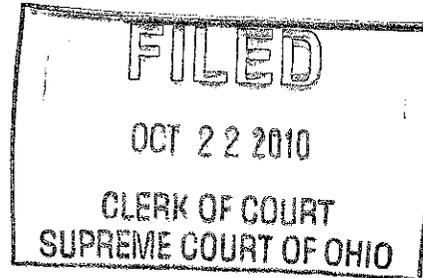


**ORIGINAL**

IN THE SUPREME COURT OF OHIO

THE HOME SAVINGS AND LOAN )  
COMPANY OF YOUNGSTOWN, OHIO, )  
 )  
Defendant-Appellant )  
 )  
VS. )  
 )  
DANIEL B. LETSON, )  
ADMINISTRATOR OF THE ESTATE )  
OF KATHRYN M. D'ALESSANDRO, )  
DECEASED )  
 )  
Plaintiff-Appellee )

CASE NOS. 2010-1658



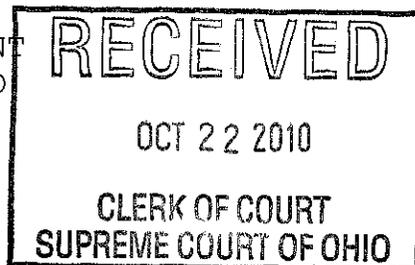
MEMORANDUM IN RESPONSE

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EXPLANATION OF WHY THIS CASE IS NOT ONE OF  
PUBLIC OR GREAT GENERAL INTEREST

Contrary to the assertions of Appellant, the decision of the Eleventh District Court of Appeals that there exists relevant, competent and credible evidence upon which the trial court could have based its judgment that Defendant-Appellant, The Home Savings and Loan Company of Youngstown, Ohio ("Home Savings"), had actual knowledge of the fiduciary relationship between the decedent and Defendant Gregory A. McCardle, Sr. ("McCardle") due to the issuance of a power of attorney by McCardle to Home Savings; that Home Savings acted in bad faith, rather than mere negligence, when it allowed McCardle to deposit the decedent's annuity check in his individual account; and that Home Savings is not protected by the Uniform Fiduciary Act does not in any conceivable manner conflict with the previous decisions of the Ohio appellate districts.

Home Savings repeatedly contends that the decision of the Eleventh District Court of Appeals conflicts with the Seventh District's holding in In re: Clark v. National City Bank, 7<sup>th</sup> Dist. Nos. 99 CA 88, 99 CA 103, 2000 Ohio 2572, 2000 Ohio App. LEXIS 4596, and the meanings of "actual knowledge" and "bad faith" as identified therein. In reality, the Eleventh District Court of Appeals based its decision, in part, on the meanings of those terms as specifically defined in In re: Clark. The balance of the

Eleventh District's decision is based upon strict readings, as opposed to liberal interpretations, of the Uniform Fiduciary Act ("UFA") as codified in R.C. 5815.06 and Section 1303.37 of the Ohio Revised Code and R.C. Section 1303.37(B)(2)(c).

The Eleventh District's decision, which, in part, holds Home Savings responsible for ensuring that funds are properly deposited, can hardly be construed as placing an undue burden on commerce. Home Savings' intended goal of securing the protection of all banks from the responsibility of seeing that funds are properly deposited to the credit of principals under the guise of the "UFA liability shield" speaks volumes as to the actions of banks in general, and the resulting impact that these actions have had on Ohio's economy, which Appellant has so aptly identified as being in a "deep recession".

ARGUMENT IN SUPPORT OF APPELLEE'S POSITION REGARDING  
APPELLANT'S PROPOSITION OF LAW NO. 1

**Proposition of Law No. I: The Uniform Fiduciary Act requires a bank to have actual knowledge of a breach of fiduciary duty or to act in bad faith before it may be found liable for permitting a fiduciary to deposit a check payable to a represented person into the fiduciary's personal account.**

A financial institution which conveys out money in its possession to an unauthorized individual without the consent of the deceased comes within the provisions of R.C. 2109.50. See In re Estate of Popp, (1994), 94 Ohio App.3d 640, 646; Fecteau v. Cleveland Trust Co. (1960), 171 Ohio St. 121. In a proceeding against a financial institution under R.C. 2109.50 for wrongful conveyance, it must first be established that there was a conveyance, made to a wrong party, after which all that is required is to show by a preponderance of the evidence, that the money belonged to the decedent; it is not necessary to establish that the conveyance was made with a fraudulent or criminal intent. See Popp at 674 citing Linguist v. Hayes (1926), 22 Ohio App. 141.

Home Savings relies upon the UFA and the Seventh District's holding in In re: Clark for the proposition that it is not liable for having wrongfully converted the Decedent's funds. Appellants reliance upon R.C. 5815.08, in particular, is inapt. As noted by Appellant, R.C. 5815.08 expressly provides that:

[i]f a fiduciary makes a deposit in a bank to the fiduciary's personal credit of ... checks payable to the

principal and indorsed by the fiduciary **if the fiduciary is empowered to indorse the checks** ... the bank receiving the deposit is not bound to inquire whether the fiduciary is committing a breach of the obligation as fiduciary.

The check at issue was made payable to the decedent, Kathryn M. D'Alessandro. The decedent's purported indorsement of the check was followed by the signature of "Gregory A. McCardle, Sr. POA". The purpose of McCardle's indorsement was for purposes of depositing the funds into his personal account, thereby effectively gifting the decedent's annuity proceeds to himself. As the Eleventh District repeatedly noted, the Power of Attorney document at issue expressly prohibited McCardle, as the decedent's purported attorney-in-fact, from making gifts to himself. In light of the foregoing, McCardle was not empowered to indorse the check at issue.

In In Re: Clark, the Court noted that R.C. 1339.08 (renumbered as R.C. 5815.06) describes when a bank may be liable for paying the funds of a principal to the fiduciary. R.C. 5815.06 expressly provides that:

If a deposit is made in a bank **to the credit of a fiduciary as such**, the bank may pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which the deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of the obligation as fiduciary in drawing the check **or** with knowledge of such facts that its action in paying the check amounts to bad faith.

As the Eleventh District held, under a strict reading of R.C. 5815.06, in order for Home Savings to qualify for protection under the statute, the deposit must be made to the credit of the fiduciary, as the fiduciary. As has been previously addressed, despite the fact that the check at issue was made payable to the decedent, Home Savings permitted the check to be deposited into an account opened by McCardle in his individual name and bearing his social security number, as opposed to an account identifying McCardle as the decedent's fiduciary.

The foregoing notwithstanding, both the lower court and the Eleventh District examined the merits of Home Savings' claimed protection under the UFA. In doing so, both courts, contrary to the claims of Appellant, applied the meanings of "actual knowledge" and "bad faith" as those terms are defined by the General Assembly and the Seventh District's holding in In Re: Clark. Furthermore, the Eleventh District held that the decisions of the lower court, as the trier of fact, that Home Savings had actual knowledge that McCardle was defrauding the decedent and that Home Savings acted in bad faith, as opposed to mere negligence, were supported by relevant, competent and credible evidence.

ARGUMENT IN SUPPORT OF APPELLEE'S POSITION REGARDING  
APPELLANT'S PROPOSITION OF LAW NO. 2

**Proposition of Law No. II: Notice of a breach of fiduciary duty implied by R.C. 1303.77(B) (2) (c) by itself does not preclude a bank from becoming a holder in due course because such implied notice, without more, is not actual knowledge of a breach of fiduciary duty and does not automatically establish that a bank acted in bad faith.**

R.C. 1303.37 (UCC 3-307) is instructive as to when a bank, or any other taker of a negotiable instrument, is put on notice of a breach of fiduciary duty by the fiduciary. R.C. 1303.37 (B) (2) (c) provides:

If an instrument is taken from a fiduciary for payment or collection or for value, the taker has knowledge of the fiduciary status of the fiduciary, and the represented person makes a claim to an instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of the fiduciary duty, all of the following rules apply: ... (2) In the case of an instrument payable to a represented person or to the fiduciary as fiduciary of the represented person, the taker has notice of the breach of the fiduciary duty if any of the following apply: ... (c) the instrument is deposited to an account other than an account of the fiduciary as fiduciary of the represented person or an account of the represented person.

As the Second District Court of Appeals has pointed out, cases from other jurisdictions which construe statutes similar to R.C. 1339.08 [UFA] are persuasive, however, as the UFA explicitly states, it "shall be so construed so as to effectuate [its]

general purpose[,] which is to make the law of [Ohio] uniform with the law of those states which enact similar legislation." Nations Title Insurance of New York, Inc. v. Bertram, 2001 Ohio 94, 140 Oh. App.3d 154, 161. In a recent decision addressing the role that UCC 3-307 (R.C. 1303.37) has in establishing "actual knowledge" under the UFA, a Tennessee Court of Appeals recently found that:

"Despite the pro-bank leanings of the 1990 revisions to Articles 3 and 4 ..., the current version of the UCC substantially changes the rules applicable to depositary banks that take checks from fiduciaries. Section 3-307 (Tenn.Code Ann. § 47-3-307) [Analogous to R.C. 1303.37] is an elaborate statement of the "red flag" circumstances under which the taker from a fiduciary will be deemed to be "on notice" and, therefore, subject to claims of the principal that the fiduciary has misappropriated funds. This provision is a significant departure from the UFA, and it specifically rejects the "actual notice" rule in Section 9 of the UFA (Tenn.Code Ann. § 35-2-109) [Analogous to R.C. 5815.08]. It substantially affects a bank's ability to achieve holder-in-due-course status and the resulting protection from claims by a fiduciary's principals."

C-Wood Lumber Co., Inc. v. Wayne County Bank, (2007), 233 S.W.3d 263, 276.

The Court went on to hold that:

Under Tenn.Code Ann. § 47-3-307(b)(2)(iii) [Analogous to R.C. 1303.37(B)(2)(c)], a depositary bank is on notice of a breach of fiduciary duty if the depositary bank allows the fiduciary to deposit a check payable to a "represented person" in any account other than an account of the represented person or the "fiduciary as such." Thus, Tenn.Code Ann. § 47-3-307 treats a deposit by a fiduciary in a personal account as, in effect, a suspicious circumstance that imposes on the depositary bank

the risk that the deposit is part of an embezzlement scheme.

*IBID.*

Under a strict reading of R.C. 1303.37(B)(2)(c), there can be no question that Home Savings had actual knowledge of McCardle's breach of his fiduciary duty to the decedent. Home Savings took the check at issue from McCardle for deposit; Home Savings was aware of McCardle's fiduciary status by virtue of the fact that McCardle indorsed the check as the decedent's purported attorney-in-fact and McCardle presented Home Savings with a copy of a Power of Attorney purportedly designating him as the decedent's attorney-in-fact; the decedent has made a claim to the instrument on the basis that the transaction constituted a breach of McCardle's fiduciary duty; the instrument was payable to the decedent; and the instrument was deposited into a personal account of the fiduciary, as opposed to an account of the decedent or McCardle as fiduciary for the decedent.

In accordance with the express terms of R.C. 1303.37 (B)(2)(c), the foregoing actions establish that Home Savings had notice of McCardle's breach of his fiduciary duty. As Appellant has pointed out, R.C. 1301.01(Y) expressly provides that:

"A person has notice of a fact when any of the following applies:

- (1) The person has actual knowledge of it.
- (2) The person has received a notice or notification of it.
- (3) From all the facts and circumstances known to the person at the time in question, the person has reason to know that it exists."

Inarguably, the General Assembly adopted R.C. 1303.37

(B)(2)(c) and its use of the word "notice" for purposes of attributing actual knowledge under the specific circumstances defined therein, to change the rules applicable to depository banks who take checks from fiduciaries, and to limit a bank's ability to achieve holder-in-due course status and the resulting protection from the claims of a fiduciary's principals.

It is significant to note the fact that Home Savings' employees are trained and instructed to read and review powers of attorneys when they are presented, and to also make determinations as to the specific powers granted to the attorney-in-fact. In fact, the Home Savings Operations Manual requires such a review and determination and, in addition, the Home Savings employee who wrote the Operations Manual confirmed these requirements. This is significant because, it not only serves as further evidence that Home Savings was fully aware of the fiduciary relationship between

McCardle and the decedent, but it also reveals that, had the account at issue been properly established in either the name of the decedent or McCardle as the decedent's attorney-in-fact, the subsequent disbursements that McCardle was enabled to tender from the account for his own benefit would have been prevented.

The evidence established that when an account is properly opened when a power of attorney is involved, Home Savings employees are required to "place appropriate flags" indicating that there is a power of attorney on file. The account was not established with such "flags" or any other indication of the existence of a power of attorney being on file. The Home Savings employee who was responsible for issuing an official check from the account in the amount of \$33,645.57 that was made payable to McCardle (and which served to close the account less than two (2) weeks after the account was opened) confirmed that there were no "flags" on the account indicating the existence of a power of attorney, but she testified that, had she had the opportunity to review the Power of Attorney at issue, she would have made the determination that McCardle was not permitted to make gifts to himself. This same employee of Home Savings also testified that, had the account been opened as a power of attorney account, she would have reviewed the power of attorney at issue and would not have written the official check.

Considering the fact that had Home Savings properly deposited the check at issue and had its employees followed the bank's own procedures, the conversion of the decedent's funds would not have occurred. As such, Appellant's claims that the decision of the Eleventh District Court somehow places an undue burden on financial institutions and serves as an obstacle for commerce are disingenuous at best.

ARGUMENT IN SUPPORT OF APPELLEE'S POSITION REGARDING  
APPELLANT'S PROPOSITION OF LAW NO. 3

**Proposition of Law No. II: If a fiduciary breaches a fiduciary duty to a decedent and two or more defendants are found jointly and severally liable to the decedent's estate for the same damages, the damages must be reduced by any amount to which the fiduciary is entitled to receive under the decedent's estate to prevent the fiduciary in breach of his duty from inheriting more than he would have received from the estate in absence of the breach.**

Appellee reiterates the Eleventh District's holding that the record reveals that the decedent was the sole beneficiary of the annuity, and that there is no evidence that either of the decedent's daughters are named beneficiaries of the annuity or that they are even beneficiaries of the decedent's estate.

Furthermore, the decision of a trial court as to a determination of damages is not to be disturbed absent an abuse of discretion. Roberts v. U.S. Fid. & Guar. Co. (1996), 75 Ohio St.3d 630, 634. In order for an abuse of discretion to be found, the trial court's decision must be determined to have been

unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. The "result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but pervasivity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St.3d 83, 87.

In asserting its appeal of the trial court's decision with respect to the damages resulting from the actions of the parties, Home Savings is essentially disputing the trial court's ruling that the parties are jointly and severally liable and that Home Savings should be accountable for the entire amount of the damages. In dealing with similar circumstances, the Seventh District Court of Appeals ruled in Clark that:

Under R.C. 2307.31 as amended by Am.Sub.S.B.No. 350, a tortfeasor who is determined to have contributed fifty percent or less of the negligence, is liable only for the proportionate share of the compensatory damages which represent economic loss. However, Am.Sub.S.B.No. 350 was deemed unconstitutional in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. Where damages are caused by the acts of two or more persons and joint and several liability applies, each person may be held liable for damages jointly or severally. *Shoemaker v. Crawford* (1991), 78 Ohio App.3d 53, 66-67. Furthermore, judgment can be taken against any joint tortfeasor for the entire amount. *Id.* at 67. R.C. 2307.31 before Am.Sub.S.B.No. 350 provides a right of contribution between two or more tortfeasors, but

R.C. 2307.31 (E) states that it does not apply to breaches of trust or other fiduciary obligations.

Based upon the Seventh District's holding, and the statutory Provisions referenced therein, the trial court's decision to render the parties jointly and severally liable was not an abuse of discretion.

It should be noted that an avenue was available to Home Savings to pursue in its effort to direct the liability for its actions to Kathy. Home Savings could have filed a Cross-Claim, and, ultimately, a Creditor's Bill Action against Kathy in accordance with the Ohio Rules of Civil Procedure. As the Eight District Court of Appeals has held, "2109.50 may be quasi-criminal in nature, but the Rules of Civil Procedure as practiced in the probate court are applicable". Popp at 649.

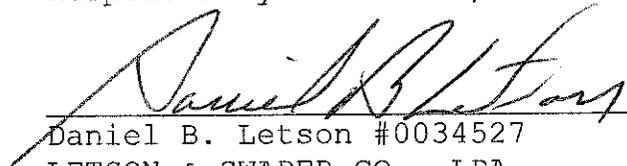
This Court has examined the nature of a concealment action and has held that "a proceeding for the discovery of concealed or embezzled assets of an estate, brought under R.C. 2109.50 is a special proceeding of a summary, inquisitorial character whose purpose is to facilitate the administration of estates by summarily retrieving assets that rightfully belong there." State ex rel. Goldberg v. Mahoning Cty. Probate Court (2001), 93 Ohio St.3d 160, 162. The trial court has accomplished the purpose identified by this Court, as its decision has resulted in the retrieval of assets that rightfully belonged to the decedent at

the time of her passing, and which accordingly belong to the decedent's estate. In addition, it is important to note that the ultimate disposition of the retrieved assets has yet to be determined. For instance, there are potential setoffs which could be implemented by the Probate Court due to the increased costs and fees that the estate has incurred as a result of the delays in administration that are directly attributable to the facilitation of the within concealment of assets action, as well as the appointment of an Administrator WWA.

CONCLUSION

For the reasons discussed above, this case does not involve matters of public and great general interest. The law is well settled with respect to the issues presented. The Eleventh District Court relied upon both strict readings of the relevant statutes and the holdings of the other Districts in rendering its affirmation of the trial court's judgment.

Respectfully submitted,



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I hereby certify that a copy of the foregoing Appellee's Memorandum in Response was mailed, via ordinary U.S. Mail, this 21<sup>st</sup> day of October, 2010 to:

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