

IN THE SUPREME COURT OF OHIO

11-0014

THOMAS G. KLOCKER,

Appellant,

v.

ROBERT L. ZEIGER, et al.,

Appellees.

On Appeal from the
Cuyahoga County Court of Appeals,
Eighth Appellate District

Court of Appeals Case
No. CA-10-94555

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT THOMAS G. KLOCKER

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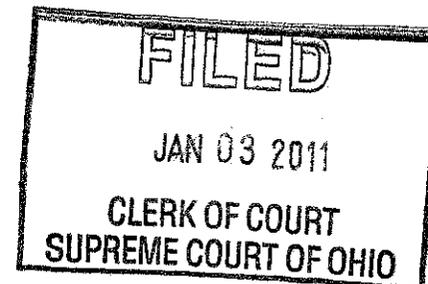
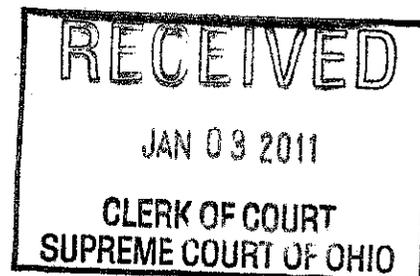
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	10

Proposition of Law No. I:

Under the law of easements, the holder of a dominant easement estate has sufficient personal authority to improve his dominant estate to his full use and enjoyment, including making aesthetic improvements within his reasonable discretion, when the underlying real estate documents do not expressly grant or reserve the power in the servient estate to impose specific aesthetic limitations upon his estate by notice in the chain of title or by rule or regulation properly adopted, provided that the dominant estate holder does not obstruct or unreasonably burden and interfere with the servient estate holder’s rights

10

Proposition of Law No. II:

The Ohio Trust Code at R. C. § 5808.15 and 5808.16(H) extending general and specific powers to trustees in their management of property, must be read and construed in conjunction with the Trust Code’s general duties of loyalty, fidelity, and good faith required of trustees towards trust beneficiaries, such that trustees may not act or construe their power to act in a manner that would be arbitrary or capricious towards the trust beneficiaries, including taking actions outside of the recorded deeds or the established law of easements, and must use affirmative legal process to resolve disputes and to avoid conduct that constitutes forcible self-help.....

12

CONCLUSION.....15

CERTIFICATE OF SERVICE16

Appx. Page

APPENDIX

A. Journal Entry and Opinion of the Cuyahoga County Court of Appeals – Case 94555
(November 18, 2010).....1

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Benner v. Hammond</i> (1996), 109 Ohio App.3d 822	11
<i>Bove v. Giebe</i> (1959), 169 Ohio t. 325	11
<i>Central Cable Television Co. of Ohio, Inc. v. Cook</i> (1991), 58 Ohio St.3d 8	3, 15
<i>Crane Hollow, Inc. v. Marathon Ashland Pipeline Co., LLC</i> (2000), 138 Ohio App.3d 57	12
<i>Frontier Community Services v. Knoll Group</i> , December 19, 2001, Jackson App. 00CA22, unreported	10
<i>Hitz v. Flower</i> , 107 Ohio St. 47	11
<i>Houk v. Ross</i> , (1973), 34 Ohio St.2d 77.....	11
<i>Hunt v. Held</i> , (1914) 90 Ohio St. 280.....	11
<i>McKenzie v. Neville</i> (1941), 68 Ohio App.....	3
<i>Russell v. Russell</i> , (1940) 137 Ohio St. 153, 157.....	10
<i>Smith v. Newell</i> , 2007-Ohio-72, Cuy. App. No. 87697, Jan. 11, 2007	10
 <u>OTHER AUTHORITIES</u>	
R.C. §5801.01 <i>et seq.</i>	2
R.C. §§5808.01; 5808.02; 5808.04(B); and 5805.13	2, 3
R.C. §§5808.15 and 5808.16	1, 2, 3, 6, 12, 13, 14
 <u>RULES</u>	
Ohio Appellate Rule 12(A)(1)(c).....	2, 4

EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST

This case is a matter of public or great general interest because the decision by the Court of Appeals below entering summary judgment de novo (1) endorses arbitrariness, forcible self-help, and the disregard of established rules of construction under the Ohio Law of Easements that favor the free use and development of property by a dominant easement holder, provided that there is no obstruction or interference with the servient estate holder's estate, and (2) engrafts expansive, unspecified and un contemplated powers as a precedent onto the Ohio Trust Code at R. C. § 5808.15 and 5808.16(H) which allows unilateral unfettered discretion to Trustees to disregard known dominant easements and to avoid their fiduciary trust obligations of loyalty, fidelity, and good faith to beneficiaries in the management of trust property.

Here, Appellant Thomas Klocker purchased, and has sought to improve his home and improve a "Strip" area of property adjacent to his home that is the sole point of access/egress thereto. The "Strip" fronts 18 other unique homes facing Rocky River and allows access/egress onto Beach Road which, along with the Strip, is owned in fee by the Clifton Park Lagoons Trust. The Trustees are fiduciaries.

Improvements to the Strip have been non-uniform and reflect inconsistent materials and colorations. Appellant's chain of title does not contain aesthetic limitations. Nor have the Trustees ever issued or promulgated any aesthetic limitations.

Appellant installed "beige" colored pavers over a sub-surface snowmelt system which is not objected to by the Trustees. Nor are the pavers, which were approved by a City of Lakewood variance. "Beige" pavers were forcibly removed by the Trustees on a Sunday when Appellant was out of the City.

The Courts below have never entered a sufficient “declaratory judgment” reviewing Appellant’s property rights and chain of title. The Court of Appeals entered a summary judgment *de novo* without separate determination of Appellants’ three (3) assigned errors, violating Appellate Rule 12(A)(1)(c). Material factual disputes exist as to the existence of terms of a “gentleman’s agreement” of 1996 claimed by the Trustees, three Affidavits filed by Appellant.

The Court of Appeals never determined or discussed Appellant’s rights as a dominant estate holder. The Ohio law of easements has been disregarded. And, the Court of Appeals has endorsed forcible self-help under general and specific powers of the Ohio Trust Code at R.C. §§ 5808.15 and 5808.16(H), by allowing the Trustees to use unenumerated powers to vest themselves with arbitrary power.

This case is a case of public or great general interest. “Power” does not relieve the Trustees of “responsibility” and the Court’s precedential endorsement of forcible self-help is contrary to the mandatory duties of Trustees under the new Ohio Trust Code, enacted in June, 2006 and effective July 1, 2007. R.C. §5801.01 *et seq.*

Ohio did not have enacted “powers” for trustees prior to the Ohio Trust Code. Forcible self-help by the Trustees must be tested and measured against the fiduciary/trustee’s mandatory duties of loyalty, fidelity, and good faith. R.C. §§5808.01; 5808.02; 5808.04(B); and 5808.13. Forcible self-help is not peaceable and is contrary to fiduciary responsibility and the public interest. Trustees are required to act in the best interests of their beneficiaries and do so with reasonable care, skill, and caution.

This case presents an opportunity for the Supreme Court to declare and determine that:

(1) trustees in the exercise of their powers and as fiduciaries must respect the follow the established law of deeds and easements; and

(2) trustees in the exercise of their powers as fiduciaries must avoid forcible self-help and should, if at all, proceed by affirmative legal action to challenge Appellant's "use" under a burden to show obstruction, interference, and deprivation of their own interest in the fee.

R.C. §5808.04. *Central Cable Television Co. of Ohio, Inc. v. Cook* (1991), 58 Ohio St.3d 8;
McKenzie v. Neville (1941), 68 Ohio App. (app. Dism. 139 Ohio St. 136).

STATEMENT OF THE CASE AND FACTS

The Complaint in this lawsuit was filed on September 28, 2007 by Appellant, Thomas G. Klocker, in ten (10) separate counts for relief. The named Defendants/Appellees are Robert Zeiger, Alan Bobee (sic, Bobey) and Thomas J. Friel (now deceased), both individually and separately as the purported Trustees of the so-called "The Clifton Park Lagoons Trust", and so named as a Defendant to the extent that it ever existed or exists. Appellant has sought to improve his property in accordance with his deeded rights and the variance lawfully obtained. Appellees forcibly removed his "beige" colored pavers under claim of a disputed 1996 "gentleman's agreement" unknown to Appellant.

After the Trustees ripped out and removed Appellant's professionally installed beige-colored pavers from his frontage and driveway access to his home on a "Strip" of land owned in fee by Appellees, but subject to Appellant's dominant easement rights, Appellant filed the lawsuit. The ten (10) original Counts were reduced to three counts: Count 7, Declaratory Judgment; Count 9, Conversion; and Count 10, Estoppel.

On August 14, 2008, the Court entered a sparse and insufficient summary judgment not examining the deeds and documents as required for a declaratory judgment. Appellant's appeal to the Court of Appeals, Case No. 09-CA-92044 resulted in a reversal of the Trial Court's decision of August 14, 2008 and a remand to the Trial Court for lack of a final appealable order.

After reversal and remand, Appellant as Plaintiff filed his Motion To Determine The Course Of Future Proceedings, To Vacate The Order Of August 14, 2008; For Renewed Summary Judgment, Etc. Defendants/Appellees filed their Brief In Support Of Summary Judgment And Declaratory Judgment. Trial on disputed material facts was denied. Three (3) Affidavits existed in the Record materially disputing the existence of the oral 1996 “gentleman’s agreement” and vague terms relied upon by the Trustees in their self-help enforcement.

On January 8, 2010, the Trial Court issued its Journal Entry which denied all relief sought by Appellant, denied Appellant’s requested summary judgment, granted Appellees a summary judgment. The Trial Court’s second summary judgment did not enter a “declaratory judgment”, but entered a superficial summary judgment denying Appellant’s intended improvement on aesthetic coloration grounds and enforcing a wholly disputed, unwritten “gentleman’s agreement” allegedly made in 1996 but never defined or issued as a “rule and regulation” or finding its way into Appellant’s chain of title.

Appellants’ second appeal as Case No. CA 94555 was filed on January 21, 2010. Appellant presented three (3) distinct assigned errors in the Court of Appeals. The Court of Appeals in Case No. CA 94555 did not rule separately upon the three (3) assigned errors as required by Appellate Rule 12(A)(1)(C) or enter a “declaratory judgment”, but entered a “summary judgment” de novo at the appellate level, despite material disputes as to even the existence of the 1996 “gentleman’s agreement” forming the Trustees’ alleged authority.

A. Background Facts.

Appellant, the fee owner of his own home, holds an express written dominant easement for the right to pass over and across a “Strip” between his garage and Beach Road. Appellees, individually and/or as the purported Trustees of the Clifton Park Lagoons Trust are the fee owners

of the Strip of property, which is Appellant's frontage and driveway (the "Strip") and is servient to Appellant's dominant easement rights. The land area in question is a 16' X 25' Strip lying between Appellant's home located at 908 Beach Road, consisting of his garage, home, and boatwell, and the privately-owned Beach Road. The land is that part of a continuance "Strip" that lies on the U-shaped Clifton Lagoon between about eighteen (18) individual owners' lots and Beach Road facing Rocky River to the west.

During new home construction, Appellant was in the legal use of his easement rights to professionally install chosen beige-colored paving stones over a sub-surface base with hard concrete, mesh, and a snow-melt system on the Strip, when Appellees ripped out and converted Appellant's pavers without notice, permission, or suit. Appellees had no objection to Appellant's use of the Strip for the access improvement, but they objected to installation of the beige coloration of Appellant's pavers. Appellees used forcible self-help.

The factual and legal issue is whether Appellant's dominant easement rights to control his full use and enjoyment of the Strip are limited by any right in the servient estate to restrict the aesthetic color of material he installed on the Strip. While the Trustees own the Strip in fee, their servient ownership is subject to the dominant easement rights of all of the adjoining lot owners, including Appellant, to use the Strip as frontage and a driveway to cross and recross, and pass over and across the Strip. Appellant's dominant easement rights flow from the material documents admitted in the Record, as well as from the law. Appellees have no rights denominated in Appellant's chain of title or in their own chain of title to limit the Appellant's dominant easement rights for aesthetic reasons. Appellees asserted their claim of authority based upon their fee ownership of the "Strip" property, despite the absence of any "rules or regulations" ever issued or promulgated by them in any capacity, and pursuant to their claim that

the broad, unenumerated powers of the Ohio Trust Code at R. C. § 5808.15 and 5808.16(H) granted them a power of self-help even in the absence of any “rules and regulations” issued to any lot owners adjacent to the Strip, including Appellant. None of the claimed provisions of the Ohio Trust Code specifically apply here and any application at all raises the spectre of absolute arbitrariness coupled with ultimate standardless power.

B. The Failure Of The Court To Address The Factual Issues.

The deeds at issue are critical for review. As the Court of Appeals in Case No. CA-09-92044, the Record had to be examined to determine “whether such rule [and regulation . . . that requires Klocker to install red driveway pavers on the strip of property in front of his home owned by the Trustees] was ever properly promulgated. See CA 09-92044 at pp. 5-6. No evidence of any “proper promulgation” or any “promulgation” at all exists in the Record.

Further, the purported “agreement” of the Trustees was never established in the Record. The facts as to its very existence are disputed, let alone its terms. And, the Appellate conclusion that Appellant had “knowledge” of “non-conformity” is not established in the Record and cannot stand as a basis for establishing a deed restriction or a “rule and regulation” to a legal standard in Ohio. “Non-conformity” cannot be founded upon an unknown, non-specific “gentleman’s agreement” but only upon a “rule or regulation” applicable to Appellant and to others in a similar position.

C. The Underlying Real Estate Documents.

This case involves two lots: (1) Klocker’s lot, Permanent Parcel No. 311-02-035; and (2) the Strip in front of 908 Beach Road, P.P.N. No. 311-02-048, which is part of the property owned by the so-called Clifton Park Lagoon Trustees.

1. The Root Deed Pertaining To Klocker's Lot – The Schneider Deed

Klocker purchased his residential lot on or about May 15, 2003 from Robert J. Tomsich, Trustee. Klocker's lot was originally conveyed by The Clifton Park Land Company to Franklin G. Schneider (Klocker's predecessor-in-interest) by deed dated August 5, 1918 and recorded at Volume 2216, pgs. 598 and 599 of the Cuyahoga County Recorder's Office (the "Schneider Deed"). The Strip area between what is now Klocker's lot and what is now known as Beach Road remained owned by The Clifton Park Land Company at the time when Klocker's lot was originally conveyed to Franklin Schneider. Along with the conveyance of this residential lot, the Schneider Deed conveyed "the right to pass over and across other lands of the grantor *adjacent* to the lot hereby conveyed...", i.e. the Strip, "subject to such rules and regulations as may from time to time be established by said Company, its successors and assigns." (emphasis added.) No written rules or regulations promulgated by the Trustees exist, none have been recorded, and none were produced as evidence by Appellees in the Record.

The Schneider Deed contained several detailed restrictions and limitations, including a duty on the part of the lot owner to submit any plans for development of the lot to the Grantor. However, by the express terms of the Schneider Deed, those restrictions and limitations expired after fifty (50) years by January 1, 1963.

The Schneider Deed expressly provided, "the said several covenants, agreements, and provisions herein contained shall run with the land hereby conveyed and be binding upon the said grantee (Schneider), his heirs and assigns (e.g., Klocker) for the period of fifty years from the first day of January in 1913." Accordingly, those "covenants, agreements, and provisions" in the Schneider Deed, including any rules and regulations governing the use of the Strip, together with the requirement that "plans for any boathouse or other building to be erected on said

premises shall be submitted to and approved by the Grantor herein before any step is taken towards the erection of same," expired on January 1, 1963.

Nothing in the Schneider Deed provided that the lot owner's dominant easement right to use and pass over and across the Strip was limited by any aesthetic standards – either as written therein, or that might later be adopted by the Grantor, or its successors or assigns, to limit Appellant's dominant easement rights in the future.

2. The Deed Pertaining To The Strip – The Trusteeship Deed

On or about March 13, 1920, The Clifton Park Land Company conveyed property to the original Clifton Lagoon Trustees, by deed recorded at Volume 2313, pgs. 327-330, which includes the "Strip" benefiting adjacent parcels.

There is no provision at all in the Trusteeship Deed, V. 2313, p. 327-330, that allows the Trustees to enact any "rules and regulations". Furthermore, there is nothing in the Trusteeship Deed to the Trustees that states the lot owners' rights to use and pass over and across is subject to the Trustees' right to require pre-approval of an aesthetic color for driveway pavers upon which the right to pass over and across can be exercised. There was no such express limitation or right reserved in the Trustees.

Nothing in the Trusteeship Deed authorized the Trustees to set or enforce aesthetic standards for the common Clifton Park Lagoon Trust property or the individually owned lots around the Lagoon. Moreover, nothing in the Schneider Deed or the Klocker Deed or the deed of similarly situated lot owners gives the Trustees the right to rule or regulate the properties adjacent to the Trust common property after January 1, 1963.

3. Klocker's Title Work – The Klocker Deed

Appellant's title work was introduced in the Record at the hearing on January 4, 2008. The "Klocker Deed" of May 15, 2003 at AFN 200305150895 contains no restriction limiting Appellant's rights of ownership or limiting his right to use his dominant easement right to pass over and across the Strip to access his property from Beach Road. No rule or regulation exists in Appellant's chain of title that restricts his use of his property or his dominant easement rights in the Strip by any aesthetic standards imposed or to be imposed by the Trustees or otherwise.

D. There Are No Written Rules Or Regulations Ever Issued Or Promulgated By Their Purported Trust Within Appellant's Chain Of Title.

There is no signed written agreement or any rule or regulation adopted by the Trustees by which the lot owners agreed or became bound to use only one particular color of paving stone material on the Strip, if and only if an improvement were made to the Strip property in perpetuity. The Trustees' claim of authority has rested solely upon their contention that in 1996 there was a "flexible" or "general agreement" or an "informal handshake, gentleman's agreement" or "one neighbor to another, with gentleman's handshake agreement" or a "voluntary (understanding) – not in writing" – that required a Lagoon lot owner (if his lot faces the Rocky River) to use a particular type of interlocking "reddish" paving stone material. The Trustees' reliance upon the alleged "gentleman's agreement", which purports to impose an aesthetic restriction on only a small sub-group of the deeded lot owners (i.e. those Lagoon lot owners whose properties face the Rocky River), does not appear in the chain of title of anyone and is not recorded with the Cuyahoga County Recorder. Nor is the purported "gentleman's agreement" written in the records of the Trusteeship or locatable in its records. Nor does the City of Lakewood have any record of the purported "gentleman's agreement." Thus, in perpetuity any prospective purchaser of a lot in the Clifton Lagoons cannot be placed on notice of the claimed

restriction or its terms by any document of record; and no purchaser has ever been placed on notice within his chain of title or otherwise.

Even if the purported limitation existed, the Record proves that compliance by lot owners and enforcement by the purported Trustees has been non-existent. Multiple types of frontage and driveway access improvements have been installed by lot owners across the Strip, and multiple color variations have been used for frontage and driveway improvements installed by lot owners across the Strip. Uniformity of architectural or aesthetic standards has never existed and does not exist in the Strip. Implicit from the history of the area, and in the Record however, is the Trustees' recognition of the lot owner's dominant right to improve the full use and enjoyment of their dominant easement access and passage over the Strip with a variety of long-term useful life surface materials of various colorations selected by the lot owners.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

Under the law of easements, the holder of a dominant easement estate has sufficient personal authority to improve his dominant estate to his full use and enjoyment, including making aesthetic improvements within his reasonable discretion, when the underlying real estate documents do not expressly grant or reserve the power in the servient estate to impose specific aesthetic limitations upon his estate by notice in the chain of title or by rule or regulation properly adopted, provided that the dominant estate holder does not obstruct or unreasonably burden and interfere with the servient estate holder's rights.

The rule of construction in Ohio applicable to easements states that: "A deed is to be construed most strongly against the grantor and in favor of the grantee." *Russell v. Russell*, (1940) 137 Ohio St. 153, 157. If a deed or easement could be construed in two different ways, any restriction must be construed against the restriction and in favor of free use of the easement. *See Frontier Community Services v. Knoll Group*, December 19, 2001, Jackson App. 00CA22, unreported, cited in *Smith v. Newell*, 2007-Ohio-72, Cuy. App. No. 87697, Jan. 11, 2007.

Appellant has held a dominant easement over the trust property and his use should be given the fullest and freest possible expression, unless it interferes with the fee owner's servient estate. Other adjacent property owners have like issues with their improvements, past and present to the Strip which are unresolved and left to future disputes with the Trustees and litigation.

The Ohio Supreme Court has set the standard for resolution of disputes over deeded use restrictions as follows: "where the right to enforce a restriction contained in the conveyance as to the use of the property conveyed is doubtful, all doubt should be resolved in favor of the free use thereof for lawful purposes" by the grantee. *Hunt v. Held*, (1914) 90 Ohio St. 280, ¶ 1 of the syllabus. *Accord, Hitz v. Flower*, 107 Ohio St. 47, ¶ 1 of the syllabus. "Further, where the language contained in a deed restriction is unclear and capable of contradictory interpretation, the deed restriction must be construed against the restriction and in favor of the free use of the land." *Houk v. Ross*, (1973), 34 Ohio St.2d 77, ¶ 2 of the syllabus, *Bove v. Giebel* (1959), 169 Ohio St. 325, ¶ 1 of the syllabus, cited in *Benner v. Hammond* (1996), 109 Ohio App.3d 822, 827. Here, where there is no restriction in any of Appellant's relevant deeds (the Schneider Deed, as Appellant's root deed, or in the Trusteeship Deed) setting any aesthetic standards for the common Strip area adjacent to Appellant's lot owned in fee by the Trustees, and where there are no written "rules and regulations" of the Trustees in existence or in the Record, there are no aesthetic restrictions or limitations to prevent the Appellant's free use of his dominant estate. But, disputes between a lot owner and the Trustees will inevitably lead to arbitrary decisions, self-help, and a conflict in perpetuity.

In this case, the Record reflects that right of enforcement of aesthetic standards by the Trustees has been waived in fact by past conduct or would be vague and arbitrary. The Record shows five (5) different types of paving materials already in use on the common Strip property

and the 18 or so lots facing the Rocky River under the Trustees' alleged unwritten "gentleman's agreement." By reason of waiver or lack of present uniformity, vague or arbitrary restraints are void and unenforceable.

Appellant's professional installation of his chosen beige pavers over a snow-melt system is consistent with his dominant easement rights to use, pass over and across the Strip in order to enjoy and to improve his driveway and frontage. These rights are indistinguishable from easement rights, and include the right to vary the mode and use and enjoyment of the easement, so that he can freely exercise his rights. *Crane Hollow, Inc. v. Marathon Ashland Pipeline Co., LLC* (2000), 138 Ohio App.3d 57, 66.

Proposition of Law No. II:

The Ohio Trust Code at R. C. § 5808.15 and 5808.16(H) extending general and specific powers to trustees in their management of property, must be read and construed in conjunction with the Trust Code's general duties of loyalty, fidelity, and good faith required of trustees towards trust beneficiaries, such that trustees may not act or construe their power to act in a manner that would be arbitrary or capricious towards the trust beneficiaries, including taking actions outside of the recorded deeds or the established law of easements, and must use affirmative legal process to resolve disputes and to avoid conduct that constitutes forcible self-help.

In this case, the Court engrafted arbitrary power without specificity or limitation onto the Ohio Trust Code at R. C. § 5808.15 and 5808.16(H) allowing the Trustees to use claimed, broad statutory powers to impose undefined, unnoticed, and arbitrary restrictions upon the use of the dominant estate property in the face of the historical and non-uniformity of the aesthetics of existing improvements along the Strip despite the prevailing law of easements in Ohio. The Trustees/Appellees were given a power leading to arbitrary results in this case and a precedent that will lead to disputes and conflict in the future.

The Court of Appeals cites to “the Ohio Trust Code, R. C. 5808.15 and R. C. 5808.16” in its decision without any analysis of the implication of its citation. At oral argument below, Appellees’ counsel conceded that there is no single piece of paper or “rule and regulation” that the Trustees can point to that would define the restriction claimed under the alleged 1996 “gentleman’s agreement.” And, since the purported Trustees have never established or issued or promulgated any “rule and regulation” limiting or restricting or governing aesthetic improvements to the Strip, (when a “rule and regulation” opportunity was available under the Schneider Deed or the Trusteeship Deed at issue), the Court’s providing such overreaching statutory power without limitation or definition in the law that has never been so applied leads only to current arbitrariness and perpetual conflict.

Without any analysis, the Court allowed unlimited broad powers to the Trustees under the Ohio Trust Code at R. C. § 5808.15 to control trust property based only on the words “with all powers over the trust property that an unmarried competent owner has over individually owned property.” But nothing here gives the Trustees the power to disregard the law of easements. The Trustees claimed below that these statutorily vested powers under R. C. § 5808.15 in any trusteeship are so “broad” and so “unlimited” that there is no need for the powers to be enumerated and, in essence, no need for the Trustees to comply with the Ohio law of easements or the documents at issue in Appellant’s chain of title. However, nothing in the language of R.C. § 5808.15 or 5808.16(H) applies to the fact situation present here where the fee is owned in trust, but the fee owner is a mere servient estate holder subject to a dominant estate holder. There is no precedent in Ohio for the Court’s decision in this regard. As a result, following this precedent, Trustees in Ohio can only feel empowered to act arbitrarily without fear of limitation; and even feel the power to act with forcible self-help protected by this precedent.

The Court of Appeals' endorsement of the Trustees' reliance on the Ohio Trust Code does not consider and, in essence, rejects and disregards the Ohio law of easements. While the Trustees may have power over the development of their fee interest in the Strip, the Trustees cannot claim a statutory power by virtue of the Ohio Trust Code to disregard, deny, or trample over a dominant easement holder's rights in the Strip. To allow the Trustees to use unenumerated powers claimed under R. C. § 5808.15 and 5808.16(H) is to vest them with arbitrary power without any limits at all – including the purported power to deny easement rights while seeking to enforce their own claimed vague, undefined aesthetic standards not required by the local building standards, not promulgated by any duly issued “rules and regulations”, and not contained in the deeds at issue or in a property owner's chain of title.

Also, the Court's decision avoids and circumvents the express language of the Schneider Deed (Klocker's Root Deed) that cannot be sustained. Schneider obtained an express easement right to “use” the Strip “to pass over and across” it for ingress and egress, but reserved to the “Company, its successors and assigns” was a limited power and authority to govern the grantee's “use” of the Strip in that it “shall be subject to such rules and regulations as may from time to time be established by the Company, its successor and assigns.” The Record here clearly established that the opportunity reserved to the “Company, its successors and assigns” to issue “rules and regulations”, as specifically provided in the Schneider Deed (Klocker's Root Deed), was never exercised by the Company or the Trustees. The Trustees' claim and the Court's approval of unlimited, unenumerated, and unconstrained “broad powers” vested in the Trustees under R. C. § 5808.15 and 5808.16(H) is directly contrary to the express necessity of establishing “rules and regulations” provided for in the Schneider Deed (Klocker's Root Deed), and expressly denied Appellant's dominant easement rights.

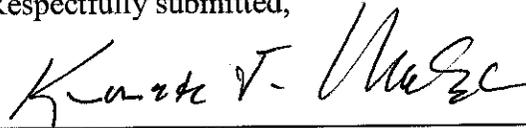
The Court of Appeals' endorsement of a denial of the Ohio law of easements cannot stand as precedent in Ohio on a statewide basis through this sole and unfortunate application of the Ohio Trust Code. A review and correction by the Ohio Supreme Court is in order in the public and great general interest.

A trustee vested with arbitrary powers can act at his own whim and with vague undefined standards or no standards at all. Such a result is anathema to the mandatory requirement that fiduciaries act with care, skill, caution, good faith, and in the best interest of beneficiaries. Affirmative civil suit for injunction on other legal action, if at all, must be preferred and required of trustees under the Ohio Trust Code rather than arbitrariness and forcible self-help. *Central Cable Television Co. of Ohio, Inc., Id.; McKenzie, Id.*

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Appellant requests that this court accept discretionary jurisdiction of this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true copy of the **Memorandum In Support Of Jurisdiction Of Appellant Thomas**

G. Klocker has been served via Regular U.S. Mail this 30th day of December 2010, upon the following:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94555

THOMAS G. KLOCKER

PLAINTIFF-APPELLANT

vs.

ROBERT ZEIGER, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-637240

BEFORE: Blackmon, P.J., Boyle, J., and Jones, J.

RELEASED AND JOURNALIZED: November 18, 2010

EXHIBIT "A"

PATRICIA ANN BLACKMON, P.J.:

Appellant Thomas G. Klocker ("Klocker") appeals the trial court's decision granting summary judgment in favor of Robert Zeiger, Thomas Friel, Allan Bobey, and the Clifton Lagoon Trust ("the Trustees"). Klocker assigns the following errors for our review:

"I. The trial court failed to declare or determine the key issue set forth by the Court of Appeals in Case No. CA 92044 and its grant of summary judgment as a declaratory judgment is both an insufficient analysis of the deeds and issues as well as an inaccurate reading of the Record which is clearly erroneous as a matter of law."

"II. The trial court erred in its summary judgment and in denying Appellant a trial on the facts in dispute because the purported 'Clifton Park Lagoons Trust' has no proven existence or power to enforce an architectural or aesthetic standard over Appellant's dominant easement rights in the 'Strip' property of Appellees servient thereto which is adjacent to and integral to the Appellant's use of his residential property, in that:

(a) Appellant had no notice in his chain of title by his Deed or otherwise through his root Deed or deeds of his predecessors in interest of any purported limitation upon his dominant easement right to install pavers of his choice on his residence property and the access portion of the 'Strip' servient thereto;

(b) The purported Trustees of the Clifton Park Lagoons Trust, by and through their Trusteeship Deed in Fee to the Strip, never had any relevant 'rules or regulations' governing the aesthetics of the Strip, all rules and regulations contained in the Trusteeship Deed expired after 50 years by January 1, 1963, and no relevant rules and regulations that might have been authorized by

any Trustees were ever issued or promulgated with notice to any of the adjacent property owners in the position of the appellant in advance of any purported administration or enforcement of such rules and regulations;

(c) The purported trustees utterly failed to provide any proof of authority and acted individually or ultra vires or without any legal authority at all; and/or

(d) The Trustees' alleged oral 'Gentlemen's Agreement' violates the Ohio Statutes of Frauds."

"III. The Court's summary judgment is erroneous as a matter of fact and law and, as applied to Appellant, the Court should have entered its Order that the Trustees who hold the servient estate do not have the power to restrict or limit the Appellant's dominant estate by architectural or aesthetic rules or regulations governing surface materials or color so long as Appellant's use or intended use conforms with local law and does not interfere with the fee owner's servient estate or the use by similarly situated lot owners."

Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

The instant appeal flows from a dispute over a strip of property (the "Strip") in the Clifton Lagoon development in Lakewood, Ohio. The background facts are sufficiently set forth in our previous decision in *Klocker v. Zeiger*, Cuyahoga App. No. 92044, 2009-Ohio-3102.

Appellees Zeiger, Friel (now deceased), and Bobey, as Trustees of the Clifton Lagoon Trust, own the Strip, along with other common area property in the development. The Strip runs in front of and abuts a series of sublots on

In the instant case, it is undisputed that the Trustees own the property herein referred to as the Strip. R.C. 5808.15, that sets forth the general power of a trustee states in pertinent part as follows:

"(A) A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust, may exercise all of the following powers:

- (1) All powers over the trust property that an unmarried competent owner has over individually owned property;**
- (2) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property * * *."**

With respect to real property, R.C. 5808.16, states in pertinent part as follows:

"Without limiting the authority conferred by section 5808.15 of the Revised Code, a trustee may do all of the following:

(H) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries * * *."

The record reveals that pursuant to the broad powers as outlined above, in 1996 the Trustees sought and obtained a variance from the city of Lakewood to install red interlocking bricks on the Strip in front of the privately owned properties. The record also reveals that subsequent to the issuance of the

variance, several homeowners installed the red interlocking bricks on the Strip in front of their homes. The record further reveals that Robert Tomisch, the immediate prior owner of the property that Klocker now owns, installed red interlocking bricks on the Strip in front of his property. Consequently, though Klocker argues the contrary, he was on notice of the requirement to use red interlocking bricks.

Moreover, the record reveals that when Klocker began renovation and extension of the existing home on the property, he sought to put a snow melt system underneath the Strip in front of his property. As previously noted, red interlocking bricks had already been installed on the Strip in front of his home. In a letter dated February 27, 2006, authored by Klocker's wife, the Klockers acknowledged that the Strip was the property of the Trustees, acknowledge that the installation of the snow melt would not entitle them to any special privilege associated with the property, and acknowledged that the upkeep of said system would be their responsibility.

Finally, at the May 9, 2005, meeting of the Lakewood Board of Building Standards Architectural Review Board, Klocker's architect Ronald Reed presented the architectural proposal for the renovation and extension of Klocker's home. Reed represented to the Review Board that the existing red interlocking blocks would remain. (Defendant's Exhibit C.) The Klockers

followed up with a letter to the Clifton Lagoon Association, dated June 23, 2005, in which they indicated that undamaged existing interlocking bricks may be reused after installation of the snow melt system underneath the Strip.

However, despite his prior acknowledgment that the Strip was the property of the Trustees, his acknowledgment that the red interlocking bricks would be replaced after the installation of the snow melt system underneath the Strip, Klocker proceeded to put yellow interlocking bricks on the Strip.

We conclude there are no genuine issues of material fact. The property referred to as the strip is owned by the Trustees, there was a valid agreement by property owners to use red interlocking bricks on the Strip, and the evidence clearly established that Klocker was aware of the requirement. As such, the trial court did not err when it granted summary judgment in favor of the Trustees. Accordingly, we overrule all of the assigned errors.

Judgment affirmed.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.



PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR