

COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO

ARTHUR P. DUECK, *et al.*, ) CASE NO. CA-15-103868  
)  
Plaintiffs/Appellants, )  
)  
vs. ) Civil Appeal from Cuyahoga County  
) Court of Common Pleas, Probate Division  
) Case No. 2012 ADV 179424  
THE CLIFTON CLUB CO., *et al.*, )  
)  
Defendants/Appellees. )

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**REPLY BRIEF OF APPELLANTS ARTHUR P. DUECK, TODD GILMORE, NANCY  
BINDER, WILLIAM R. KELLER, RHONDA LOJE, AND JEFFREY MANSELL**

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## INTRODUCTION

Both the Club<sup>1</sup> and the Trustees continue<sup>2</sup> to assert that the Plaintiffs filed their First Amended Complaint to prohibit Club Members from using the Beach. While that refrain has been repeated many times, it is not true. This lawsuit arises from the Club's attempt to reinterpret the Trust's definition of Trust beneficiaries to conjure beneficial rights under the Trust for the Club Members.<sup>3</sup> The Plaintiffs initiated this lawsuit to obtain a declaratory judgment to answer two questions: Are Club Members beneficiaries of the Trust, and do they have a legal right to use Trust Property under the terms of the Trust? Although neither of those questions was answered by the Trial Court, the answer to both questions is no. These answers are not only supported by the law, but by the available 70-year history of Club Member use of Trust Property.<sup>4</sup>

Over the past 70 years, Club Member use of the Beach was negotiated by the Trustees and the Club. The negotiation would set the number of Club Members who could use Trust Property and the amount that the Club would have to pay toward the maintenance of the Beach. There is absolutely no evidence that the Club paid an annual assessment like all other lot owners in Clifton Park as called for by the Trust. Discovery revealed that, in the 1940s, the trust beneficiaries granted the trustees the authority to permit such use under limited terms to be beneficial to the lot owners. This lawsuit was brought to protect the rights of the beneficiaries by clarifying that Club Members who, unlike resident lot owners, have no obligation to fund the maintenance of Trust Property do not gain an unchecked right to use Trust Property.

The Trustees' argument that the Trial Court did not err in granting summary judgment and finding that the Club Members have a right under the Trust to use the Trust Property is based

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<sup>1</sup> All capitalized terms have the same meaning as used in the Appellants' Opening Brief unless noted otherwise herein.

<sup>2</sup> Because the Club's Brief incorporates the arguments of the Trustees, any reference herein to the "Trustees' arguments" is a combined response to the Club and the Trustees.

<sup>3</sup> As in Appellants' Opening Brief, "Club Members" means members of the Clifton Club who are not Clifton Park resident lot owners.

<sup>4</sup> The evidence in the record establishes only Club Member use of the Beach from the 1940's to the present. While there is anecdotal evidence that non-residents belonged to the Club in the early part of the century, which is not surprising given that Clifton Park was being developed at the time and the Club was used as a marketing device to sell lots, there is no evidence that they used the Beach.

on two incorrect premises (Trustees' Br. at 8-14). First, the Trustees rely on a version of corporate law that does not exist in Ohio, *i.e.*, they wrongly claim that the rights of a for-profit corporation, like the Club was in 1912, devolve on its individual members or shareholders. Ohio law is clear that corporate property is owned by a corporation alone, and no rights to use such property devolve on individual shareholders or members. Second, they claim, as the Trial Court did, that the settlors had to intend that Club Members have a right to use Trust Property because the Club, as a "simple structure," cannot use that property, and the Club Members would not join unless they could use the Beach. But that argument assumes that the Club is a Beach club, which it is not. Rather, the Club is a social and dining club and has been marketed as such since its inception in 1902 and continues to be marketed as such.<sup>5</sup> Club Members who join the Club gain access to the Club's facilities, *i.e.*, its Clubhouse, meeting facilities, and dining facilities. But because the Beach is not owned by the Club, Club Members have no access to those facilities, except by way of annual permission granted by the Trustees, who own the Beach as Trust Property, which is the historical and accurate interpretation of who has rights under the Trust to use Trust Property.

The Trustees' arguments do not overcome the conclusion that the Trial Court erred by (1) not answering the fundamental question of whether the Club Members are beneficiaries where it was undisputed that they were not; (2) finding that the terms of the Trust grant the Club Members a right to use Trust Property without reading the Trust as a whole and where no such language exists; (3) relying on the Trustees' extrinsic evidence while excluding the Plaintiffs' evidence (Appellants' Br. at 16-30) and ignoring the facts and law that demonstrate that the Trial Court abused its discretion by denying the Plaintiffs' Motion to Remove the Trustees and Motion for Attorney Fees (*Id.* at 31-40).

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<sup>5</sup> The Club's Web site shows that it still advertises itself as a social and dining club. <http://cliftonclub.com/about.html>. And the Trustees admit this fact in their Brief (*e.g.*, Trustees' Br. at 2, 5).

## ARGUMENT

### **I. THE TRUSTEES AND THE CLUB FAIL TO ADDRESS, LET ALONE REBUT, APPELLANTS' ARGUMENTS THAT THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF THE TRUSTEES WAS ERRONEOUS AND CONTRARY TO OHIO LAW.**

The Trustees selectively quote and re-order the Trial Court's opinion to argue that the Trial Court found that the Club Members have rights under the Trust without considering any extrinsic evidence (Trustees' Brief at 10). But notably absent from the Trustees' Brief, as it was from the Trial Court's Judgment Entry, is any language from the Trust that confers rights to use Trust Property onto the Club Members. If such language existed, the Trustees and the Court merely would have needed to cite it, and neither the Trial Court nor the Trustees would have had to rely on the Club Lease (*id.* at 5, 12; 11/10/2015 Journal Entry at 9), the Club Deed (Trustees' Br. at 5-6, 9-10; 11/10/2015 Journal Entry at 6),<sup>6</sup> and extrinsic "facts" derived from *Wallace v Clifton Land Co.*, 92 Ohio St. 349 (1915) (Trustees' Br. at 5; 11/10/2015 Journal Entry at 8).

The Trustees' argument which is based on extrinsic evidence and not the language of the Trust shows that the Trial Court erred (1) where it found that the Trust confers rights because there is no language in the Trust supporting that conclusion when reading it as a whole and without adding terms that do not appear in the Trust (Appellants' Br. at 18-22); and (2) where the Trial Court found that the Club Members have rights to use Trust Property based on the Trustees' extrinsic evidence to the exclusion of the Plaintiffs' evidence (*Id.* at 23-30).

The Trustees attempt to overcome the Trial Courts' errors by (1) relying on corporate law that Ohio does not follow (Trustees' Br. at 12-14); (2) incorrectly claiming that Plaintiffs' requested relief somehow violates Ohio law by infringing on the Trustees' authority to regulate Trust Property (*id.* at 15-16); (3) requesting that this Court ignore the fundamental question of who the beneficiaries are (*id.* at 17); and (4) relying on an incorrect standard of relevance

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<sup>6</sup> Plaintiffs asked for a declaration concerning the Club Deed because the Club had and still does argue that the Club Deed gave Club Members rights to use the Beach. Because this argument is counter to Ohio law that a deed can only convey the extent of the grantor's title and because the grantor of the Club Deed had already conveyed any interest in the Trust Property to the trustees, Plaintiffs sought a declaration that this interpretation was wrong.

relating to evidence which aids in interpreting the Trust (*id.* at 19-20).<sup>7</sup> As shown below, the Trustees' arguments are unavailing.

A. **Ohio Law Does Not Grant Shareholders of the Club Any Legal Interest in the Club's Beneficial Rights.**

The Trustees' argument that corporate rights devolve on its individual members is based on a version of the law that Ohio law does not follow (Trustees' Br. at 12-14). The Trustees contort *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), and incompletely cite Bogert, *The Law of Trusts and Trustees, Trusts and Estates*, § 16, at p.221 (3d Ed. 2007) (*See id.* at 26-27). Bogert actually notes that many courts find that the "entire interest in the corporate property is vested in the legal entity known as the corporation" and that its shareholders do not have an equitable title or interest in such property or to reduce it to the shareholder's possession. Bogert, at § 16, at pp. 221-22 (quotations omitted). Ohio follows that view (*See* Appellants' Br. at 32). Because the undisputed evidence showed that the Club was a for-profit stock corporation when it was formed and when CPLIC conveyed the Club its Deed, well-established Ohio law shows that the granting of rights to the Club does not make a Club Member the beneficiary of those rights.

The Trustees' other out-of-state cases are inapposite. First, in *Raulston v. Evans*, 561 S.W.2d 635 (Tex. 1978), the court found that the members of a **non-stock** membership corporation, which is like an unincorporated association under Texas law, acquire "not a severable right to any of [that corporation's] property or funds, but merely a right to the joint use and enjoyment thereof so long as he continues to be a member." *Id.* at 637-38. In reaching that holding, the Court distinguished a non-stock membership corporation from "stock corporations." That distinction is relevant because it is undisputed that the Club was a for-profit stock corporation. Accordingly, the Club is not like an unincorporated association, and the holding in *Raulston* does not cause the Club's rights under its Deed to devolve on the Club Members.

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<sup>7</sup> The Trustees' claim that the Plaintiffs' obfuscated the nature of their claims by removing the distinction between non-lot owners and lot owners is baseless and false (Trustees' Br. at 20-22). The Trustees ignore page two of Appellants' Brief where Club Members are defined as "the Club's members who do not own sub-lots in the Clifton Park allotment" (Appellants' Br. at 2). The Trustees' tactic of casting unwarranted aspersions should be rejected.

Similarly, the Trustees' other out-of-state cases do not transform the Club's rights under the Club Deed to rights of the Club Members. In those cases, a club had its members use a certain piece of land and found that such use by that club's members satisfied the open and notorious use requirement necessary for the club to obtain a prescriptive easement over real property. None of those cases found that the club's members gained a prescriptive easement or a right of use.

The Trustees' logic, like the Trial Court, relies heavily on an incomplete reading of the Trust and the incongruous argument that the Trust's settlors intended Club Members to have rights because the Trust did not use the term "resident" to define who the Trust's beneficiaries are, but rather used that term to define who the trustees could be and repeatedly used the term "lot owner." But, as shown in the Plaintiffs' opening brief, that logic ignores the phrase "lot owners . . ., and their successors in title, and members of their households[,]" which was used to define for whose benefit the Trustees hold Trust Property. By ignoring the term "members of their households," the Trial Court violated several rules of trust construction and interpretation, which actually show that the Club Members were not beneficiaries or persons with rights under the Trust (Appellants' Br. at 18-23). In fact, the term "households" means "those who dwell under the same roof and compose a family; *also* a social unit comprised of those living together in the same dwelling." Merriam-Webster's Collegiate Dictionary 562 (10th Ed. 1993).<sup>8</sup> Certainly, the phrase "members of their households" is synonymous with the terms "residents." Further, the contrary logic is just as plausible in this case, *i.e.*, if the settlors intended for Club Members to have rights under the Trust, they easily could have added "members of the Clifton Club" to the list given that they used the term "members of their households." Thus, the settlors were well aware of the term "members" and its meaning when drafting the Trust and chose not to mention Club Members in the Trust. Couple this with the Trustees' assertion that the Club

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<sup>8</sup> The 1912 definition of that term is similar to the present-day meaning. See Universal Dict. of the English Language 2554 (Volume Two, 1898) ("Those who live together under the same roof; a family under the same head"); Worcester's Academic Dictionary, A New Etymological Dictionary of the English Language 291 (Rev. Ed. 1910) ("a family living together"); New Websterian 1912 Dictionary 422 (1912) ("a family living together"); A Thesaurus Dictionary of the English Language 510 (2d Ed. 1906) ("a family living together").

had members who did not live in the Park when the Trust was formed demonstrates that the settlors did not intend to give Club Members the right to use Trust property.

**B. The Plaintiffs' Requested Relief Does Not Violate Ohio Law Because They Never Have Asked the Court to Override the Trustees' Duty to Regulate the Trust.**

The Plaintiffs have not challenged the Trustees' power to regulate use of the Trust Property. Further, that duty is irrelevant because it does not give the Trustees discretion to determine who the beneficiaries are and determine who has a legal right to use Trust Property under the Trust. Instead, those threshold inquiries must be answered by the Court before considering any regulation. That is the dispute because the Plaintiffs have not asserted that the Club is not a beneficiary, nor have they asserted that the Trustees do not have the authority pursuant to a 1940s agreement to allow a certain number of Club Members access to the Beach provided that use does not interfere with the resident lot owners' use and enjoyment granted under the Trust. Further, the ratification argument turns the history of the administration of the Trust on its head. Because the past trustees consistently agreed that Club Members have no legal right to use the Beach and that any such use was permissive as agreed to in the 1940s, there was nothing to nullify or contest. Accordingly, Plaintiffs' requested relief is not contrary to the law.

**C. Determining If the Club Members Are Beneficiaries Is a Threshold Inquiry.**

The Trustees assert that whether the Club Members are beneficiaries has never been an issue in this case (Trustees' Br. at 17). They are wrong. The Club denied that the Club Members were not beneficiaries both before and during the litigation in response to Requests for Admission, and because of that claim, the Plaintiffs sought a declaration that the Club Members are not beneficiaries. That is a fundamental question that must be answered before the Court can determine who has a right to use Trust Property because a trustee must "administer the trust solely in the interests of the beneficiaries," (R.C. 5808.02(A)), and in administering the trust, the fundamental obligation of the trustee is to place the interest of the beneficiaries above all others. R.C. 5808.01, Official cmt., R.C. 5808.02, Official cmt. Accordingly, the first and most fundamental question is **who are the beneficiaries of the Trust?** As the Trustees admit, they

did not dispute that Club Members were not Trust beneficiaries. Despite this undisputed fact, the Trial Court did not address this question and granted judgment in favor of the Trustees. That was a clear error of law, which warrants reversal of the summary judgment in favor of the Trustees.

**D. The Plaintiffs' Evidence Is Relevant and Shows that the Club Members Were Not Intended to Have Rights Under the Trust or Club Deed.**

Given that the Trust does not clearly and unambiguously give Club Members rights to use Trust Property and the Trial Court relied on the Trustees' extrinsic evidence, including the Club Lease, the Club Deed, the purported 112 years of Club Member Beach use, and a portion of *Wallace* decision, to reach its judgment, Plaintiffs' evidence is relevant, and the exclusion of the evidence was error.

The Plaintiffs' evidence showed the basis for allowing the Club Members' Beach use, and such evidence is relevant and admissible to determine whether the Trust was intended to give rights to Club Members where it is silent on that issue. Where such an ambiguity exists, the court can look to "any" extrinsic evidence – and what greater ambiguity can there be than silence. *McDonald & Co. Secs. v. Alzheimer's Disease & Related Disorders Ass'n*, 140 Ohio App. 3d 358, 363 (1st Dist. 2000); *see also Nat'l City Bank v. de Lavelle*, 170 Ohio App. 3d 317, 326, 2006-Ohio-5909, at ¶ 39 (6th Dist.). Appropriate evidence includes the conduct of the trustee. *See Curtis v. Shillman*, 8th Dist. No. 40136, 1980 Ohio App. LEXIS 13755, at \*11-12 (Jan. 25, 1980) (“[W]here an ambiguity exists as to how a provision in a written trust document was intended to be interpreted and applied with regard to a certain trustee, the interpretation can be determined from the intent and conduct of the testator and trustee” (quotations omitted)).

The Trustees argue that only evidence from the settlors in 1912 is relevant evidence. But the Trust and Club documents—which show that the trustees have treated the Club Members' use as permissive since 1942, the time of the earliest available records, because the historical interpretation of the Trust is that only residential lot owners have a right to access the Trust Property—are all relevant. Those facts are inconsistent with Beach use through a right granted by the Trust. And the earliest statements and investigations come from Trustees Clayton

Quintrell, John S. Pyke, Sr., and Chester Newcomb, who served as trustees with Trustee Anderson who was a Trustee from the inception of the Trust in 1912 until 1947 and also a member of CPLIC (10/26/2015 Pls. Opp. to Mot. in Limine Ex. 2). Accordingly, they had the benefit of speaking with an original trustee in formulating the historical administration and interpretation of the Trust.

*Woodward v. Ameritrust Co.*, 751 F.2d 157 (6th Cir. 1984) (finding that the terms of Trust were not ambiguous and if they were, extrinsic evidence of the beneficiary, “*the settlor* and Ameritrust [the trustee]” did not show that the settlor did not intend for the amendment to be effective), and *Wooster Rubber Co. v. C.I.R.*, 189 F.2d 878 (6th Cir. 1951) (finding that IRS commissioners’, the respondent in the case, approval of plan for certain tax statuses was of no evidentiary value in establishing the settlor’s intent), do not support the Trustees’ arguments. In *Woodward*, the court weighed the evidence and did not find that the conduct of the trustee, a beneficiary, and *the settlor* overrode the substance of the amendment, and in *Wooster Rubber*, the court found that the IRS could not change the meaning of a trust based on its tax determination. Neither case stood for the proposition that the history of trust administration, the basis for allowing the Club Members’ Beach use, or the relationship between the Trustees and the Club are not admissible evidence if an ambiguity exists in the Trust.

## **II. THE PLAINTIFFS’ CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.**

The Trustees and the Club both argue that the Plaintiffs’ claims were barred by the statute of limitations under R.C. 2305.14 (Trustees’ Br. at 22-24; Club Br. at 5-7). That claim is based on the false premises that (1) Plaintiffs seek to nullify the Club Deed and (2) that Plaintiffs have brought a breach of fiduciary duty claim against the Trustees for allowing the Club Members access to the Beach. But, the Plaintiffs’ First Amended Complaint is not barred by the statute of limitations under R.C. 2305.14 for those reasons because it requests only that the Court declare that the Club Members are not beneficiaries of the Trust (Prayer for Relief No. 1), that the Club Members do not have a legal right to use the Trust Property under the Trust, and that the Club’s

and Trustees' new interpretation of the Club's Deed is inconsistent with the Trust and must be rejected (Prayers for Relief Nos. 2 and 3). The Plaintiffs' claims did not accrue until the Club asserted that its members had a legal right to access the Beach under the Trust and the Club Deed, which was in 2011.<sup>9</sup> Finally, the Trustees' attempt to turn this into a breach of trust case is wrong. No one has attacked the Trustees for breach of trust except to the extent that they are breaching the duty of impartiality by advancing the arguments that the Club was equally capable of making as a competing beneficiary. Thus, the First Amended Complaint was timely.

### **III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFFS' MOTION TO REMOVE.**

The Trustees incorrectly claim that the Trial Court properly denied the Motion to Remove by trying to avoid the indisputable facts (Trustees' Br. at 25-29). Despite the Trustees' claims to the contrary, the Trustees breached their duty of impartiality because this was not a case where the Plaintiffs were attacking the terms of the Trust or where the Trustees could reasonably consider that the claim was adverse to the Trust. Instead, like the authorities cited in the Appellants' Brief, this was a dispute between two sets of beneficiaries—resident beneficiaries and the Club—regarding the same trust benefits, *i.e.*, use of the Trust Property (*See* Appellants' Br. at 33-35). R.C. 5808.03 (UTC 803) mandated that the Trustees remain neutral in that dispute, but the Trustees chose to advocate the Club's position and publicly demean the Plaintiffs (*Id.*). Similarly, the Trustees breached their duty to provide information and Trust documents to the Plaintiffs on request under R.C. 5808.13(A) (UTC 813). The Trustees claim that they were adversaries in litigation and produced copies of 12,000 pages of documents. That argument misses the point: (1) the Plaintiffs requested access to Trust documents long before the litigation ensued and were denied; (2) the Trustees were aware of the Club's threat to claim a breach of fiduciary duty—no matter how the Trustees whitewash the Club's letter—and did not share that information with other beneficiaries; and (3) the Trustees made baseless privilege

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<sup>9</sup> The Club falsely claims this argument was rejected by the Trial Court. The Trial Court did not make any findings as to the accrual date of Plaintiffs' claims. The Trial Court's erroneous finding that since 1912, Club Members have used the beach—even though no party could present evidence of such use—is not a ruling on the accrual date of Plaintiffs' claims.

claims and refused to produce original documents forcing the Plaintiffs to file motions to compel (*Id.* at 36-37). That conduct violates their duties and further demonstrated the seriousness of their breaches. Accordingly, removal was warranted under Ohio law, and the Trial Court abused its discretion by denying Plaintiffs' Motion to Remove.

**IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE MOTION FOR ATTORNEYS' FEES.**

The Trustees argue that the Trial Court did not err in denying Plaintiffs' motion for attorneys' fees by arguing that they prevailed and to again, deliberately misquote the relevant statute (Trustees' Br. at 29-30). First, contrary to the Trustees' claims, R.C. 5810.04 states that the Court can award attorneys' fees "to be paid by another party," which would include the Trustees. Second, the Trustees' remaining argument that they prevailed ignores the remaining factors supporting an award of attorneys' fees and does not respond to the points raised in Appellants' Brief. Those additional factors include (1) the Trustees' unreasonable positions and defenses; (2) their conduct that unnecessarily prolonged the litigation; (3) the unfairness of Plaintiffs bearing the burden of correcting the Trustees' unreasonable positions; (4) the Plaintiffs' actions benefiting and protecting the Trust; and (5) the Trustees' bad faith acts of breaching their fiduciary duties.

**CONCLUSION**

For the foregoing reasons and the reasons set forth in Appellants' Opening Brief, Plaintiffs request that the Court reverse the Trial Court's grant of summary judgment in favor of the Trustees and remand this case for further proceedings. Further, Plaintiffs request that the Trial Court's August 24, 2015 Judgment Entries denying Plaintiffs' Motion to Remove the Trustees and Plaintiffs' Motion for Attorneys' Fees against the Trustees be reversed and remanded with directions to enter judgment on those Motions in favor of the Plaintiffs.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Reply Brief of Appellants Arthur P. Dueck, Todd Gilmore, Nancy Binder, William R. Keller, Rhonda Loje, and Jeffrey Mansell has been served by electronic and/or U.S. mail on this 27th day of May, 2016, upon the following counsel of record:

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I hereby certify that a copy of the foregoing Reply Brief of Appellants Arthur P. Dueck, Todd Gilmore, Nancy Binder, William R. Keller, Rhonda Loje, and Jeffrey Mansell has been served by electronic and/or U.S. mail on this 27th day of May, 2016, upon the following

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