediate needs;
- 3) The Cundalls had full access to CIC’s financial information due to Richard Cundall, Jr.’s insider status;
- 4) With the advice of counsel the Cundalls rejected an offer of \$155 per share for their KCM stock in 1983. In rejecting this offer, the Cundalls knew that opportunistic industrialist Lloyd Miller was paid a premium for his CIC shares;
- 5) While Michael Cundall describes the 1983 offer of \$155 per share as an “all or nothing, now or never” offer in his Merit Brief, with the advice of counsel the Cundalls agreed to sell their stock for \$210 per share in 1984;
- 6) The \$210 per share price was at or above the fair market value for the KCM shares as established by the IRS valuation of the KCM shares in Betty Lou Cundall’s estate and U.S. Bank’s independent appraisal;
- 7) Michael Cundall, his father Richard Cundall, and his siblings released all claims arising out of the 1984 stock sale against Bud Koons, his heirs, his executors, and his assigns—including the alleged self-dealing by Bud Koons—on their own behalf and on behalf of their heirs;
- 8) The Cundalls’ lawyer drafted a similar release of U.S. Bank; and
- 9) The Cundalls enjoyed the proceeds of the 1984 stock sale for decades while the remaining CIC shareholders faced substantial risks.⁶

This is not a case of self-dealing, as the First District unfortunately presumed without context. This is a case about side-switching lawyers who manufactured a lawsuit that does not

⁵ Merit Brief at 10-14.

⁶ *Id.* at 3-10.

comport with reality. Over a century of Ohio law demands dismissal of this case because no tender was made before this suit over released claims was filed.

REPLY IN SUPPORT OF DEFENDANTS-PETITIONERS' PROPOSITIONS OF LAW

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

Neither Michael Cundall nor his children dispute that:

- 1) The First District is the first and only court in Ohio that has failed to apply the tender rule to a fraud in the inducement claim, except when a limited exception (which is not applicable here) applies;
- 2) Ohio's courts have faithfully applied the tender rule to a myriad of releases, including releases of fiduciaries; and
- 3) Other than by making unsupported blanket statements and insinuations, Respondents do not contest that they allege fraud in the inducement.

In fact, Respondents in large part do not defend the First District's reasoning. Instead, Respondents make nearly a dozen arguments of their own as to why the tender rule should not be required, including several never raised below. None of those arguments are valid.

Nor do Respondents' arguments demonstrate that this Court's precedent on the tender rule was wrongly decided, defies practical workability, or that its abrogation will not create undue hardship those who have relied upon it. Thus, the First District's decision to abandon this Court's practical, century-old tender rule should not stand in contravention of settled Ohio law.⁷

A) In *Weisman and Lewis*, Ohio Courts Applied the Tender Rule to Releasors to Whom Fiduciary Duties Were Owed Who Had Less Protections than the Cundalls.

Plaintiff Cundall argues that the Ohio appellate cases *Weisman* and *Lewis* (in which the courts applied the tender rule to persons to whom fiduciary duties are owed) are inapplicable

⁷ *Westfield Ins. Co.*, 2003 Ohio 5849 at ¶ 48.

because both involve arms-length transactions.⁸

This argument fails. As here, *Weisman* and *Lewis* involved fiduciaries who owed their releasors fiduciary duties.⁹ In fact, the plaintiffs in those cases had much less protection than the Cundalls. Like the *Weisman* and *Lewis* plaintiffs, Richard Cundall was a corporate insider. However, unlike the *Weisman* and *Lewis* plaintiffs, the Cundalls indisputably had two additional safeguards: representation by independent counsel and an independent stock appraisal by U.S. Bank. In addition, Plaintiff Cundall also sold KCM stock that he owned individually outside of any fiduciary relationship at the same price.¹⁰

Moreover, *Lewis* and *Weisman* are as much self-dealing cases as Respondents claim this case is. In both, plaintiff minority shareholders argued that the defendant majority and controlling shareholders, who were also corporate officers, paid too little to buy their stock. In fact, since there were only two other shareholders in *Lewis* (many fewer than CIC had in 1984), the fiduciaries in *Lewis* and *Weisman* gained the same or greater benefit from self-dealing than Bud Koons allegedly did. Despite the allegations of fiduciary self-dealing, the Fourth and Eighth Districts found it fair to follow this Court's precedents and apply the tender rule.

B) Trustees Owe No Unique Duties Excusing Beneficiaries From The Tender Rule.

In an attempt to avoid the fact that other Ohio appellate courts apply the tender rule to fiduciary relationships, Respondents baselessly argue that such cases are distinguishable because trustees have a fiduciary duty to their beneficiaries which is unique to other fiduciaries.¹¹

⁸ Merit Brief of Michael K. Cundall ("Cundall Merit Brief") at 8-10, *citing Weisman v. Blaushild*, 8th Dist. No. 88815, 2008 Ohio 219, *Lewis v. Mathes*, 4th Dist., 161 Ohio App. 3d 1, 2005 Ohio 1975.

⁹ Merit Brief at 20.

¹⁰ *Id.* at 5-6, 8.

¹¹ Cundall Merit Brief at 10-11; Merit Brief of Michael Cundall, Jr., Courtney Fletcher Cundall, and Hillary Cundall ("Cross-Claimant Merit Brief") at 7-8.

Notably, the First District itself made no such distinction, instead holding that the tender rule does not apply in the entire fiduciary context – not just against trustees but all other fiduciaries.¹² Moreover, as discussed in our Merit Brief, restricting the First District’s holding on tender to trustees is not analytically sound or supported by law.¹³

C) Allowing a Set-Off Instead of Requiring Tender Defeats the Purpose of the Tender Rule.

Michael Cundall argues that instead of requiring tender, the Court should apply “a credit or set-off against the amount the wrongdoer is ordered to pay.”¹⁴ For good reason, this argument has not been accepted in Ohio. If a set-off were allowed in lieu of pre-filing tender, then plaintiffs would be free to release their claims for money and later use that money to fund a lawsuit against releasees. Releasees would be left to defend themselves without those funds.¹⁵

Since allowing a set-off in lieu of tender has never been the law in Ohio and absolutely fails to protect releasees, the pre-filing tender rule should remain the law of Ohio.

D) The Tender Rule Does Not Allow Self-Dealing Trustees To Escape The Consequences Of Their Actions; Cross-Claimants Waived This Argument.

Cross-Claimants argue that if tender is required, self-dealing trustees will escape retribution.¹⁶ They waived this argument by not raising it below.¹⁷ Regardless, such claim is untrue. Beneficiaries who release a trustee may still sue over released claims where fraud in the inducement has occurred, if they first tender back the consideration. There is no reason why

¹² *Cundall v. U.S. Bank*, 1st Dist. Nos. C-070081 & 82, 2007 Ohio 7067 at ¶ 34, Appx. at 19.

¹³ Merit Brief at 22-23.

¹⁴ Cundall Merit Brief at 11-12.

¹⁵ *See also* Merit Brief at 18-19 for the policy reasons as to why this Court has required tender for more than one hundred years.

¹⁶ Cross-Claimant Merit Brief at 8-9.

¹⁷ *E.g. State ex rel. Porter v. Cleveland Dep't of Pub. Safety* (1998), 84 Ohio St. 3d 258, 259.

beneficiaries, unlike all other litigants, are entitled to retain the consideration and the right to sue.

E) The Limited Exception To The Tender Rule Where The Releasee Owes Money To The Releasor Does Not Apply Here Because No One Owed the Cundalls Money.

Respondents argue that “if there is no question that at least the amount originally paid upon the execution of a release is owed, there is no reason to require repayment of the original amount when the release is challenged and an additional amount is sought.”¹⁸ Such claim misstates a single circumstance where this Court permits departure from the tender rule. In *Manhattan Life Insurance Co.*, this Court describes this limited circumstance:

If at the time of the agreement there was, without dispute, an amount due equal to the amount paid . . . then no tender is necessary; but if, at the time of the settlement, it is denied by the alleged debtor that anything is owing, and a dispute as to that liability exists, and that is settled by payment and release, then a return or tender is necessary.¹⁹

In *Manhattan Life Insurance Co.*, this Court found that the limited exception does not apply in a similar scenario. The defendant, an insurer, denied that it owed a plaintiff anything pursuant to a policy, but agreed to compromise the claim in consideration for the plaintiff’s release. Without tendering the consideration, the plaintiff later sued the insurer and won a jury

¹⁸ Cross-Claimant Merit Brief at 9; Cundall Merit Brief at 12-14.

¹⁹ *Manhattan Life Ins. Co. v. Burke*, 69 Ohio St. 294, 306, 1903 Ohio LEXIS 208, citing *Bebout v. Bodle* (1882), 38 Ohio St. 500, *Kley v. Healy* (N.Y. 1891), 127 N. Y. 555. Respondents’ citations are not on point. In *Bebout*, the lender agreed to extend a note, after the debtor falsely stated that the surety agreed to the extension. *Bebout*, 1882 Ohio LEXIS 197 **1-2. The court allowed the lender to break the extension agreement and sue on the original note without tendering the interest because it “was her own in either event.” *Id.*, 38 Ohio St. at 504-05. In *Gray’s Estate*, this Court found that tender is not required when an administrator of an estate sought to break a release of a surety company when it was undisputed that the surety company owed money to the administrator in addition to the released claims. *In re Gray’s Estate* (1954), 162 Ohio St. 384, 391. In *Hoppel*, the release was executed under a mutual mistake concerning the applicable policy and the plaintiff was undisputably entitled to the money already received. *Hoppel v. Farmers Ins. Co.* (7th Dist. June 6, 1990), 1990 Ohio App. LEXIS 2246, *4-5. Plaintiff has never claimed that CIC owed him money for any reason other than as consideration for the release, or that CIC would have bought the stock without the release, or that there was a mutual mistake.

verdict. This Court reversed the jury verdict, finding that the release “whether obtained by fraudulent representation or not, is binding until set aside either by tender or return of the money received.” This Court explained that the limited exception to the tender requirement quoted above did not apply because—like here—the parties settled a disputed claim and the plaintiff agreed to release the defendant in return for monetary consideration.²⁰

Likewise, the Cundalls cannot avoid the tender rule because there is no preexisting obligation by which CIC had to pay the Cundalls millions of dollars in 1984. The only document that created an obligation to pay the Cundalls money also provided that in exchange for those funds, the Cundalls would release Bud Koons from all liability.²¹ Since CIC did not owe the Cundalls any money except in return for the release, tender is not excused.

So Respondents’ claim that: “[t]here can be no question that the Cundalls are owed at least the amount they received from the stock sale in 1984” is incorrect.²² Neither the trial court nor the First District so found.

In *Lewis*, the Fourth District determined that “in the absence of the agreement [the defendants] were not obligated to buy [the plaintiff’s] shares at any price.”²³ Since the consideration was not apportioned between the stock and the release, the Fourth District held that the plaintiff was required to tender back all of the consideration before filing suit.²⁴

Likewise, the Cundalls were owed nothing because without the settlement no one had any

²⁰ *Manhattan Life Ins. Co.*, 69 Ohio St. at 307, 1903 Ohio LEXIS 208 at ***1-2, 6.

²¹ Letter Agreements, Supp. at 59. The trial court properly considered both the letter agreements listing the terms of the 1984 sale and the releases on this Civil Rule 12(b)(6) Motion. Entry at 3-4, Appx. at 39-40; *E.g. Irvin v. Am. Gen. Fin., Inc.*, 5th Dist. No. CT2004-0046, 2005 Ohio 3523, ¶16 n.6; Civil Rule 10(D)(1).

²² Cross-Claimant Merit Brief at 9; Cundall Merit Brief at 12.

²³ *Lewis*, 2005 Ohio 1975 at ¶ 28, 32.

²⁴ *Id.*, 2005 Ohio 1975 at ¶ 32.

obligation to pay \$3.5 million to buy their stock.²⁵ Instead, the Cundalls with their own counsel bargained to sell their stock at a price they each agreed upon and in return for providing both consent and releases for the sale. Thus, all of the consideration should have been tendered.

F) Impossibility Is Not an Exception to the Tender Rule; Tender Was Not Impossible; Michael Cundall Waived This Argument.

Without authority, Plaintiff argues that tender could be impossible when a trustee through “tyranny and negligence,” exercises his “power and discretion” to diminish the trust corpus.²⁶ Michael Cundall waived this argument by failing to raise it below.²⁷

Ohio’s courts have rejected impossibility as an exception to the pre-filing tender rule.²⁸ In any case, the Cundalls have made no showing as to how it was impossible for them to tender. Again, neither the trial court nor the First District found impossibility to tender.

G) Tender Is to Put the Defendant in *Status Quo Ante*, Not the Plaintiff.

Michael Cundall next argues that requiring tender is unfair because the Cundalls could not be returned to *status quo ante* since it is somehow impossible for their stock to be returned.²⁹

The undisputed purpose of the tender rule is not to return the party breaking the release to *status quo*. Tender requires that the breaching party “must place the other party” in *status quo* “by returning or tendering the return of whatever has been received by him under such compromise, if of any value, and so far as possible, any right lost by the other party in

²⁵ Letter Agreements, Supp. at 59.

²⁶ Cundall Merit Brief at 14.

²⁷ *E.g. State ex rel. Porter*, 84 Ohio St. 3d at 259.

²⁸ *Weisman*, 2008 Ohio 219, ¶ 38-43 (rejecting alleged exception and argument that tender is impossible when the consideration received for both the release and stock is not severable); *Jacobs v. Invisible Fence Co.* (6th Cir. Dec. 3, 1999), 1999 U.S. App. LEXIS 32201 *10-12.

²⁹ Cundall Merit Brief at 15.

consequence thereof.”³⁰ In any event, discussion of what the proper tender should have been is too late. Tender is due before the lawsuit is filed.³¹ The Cundalls tendered nothing.

H) Failure to Obtain Court Approval Is Not an Exception to the Tender Requirement, Nor Was Court Approval Needed.

Plaintiff argues that tender should not be required since Bud Koons and CIC—and the Cundalls and their lawyer—did not seek court approval of the 1984 sale and release. This Court has long held that such arguments that a release is unenforceable cannot be reached unless tender was made before filing suit:

[T]he weight of authority is to the effect that [with the exception of fraud in the factum claims] if a person executes a release and afterwards *seeks to avoid its effect on any ground that will entitle him to avoid it*, he must first restore the *status quo* by restoring, tendering or offering to restore what he has received in return for the release . . . ³²

Nevertheless, Plaintiff argues that since no tender was required because court approval of the 1984 sale should have been obtained because: 1) Bud Koons allegedly sold the KCM stock from Share B in violation of a material purpose of the Grandparents Trust thereby modifying and terminating the trust,³³ and 2) Bud Koons allegedly was self-dealing.³⁴ Such arguments are premature since no tender was made. These arguments also fail.

First, if the 1984 sale terminated the trust, then Plaintiff’s claims against Bud Koons are barred by the four-year statute of limitations, which would have begun to run in 1984.³⁵

³⁰ *Manhattan Life Ins. Co.*, 69 Ohio St. at 302 (emphasis added); *Picklesimer v. Baltimore & Ohio Rd. Co.* (1949), 151 Ohio St. 1, 6.

³¹ *Maust v. Bank One* (10th Dist. 1992), 83 Ohio App. 3d 103, 110, citing *Haller*, 50 Ohio St. 3d at 15.

³² *Picklesimer*, 151 Ohio St. at 4-5, citing 53 Corpus Juris, 1232, § 50.

³³ Cundall Merit Brief at 16-21.

³⁴ *Id.* at 23-25.

³⁵ *Cassner v. Bank One*, 10th Dist. No. 03AP-1114, 2004 Ohio 3484, ¶ 37; R.C. 2305.09. If the Grandparents Trust terminated in 1984, then Michael Cundall’s suit to be appointed successor

Nor did the 1984 sale modify or violate a material purpose of the Grandparents Trust. In fact, the Grandparents Trust specifically authorized the sale of trust assets—CIC stock—without court approval.³⁶ Taking an action permitted by a trust cannot inexplicably modify a trust or be contrary to its material purpose.

But if, as Plaintiff claims, the trustee of the Grandparents Trust can take no action to sell or transfer CIC stock without seeking court approval because that would modify the trust, then as trustee of Trust A after 1992, Dick Ward himself improperly sold the CIC stock in Trust A to PepsiAmericas in 2005 because he did not seek court approval.

Second, this is not a case of self-dealing requiring court approval because, as a trustee of an inter vivos trust, Bud Koons needed no approval from a probate court.³⁷ And when, as here, the beneficiaries approve an alleged self-dealing transaction with the benefit of independent advice of counsel, no court approval is necessary.³⁸

D) Michael Cundall Was Authorized to Release Any Claims of Cross-Claimants Arising out of the 1984 Stock Sale; Cross-Claimants Have No Basis to Sue.

Cross-Claimants argue that their dismissal for failure to tender was improper because

trustee of Trust B was a charade. *Cundall v. U.S. Bank* (Hamilton Cty. C.P.), No. A 0507295.

³⁶ Grandparents Trust, Article IV(3), Supp. at 43-44; Article II, Supp. at 38. Since the Grandparents Trust was funded solely with CIC stock, the provisions Plaintiff cites discuss actions that the trustee can take only by selling the CIC shares that funded the trust. Grandparents Trust at 17, Supp. at 48D. Cundall Merit Brief at 17-18, citing Article II(b), Supp. at 39-40; Article IV(7), Supp. at 45. See also Article III(a), Supp. at 42-43; Article IV(2), Supp. at 44; Article IV(4), Supp. at 44-45; Article IV(8), Supp. at 46. Contrary to Plaintiff's insinuation, the provision at Article III(b) (Supp. at 43) giving the trustee discretion to loan money to an estate does not impede the trustee's express authority to sell trust assets without court approval. Article IV(3), Supp. at 43-44; Article II, Supp. at 38.

³⁷ The *Brewer* cases cited by Plaintiff states that the statute requiring such court approval, R.C. 2109.44, "is not applicable to the trustee of an inter vivos trust." *Cent. Nat'l Bank v. Brewer* (Cuyahoga C.P. 1966), 8 Ohio Misc. 409, 412. *Accord, Biddulph v. DeLorenzo*, 8th Dist. No. 83808, 2004 Ohio 4502, ¶ 30. Plaintiff later admits this point. Cundall Merit Brief at 28.

³⁸ Merit Brief at 31-33; *infra* at 17-18.

their father could not release their claims absent court-approval.³⁹ They also argue that they have privity to sue Bud Koons and can sue him for loss of expectancy of inheritance.⁴⁰ All of these assertions are incorrect.

1) Michael Cundall Was Authorized By Law To Sign The Pre-Injury Release.

Cross-Claimants do not contest that parents can sign a pre-injury release on behalf of their minor children without obtaining court approval.⁴¹ Rather, Cross-Claimants argue that the release that their father signed on their behalf was not a pre-injury release because the release was signed “contemporaneous” to the “sale of the stock.”⁴²

This argument disregards the plain language of the releases and the letter agreements, both of which specifically contemplate that the sale of the Cundall’s KCM stock will not occur unless and until the release is in place.⁴³ There is no dispute that CIC did not purchase any of the Cundalls’ KCM stock until after Michael Cundall released Bud Koons. Since Plaintiff executed the release of his children’s potential claims before the sale—and therefore before any alleged injury occurred or any claims arose—he could execute the release on their behalf without court approval.⁴⁴ Michael Cundall was also authorized to represent the contingent interests of his

³⁹ Cross-Claimant Merit Brief at 10-12. See also Cundall Merit Brief at 19-23.

⁴⁰ Cross-Claimant Merit Brief at 12-16.

⁴¹ Merit Brief at 24, n. 108, citing *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 372, R.C. 5803.03, Appx. 55, *Cushman v. Cushman* (12th Dist. Sept. 28, 1984), 1984 Ohio App. LEXIS 10990 *4-5.

⁴² Cross-Claimant Merit Brief at 12.

⁴³ 2/7/1984 Letter Agreements, Supp. 59-60 (“The terms of the purchase and sale shall be as follows 5. The undersigned members of the Cundall family approve and consent to the sale of the shares by the Koons Trust and the Cundall Trust and will release the trustees of the trusts from any and all claims arising form the sale.”), emphasis supplied. See also Releases, Supp. 74-83 (“The beneficiary requests and approves the sale by the Trustee”), emphasis supplied.

⁴⁴ *Supra* n. 41; Merit Brief at 24, n. 108.

children as the presumptive remainderman of his portion of Share B.⁴⁵

In any event, no court approval on behalf of Cross-Claimants was necessary because they only had a contingent interest in their father's share of the final distribution from Share B.⁴⁶

2) Cross-Claimants Lack the Necessary Privity To Sue Bud Koons

Cross-Claimants cannot show that they were entitled to receive one dime from Trust B. Pursuant to the terms of the Grandparents Trust, since Plaintiff was living at the death of Bud Koons when Trust B was to terminate, he—not Cross-Claimants—is the designated recipient of his share of the final distribution from Trust B, even if he dies before Trust B is closed.⁴⁷

While Cross-Claimants claim to have some sort of interest in a final distribution from Trust B, they allege no such interest in their pleading. Civil Rule 10(D)(1) required the Cross-Claimants to attach a written instrument to their pleading if their claims are founded on such a document. Since Cross-Claimants have not pled that such an interest exists, let alone attach a

⁴⁵ *In re Estate of Guterman* (N.Y. App. Div. 1980), 432 N.Y.S.2d 511, 511-12; *In re Lange* (N.J. 1978), 75 N.J. 464, 484-85. See also *Brewer*, 8 Ohio Misc. at 417 (“*It is hard to believe that such adult beneficiaries would not also have in mind the best interest of their children and grandchildren.*”) (emphasis supplied).

⁴⁶ *Long v. Long* (1919), 99 Ohio St. 330, 334-35 (wife with a contingent dower interest in land is not a necessary party to condemnation proceeding); *Bonnieville Towers Condo. Owners Ass'n v. Andrews*, 8th Dist. No. 89838, 2008 Ohio 1833, ¶ 37 (same as to foreclosure judgment); *Parrott v. Parrott* (Montgomery C.P. 1918), 29 Ohio Dec. 152, 157 (contingent remaindermen not necessary parties to a will construction action). *United States v. Gordin* (S.D. Ohio 1922), 287 F. 565, 571 (party with a contingent interest in a contract not a necessary party to a suit); *Randall v. Randall* (S.D. Fla. 1944), 60 F.Supp. 308, 312-13 (contingent beneficiaries of a trust not necessary parties to an action to terminate the trust; but in any case their parents as the presumptive vested recipients of the final distribution could represent their interests).

⁴⁷ Grandparents Trust at 5-6, Supp. at 40-41 (“*Upon the death of the last to die of JOHN F. KOONS, III AND BETTY LOU CUNDALL, the Trustee shall distribute the then remaining principal and all accumulated income in each of their respective separate Shares as designated above to or for the use of the following beneficiaries as indicated . . . (2) Share B [if Betty Lou Cundall makes no appointment in her will] to the then living descendants of BETTY LOU CUNDALL, per stirpes . . .*”), emphasis supplied. As Plaintiff notes, Betty Lou Cundall made no appointment. Cundall Merit Brief at 21.

written instrument to their pleading demonstrating such interest, and the trust instrument demonstrates no interest, they have no cognizable interest in the final distribution from Trust B.

Nor can Cross-Claimants state a claim for interference with an expectancy of an inheritance. Such claim is barred by the four-year statute of limitations of R.C. 2305.09.⁴⁸ While Cross-Claimants allege they were minors in 1984,⁴⁹ to survive dismissal they must allege that their minority continued until August 31, 2002, four years before the cross-claims were filed.⁵⁰ They do not and cannot so allege since the youngest Cross-Claimant reached the age of majority in 1995, eleven years prior to suit.⁵¹

In addition, as Defendants-Petitioners also argued below, Cross-Claimants have not shown that they can meet the elements of this Court's test to establish the tort of intentional interference with an expectancy of an inheritance.⁵² The cross-claims were properly dismissed.

J) Plaintiff and Cross-Claimants Do Not Allege Fraud in The Factum.

Cross-Claimants argue that the release is "void ab initio because it was obtained by fraud in the factum" and therefore, no tender was required.⁵³ In neither their cross-claims, Merit Brief, or any other brief have Cross-Claimants provided any facts demonstrating fraud in the factum. Nor did the trial court or First District so find. In fact, Cross-Claimants provide no cognizable challenge to the 1984 releases beyond those brought by their father: unspecified complaints that Bud Koons somehow used "fraud, duress and undue influence" to make several fully competent

⁴⁸ *Marshall v. Silsby*, 11th Dist. No. 2004-L-094, 2005 Ohio 5609 ¶ 24.

⁴⁹ Cross-Claims at ¶ 7, Supp. 170.

⁵⁰ R.C. 2305.16, Appx. at 66.

⁵¹ Certified copies of Cross-Claimants' birth certificates, Koons/Baker Supplement at 126-28.

⁵² T.d. 137, Motion to Dismiss Cross-Claims, at 11-14.

⁵³ Cross-Claimant Merit Brief at 10. *See also* Cross-Claims at ¶ 12, Supp. 171.

adults represented by counsel sign releases in exchange for millions of dollars.⁵⁴ These are allegations of fraud in the inducement.⁵⁵

Similarly, Plaintiff for the first time implies that since the Cundalls were “coerced into selling something they didn’t own [their children’s contingent interests in their share of the final distribution from Share B], even though they thought they did,” he alleges fraud in the factum, not fraud in the inducement.⁵⁶ Plaintiff waived this argument too by failing to make it below.⁵⁷

Regardless, such argument has no merit. As this Court explains, fraud in the factum occurs when: “device, trick, or want of capacity produces ‘no knowledge on the part of the releasor of the nature of the instrument, or no intention on his part to sign a release or such release as the one executed.’”⁵⁸ There is no fraud in the factum where there is an opportunity to read and under-stand the release before execution.⁵⁹ Plaintiff has never claimed that he failed to understand that he was signing a release or lacked time to review it before execution. His claim that he did not understand the legal consequences of the release does not amount to fraud in the factum, especially considering that the release plainly states that he is releasing the claims of his heirs.⁶⁰

K) Since a Self-Dealing Transaction by a Trustee is Not Void, Tender is Required.

Cross-Claimants argue that because the 1984 transaction allegedly involves self-dealing by Bud Koons no tender is required.⁶¹ The law is exactly the opposite. Where a transaction

⁵⁴ Cross-Claims at ¶ 7, Supp. 170; Cross-Claimant Merit Brief at 3-4; Cundall Merit Brief at 6.

⁵⁵ Merit Brief at 15-16.

⁵⁶ Cundall Merit Brief at 22.

⁵⁷ *E.g. State ex rel. Porter*, 84 Ohio St. 3d at 259.

⁵⁸ *Haller*, 50 Ohio St. 3d at 13, *citing Picklesimer*, 151 Ohio St. at 5.

⁵⁹ *Haller*, 50 Ohio St. 3d at 14.

⁶⁰ Releases, Supp. at 74.

⁶¹ Cross-Claimant Merit Brief at 7.

between a trustee and a beneficiary may involve a breach of the duty of loyalty, the transaction is voidable, not void.⁶² And as this Court has held for over a century, when a transaction is voidable, tender is required.⁶³ Even Plaintiff admits this point, stating that a release procured by fraud in the inducement “is voidable and the party is required to tender any consideration received . . . before filing suit.”⁶⁴

Proposition of Law No. 2: There Is No "Presumption of Fraud" To Alleged Self-Dealing By The Trustee Of An Inter Vivos Trust Where The Trust Agreement Permits The Actions At Issue.

Ignoring the language of the Grandparents Trust authorizing the 1984 transaction and Ohio case law holding that no presumption of fraud applies when an alleged self-dealing transaction is authorized by a trust document, the First District erred by applying a presumption of fraud as part of its rejection of the tender rule.⁶⁵

Cross-Claimants only argue that general language alone cannot authorize self-dealing.⁶⁶ In actuality, Defendants-Petitioners demonstrated that when a trust permits a transaction in which the grantors contemplated that the trustee would have a conflict, such transactions are permissible.⁶⁷ Cross-Claimants fail to contest the supporting authorities.

Plaintiff concedes that, as in *Biddulph*, a trust instrument can authorize self-dealing

⁶² See R.C. 5808.02 (transactions involving breaches of loyalty by trustees are not void but “voidable by a beneficiary;” such transactions are not even voidable if, like here, the beneficiaries consented to the transaction, the transaction was authorized by the trust, or another exception applies), Appx. at 57; e.g. *Cleveland Trust Co. v. Eaton* (1970), 21 Ohio St.2d 129, 145.

⁶³ Merit Brief at 15-16, 17 & n. 85.

⁶⁴ Cundall Merit Brief at 8-9.

⁶⁵ Merit Brief at 26-30; *Cundall*, 2007 Ohio 7067 at ¶ 7, 33-34.

⁶⁶ Cross-Claimant Merit Brief at 6-7.

⁶⁷ Merit Brief at 26-30.

conduct.⁶⁸ Though he claims that the trust document in *Biddulph* is distinguishable,⁶⁹ like Cross-Claimants, Plaintiff fails to challenge that the Grandparents Trust authorized the 1984 sale.⁷⁰

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

Relying on non-Ohio caselaw, in *dicta* the First District purports to state the burden necessary to overcome any presumption of fraud. None of the Respondents offered a substantive

⁶⁸ Cundall Merit Brief at 27, citing *Biddulph*, 2004 Ohio 4502.

⁶⁹ *Id.* at 27-28. Plaintiff also attempts to distinguish *Wolfe* because only one of the two co-trustees in that case allegedly had a conflict of interest. But in *Wolfe* the court addressed whether the co-trustee on his own accord should be disqualified when the grantor appointed him trustee knowing of the conflict: “[u]nder such circumstances, the mere existence of the conflict, known and anticipated by the settlor, does not disqualify the individual co-trustee from participating in decisions regarding the trust with respect to which, arguably, the individual trustee may have conflicting interests.” Cundall Merit Brief at 29; *Huntington Nat’l Bank v. Wolfe* (10th Dist 1994), 99 Ohio App.3d 585, 595. Based on the record and the Grandparents Trust instrument, as in *Wolfe*, the grantors must have known and anticipated the conflict when they named their son Bud Koons trustee.

In re Bernard, 9th Dist. No. 24025, 2008 Ohio 4338, lends no aid to Plaintiff. In that case, the trustee was not only trustee of the testamentary trust, but also a beneficiary of a remainder interest in that trust, trustee of a church that was also a remainder beneficiary of the trust, and executor of the estate establishing the trust. As trustee of the church, she had sued the estate of which she was executor. The court removed the trustee at the request of another remainder beneficiary because her positions as trustee of the trust and of the church were inherently incompatible and she had demonstrably acted against the interests of the estates of which she was the executor on behalf of the church. *Id.* at ¶ 3-8, 10, 15-17. This is not a case of a fiduciary suing herself in her role as another fiduciary but an alleged isolated incident of self-dealing. Thus, *Wolfe* and *Biddulph*, not *Bernard*, provide the appropriate analysis.

⁷⁰ In effecting a sale of trust property per the beneficiaries’ request, Bud Koons was not distributing income or principal to himself or taking a fee in contravention of the trust document, as Plaintiff claims. Cundall Merit Brief at 27-28. Thus, that discussion has no impact on whether the 1984 transactions were authorized.

Plaintiff also suggests that Defendants-Petitioners are claiming that a presumption of fraud does not apply to alleged self-dealing transactions with inter vivos trusts or generally in Ohio. *Id.* at 11 n.28 & 27-28. That misreads Defendants-Petitioners’ actual position as expressed in Propositions of Law Nos. 2 & 3. Merit Brief at 26-33.

response to the numerous Ohio authorities that Defendants-Petitioners cite to demonstrate that the presumption of fraud is easily overcome and is already overcome since, as Plaintiff admits, the Cundalls were represented by counsel in 1984.⁷¹ In fact, Respondents offer no defense of the First District's mischaracterization of the law and fail to address the cited Ohio authority.

Plaintiff inaccurately suggests that Defendants-Petitioners are improperly shifting the burden of proof "back to the beneficiaries and make it their case to prove."⁷² However, Ohio cases patently hold that once the presumption of fraud is rebutted, the Cundalls must prove the fraud by clear and convincing evidence.⁷³ The rebuttal burden should be construed by Ohio legal principles, not the First District's inaccurate dicta.⁷⁴

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

Respondents fail to answer the overwhelming authority from this Court and others establishing that their unjust enrichment claims against the successor trustees and Koons beneficiaries cannot be tolled and that those claims are barred because: (i) causes of action against the third party constructive trustee accrue immediately, (ii) no exemption prevents the running of the statute of limitations against third party constructive trustees, even if such trustees have the property due to a breach of fiduciary duty by an express trustee, and (iii) the six year

⁷¹ Merit Brief at 6 n. 24 & 31-33, citing *inter alia*, *McAdams v. McAdams* (1909), 80 Ohio St. 232, 242; *Craggett v. Adell Ins. Agency* (8th Dist. 1993), 92 Ohio App. 3d 443, 451

⁷² Cundall Merit Brief at 26.

⁷³ *McAdams*, 80 Ohio St. at 243; *Yost v. Wood* (5th Dist. July 11, 1988), 1988 Ohio App. LEXIS 2791, *9-10; *Craggett*, 92 Ohio App. 3d at 451. *Accord*, *Cross v. Ledford* (1954), 161 Ohio St. 469, 475.

⁷⁴ For instance, citing *dicta* from the First District's Opinion in complete contravention of Ohio law Plaintiff asserts that Defendants-Petitioners have the burden of "to establish beyond all reasonable doubt the perfect fairness and honesty of the transaction." Cundall Merit Brief at 25-26, citing *Cundall*, 2007 Ohio 7067, ¶ 26, Appx. at 16-17.

statute of limitations for unjust enrichment began to run in 1984.⁷⁵

While Cross-Claimants argue the Cundalls “should” be allowed to pursue their untimely constructive trust claim, they fail to answer the policy reasons that (i) bar stale claims from encumbering property, and (ii) prevent expanding exemptions to the statute of limitations.⁷⁶

Cross-Claimants baselessly suggest that they could not pursue claims against Bud Koons beginning in 1984.⁷⁷ The “continuing and subsisting trust” exception to the statute of limitations does not prohibit suit against incumbent trustees, it just permits beneficiaries to postpone a suit. Moreover, the beneficiaries were still free to bring suit against any alleged third party constructive trustees beginning in 1984.

Both Cross-Claimants and Plaintiff attempt to fuse together their unjust enrichment/constructive trust claim against the successor trustees with their claim against Bud Koons in hope that this Court will toll the statute of limitation by applying the continuing and subsisting trust exception to both claims.⁷⁸ Respondents cite no case suggesting that an action for unjust enrichment against a third-party transferee should have the same statute of limitations as an action against an express trustee for breach of trust.⁷⁹

⁷⁵ Merit Brief at 35-46. Cross-Claimants attempt to distinguish this Court’s decision in *Peterson*, but fail to address the plethora of Ohio and other authority applying the same rationale expressed in *Peterson* to hold that the statute of limitations for claims against third party constructive trustees is not tolled when the property is in the third parties hands due to a constructive trustee’s breach of fiduciary duty. *Id.* at 42-46; Cross-Claimant Merit Brief at 21 n.82.

⁷⁶ Cross-Claimant Merit Brief at 23; Merit Brief at 46-47.

⁷⁷ Cross-Claimant Merit Brief at 23 & n. 91.

⁷⁸ *Id.* at 20-23; Cundall Merit Brief at 30-35.

⁷⁹ Cross-Claimants’ cited cases at pp. 22-23 of their Merit Brief are inapplicable. *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, *Cassner*, 2004 Ohio 3484, and *Barthelmas v. Barthelmas* (4th Dist. Jan. 7, 1999), 1999 Ohio App. LEXIS 68, involve suits against express trustees by beneficiaries. *Estate of Southard v. United States* (S.D. Ohio Aug. 20, 2002), 2007 U.S. Dist. LEXIS 60957 involved a suit by the express trustee against the estate of a beneficiary. Both *Brate v. Hurt*, 12th Dist., 174 Ohio App. 3d 101, 2007 Ohio 6571 and *Bergholtz Coal*

Plaintiff also suggests the statute did not begin to run until Bud Koons “fail[ed] to correct his earlier self-dealing,” which was the “last of the alleged wrongdoing.”⁸⁰ At the latest, Plaintiff claims, the statute of limitations for unjust enrichment began running in 2005 at the sale of CIC to PepsiAmericas.⁸¹ Unjust enrichment occurs “when a party retains money or benefits which in justice and equity belong to another.”⁸² Since, as Plaintiff alleges, the successor trustees merely exchanged stock obtained in 1984 for cash in 2005, there was no new retention of property for a statute of limitations to begin running on in 2005.⁸³ Thus, Plaintiff’s suggestion does not impact the statute of limitations defense of the alleged constructive trustees.

This Court should not destroy decades of law establishing the fundamental differences between claims against express trustees and claims against constructive trustees. As the statute of limitations bars the only claim against the successor trustees,⁸⁴ they should be dismissed.

CONCLUSION

We respectfully request that the Court reverse the First District’s opinion.

Holding Co. v. Dunning, 11 Dist. No. 2004-L-209, 2006 Ohio 3401 concern resulting trusts and not constructive trusts. Plaintiff quotes extensively from *Palm Beach v. Dun & Bradstreet, Inc.* (1st Dist. 1995), 106 Ohio App.3d 167, a case in which the plaintiff could not escape the statute of limitations on his tort claims by calling them contract claims. Cundall Merit Brief at 31-34. Similarly, Plaintiff asks this Court to ignore that his unjust enrichment claim is against the successor trustees and allow the tolling permitted for claims against express trustees.

⁸⁰ Cundall Merit Brief at 34.

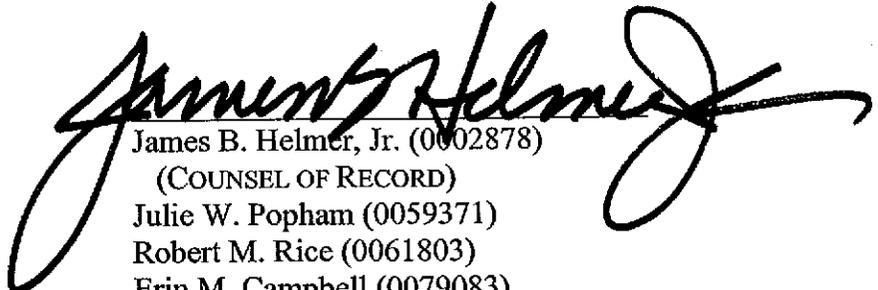
⁸¹ Cundall Merit Brief at 34; Second Amended Complaint at ¶ 48, Cundall Supp. V. I at 21.

⁸² *Graham v. Keefer*, (9th Dist. Oct. 25, 1989), 1989 Ohio App. LEXIS 4022 *5, citing *Hummel v. Hummel* (1938), 133 Ohio St. 520.

⁸³ Second Amended Complaint at ¶ 48, Cundall Supp. V. I at 21.

⁸⁴ Plaintiff’s counsel advised the trial court that the successor trustees are parties herein “as stakeholders” for purposes of the requested constructive trust remedy. T.d. 188, Transcript at 49.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "James B. Helmer, Jr.". The signature is written over the typed name and extends to the right and down.

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CERTIFICATE OF SERVICE

I certify that on October ¹⁰~~9~~, 2008, a copy of this Reply Brief was sent by ordinary U.S.

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Appendix

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PAGE'S OHIO REVISED CODE ANNOTATED
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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH OCTOBER 1, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 23. COURTS -- COMMON PLEAS
 CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS
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ORC Ann. 2305.16 (2008)

§ 2305.16. Tolling of limitations due to minority or unsound mind

Unless otherwise provided in *sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Revised Code*, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.

After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought.

HISTORY:

RS §§ 4978, 4986, 5866; S&C 945, 949, 1618, 1619; 50 v 297, §§ 19, 25; 51 v 57, §§ 10, 19; 83 v 74; 89 v 77; 93 v 81; GC § 11229; Bureau of Code Revision, 10-1-53; 131 v 645 (Eff 10-30-65); 143 v S 125 (Eff 1-13-91); 145 v S 147 (Eff 8-19-94); 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01. Eff 7-6-2001.

NOTES:

Section Notes

Section 2.02(B) of SB 108 (149 v --) repeals the HB 350 (146 v --) version and section 3(A)(3) revives and amends the former version.

Related Statutes & Rules

Cross-References to Related Statutes

Age of majority, *RC § 3109.01*.

Commencement of action, *RC § 2305.17*.