

COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO

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

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## **ASSIGNMENTS OF ERROR**

(1) Whether the trial court erred by granting the Motion of Defendants Charles Drumm, Trustee, John Pyke Jr., Trustee, Peter A. Kuhn, Trustee, Philip W. Hall, Trustee, and Warren Coleman, Trustee, for Summary Judgment relying on Defendants' extrinsic evidence while ignoring Plaintiffs' extrinsic evidence. (11/10/2015 Journal Entry);

(2) Whether the trial court erred by denying the Motion of Plaintiffs Arthur P. Dueck, Todd Gilmore, Nancy Binder, and William R. Keller and Putative Plaintiffs Rhonda Loje and Jeffrey Mansell to Remove the Clifton Park Trustees who sided with one beneficiary against other beneficiaries and failed to provide documents to trust beneficiaries as required by the Trust Code. (08/24/2015 Journal Entry); and

(3) Whether the trial court erred by denying the Motion of Plaintiffs Arthur P. Dueck, Todd Gilmore, Nancy Binder, and William R. Keller, Putative Plaintiffs Rhonda Loje and Jeffrey Mansell, and Defendant Dennis F. Butler for Attorney Fees. (08/24/2015 Journal Entry and 11/10/2015 Journal Entry.)

## **ISSUES PRESENTED FOR REVIEW**

(1) Whether the trial court erred by granting the Motion of Defendants Charles Drumm, Trustee, John Pyke Jr., Trustee, Peter A. Kuhn, Trustee, Philip W. Hall, Trustee, and Warren Coleman, Trustee (collectively, the “Trustees”), for Summary Judgment when it: (a) did not consider the fundamental question of whether the Club’s members who do not own sub-lots in the Clifton Park allotment (“Club Members”) are beneficiaries of the Clifton Park Trust, (b) found that the plain terms of the Trust grant such Club Members a right to use Trust property even though no such express language exists in the Trust, and (c) considered the extrinsic evidence presented by the Trustees but ignored the extrinsic evidence presented by the Appellants. (11/10/2015 Journal Entry.)

(2) Whether the trial court abused its discretion by denying the Motion of Plaintiffs Arthur P. Dueck, Todd Gilmore, Nancy Binder, and William R. Keller and Putative Plaintiffs Rhonda Loje and Jeffrey Mansell (collectively “Plaintiffs”) to Remove the Clifton Park Trustees where the Trustees: (a) breached their duty under the Ohio Probate Code, Ohio Rev. Code § 5810.06, to remain neutral in a dispute between beneficiaries regarding the meaning of beneficial-interest provisions, and (b) breached their duty to provide information under R.C. 5810.13. (08/24/2015 Journal Entry.)

(3) Whether the trial court abused its discretion by denying the Motion of Plaintiffs Arthur P. Dueck, Todd Gilmore, Nancy Binder, and William R. Keller and Putative Plaintiffs Rhonda Loje and Jeffrey Mansell, and Defendant Dennis F. Butler for Attorney Fees. (08/24/2015 Journal Entry and 11/11/2015 Journal Entry.)

## INTRODUCTION

This case involves two fundamental questions of trust law. First, do individuals who are not beneficiaries of a trust have any right to use trust property? The answer is no. Second, do members of a social club that is a beneficiary of a trust have a right to use trust property? The answer is no, unless pursuant to the terms of the trust, the trust beneficiaries grant the trustees the authority to permit such use and the rights of the beneficiaries are not impaired.

On March 25, 1912 the Clifton Park Land & Improvement Company (“CPLIC”) conveyed parcels of land including a beach located in the Clifton Park Allotment (“Clifton Park”) in Lakewood to five trustees to hold “for the common use of all the lot owners in [Clifton Park], and their successors in title, and members of their households” (the “Trust”). There are 204 lot owners in the Park, all but one own residential lots where members of their households reside and one is The Clifton Club Company (the “Club”), a social club with over 225 Members, most of whom do not own lots in Clifton Park. The Trust does not mention the members of the Club.

For nearly a century, past trustees have consistently interpreted the Trust to provide that: (i) the beneficiaries of the Trust were the lot owners and members of their families, (ii) members of the Clifton Club were not beneficiaries of the Trust and (iii) Club member use of Trust property is based on annual fee-based permission granted by the trustees. The recorded Trust history shows that those Club members not living in the Park (“Club Members”) had only been afforded a fee-based use of the Trust property controlled by the Trustees according to authority vested in them in 1948 by the then lot owners.

In 2011, this interpretation of the Trust was challenged as the Club and the Trustees asserted that all Club members were beneficiaries of the Trust regardless of the fact that most were not lot owners. This led to a dispute between certain resident beneficiaries and the Club

over whether the Club Members are beneficiaries and if they are not beneficiaries whether the Trust grants them any right to use Trust property. The Club claimed that Club Members had rights to use such property under the Trust and Club Deed. The Plaintiffs disputed that fact as no such language existed in the Trust and the history of the Trust administration showed that the Club Members' use of the Trust Property had always been through negotiated annual permission. Those concerned lot owners asked the Trustees to join them in petitioning the Trial Court for a declaration as to what rights, if any, the Club Members had. The Trustees refused.

Plaintiffs filed a declaratory judgment action against the Club only regarding the rights of Club Members to use the Trust property under the terms of the Trust. Plaintiffs asked the Trial Court to issue three declarations: (1) that the Club Members are not beneficiaries of the Trust, (2) that the Club Members do not have a legal right to use Trust, and (3) to the extent that the Club claimed that the Club's July 1, 1912 Deed ("Club Deed") granted Club Members a right to use the Trust property, any such grant was null and void. At no time did the Plaintiffs ask the Court to prevent the annually negotiated fee-based use of Trust property by Club Members.<sup>1</sup>

After the action below was filed, the Trustees abandoned the decades-long position of prior trustees and took sides with the Club in violation of their duty of impartiality. They moved for summary judgment and focused on issues that were not in dispute: that the Clifton Club, a lot owner, was a beneficiary of the Trust and that the Trustees had the power to regulate use of Trust property. The Trial Court granted summary judgment and found that "all of [the Club's] members [have] a legal right to use Trust property . . . subject to regulations and restrictions as set forth in the Trust Deed and Club Deed." (11/10/15 Journal Entry at 9.) The Trial Court's

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<sup>1</sup> The action was brought by the Plaintiffs to protect the interests of residential lot owners by preventing the inequitable result of dramatically increasing the number of individuals who can use limited Trust property by granting rights to use Trust property to individuals who are not beneficiaries of the Trust, without the commensurate obligation to pay for the maintenance of that property, thus changing the Trust from a benefit to a liability associated with ownership of a lot.

ruling upends the Trust by adding hundreds of users to limited Trust property and creating a situation where the lot owners (the undisputed intended beneficiaries) will be obligated to carry the financial burden of all of the additional Club Member users as the Trust has no provision for any assessments against Club members or the Club beyond those based on the Club's lot value.

The Trial Court's rulings should be reversed for several reasons.

First, the Trustees were not entitled to judgment as a matter of law because the Trial Court did not find that the Club Members were beneficiaries of the Trust, nor could it as the only beneficiaries are Clifton Park lot owners and members of their households. The Club Members are neither.

Second, the Trustees were not entitled to judgment as a matter of law because contrary to the Trial Court's findings, neither the terms of the Trust nor the Club Deed unambiguously confer any rights to use Trust property onto the Club Members.

Third, the Trustees were not entitled to summary judgment because the Trust is silent as to the rights of Club Members and the Trial Court should have considered the substantial evidence Plaintiffs presented showing the Trustees' and Club's course of dealing and historical Trust administration which demonstrated that the Club Members were never beneficiaries or persons with a right to use Trust property under the terms of the Trust or Club Deed.

Fourth, the Trial Court erred by excluding Plaintiffs' extrinsic evidence while considering the Trustees' extrinsic evidence to find that the Club Members have rights under the Trust.

Fifth, the Trial Court abused its discretion by denying the Plaintiffs' motion to remove the Trustees when the Trustees took sides in this litigation to determine the meaning of the beneficial rights provision of the Trust and refused to provide information to the Plaintiffs. This conduct was a serious violation of their fiduciary duties under the Ohio Trust Code, R.C. 5808.03 and R.C. 5810.13 and warranted removal under R.C. §5807.06.

Finally, the Trial Court abused its discretion by denying the Plaintiffs' motion for attorney fees because justice and equity required the Trial Court to award attorney fees to the Plaintiffs for having to defend against the Trustees' damaging and incorrect claims that the Club Members were beneficiaries of the Trust and had a right to use Trust property under the Trust.

### **STATEMENT OF THE CASE**

On June 6, 2012, Plaintiffs filed their Petition for Declaratory Judgment against the Club. (06/06/2012 Compl.) The Petition requested a declaration that: (i) Club Members who are not subplot owners are not beneficiaries under the Deed of Trust; (ii) Club Members who are not subplot owners have no legal right to use Trust property; and (iii) the provisions of the Club Deed purportedly allowing use of Trust property by Club Members in contradiction of the then-existing Trust is null and void. (06/06/2012 Compl.)

On August 7, 2012, the Club moved to dismiss the Petition. Even though the Trustees had refused to join in petitioning the Trial Court for a declaration of rights, *see infra* p. 15, the Trustees filed an amicus brief supporting the Club's Motion. (10/16/2012 Amicus Br.) Rather than presenting themselves as neutral stakeholders in possession of the Trust property, the Trustees took sides and advocated that Club Members had rights to use Trust property under the terms of the Trust. (*Id.* at p.1, ¶ 1.) The Court ultimately denied the Club's motion, but ordered the Plaintiffs to name the Trustees and the other Clifton Park lot owners as parties. (03/02/2013 Judgment Entry.) On April 25, 2013, the Plaintiffs filed their First Amended Complaint ("FAC") amending the Petition to add those persons as parties.

In July of 2013, requests for production of documents were served on the Trustees to discover documents to respond to the defenses and assertions made in the answers filed by the Trustees and the Club. The Trustees did not readily produce these Trust records to their beneficiaries. Instead, they engaged in obstreperous conduct. (10/31/2014 Pls. Mot. to Remove

at 8-9, 16-17, citing Ex. 8, at 1-2; Ex. 9; Ex. 10.) In fact, the Trustees wrongly asserted that certain Trust documents were privileged and refused to allow Plaintiffs to inspect original documents after certain deficiencies in their production became apparent. (04/06/2015 Mot. to Compel at 1-2, 5-9.) After the Plaintiffs were forced to file the motion to compel, the Trustees removed the privilege designation from documents that were plainly not privileged. (See 04/30/2015 Trustees' Reply to Mot. to Compel at 1; 05/14/2015 Pls. Reply in Support, citing Exs. 14-15.) Ultimately, the Court granted Plaintiffs' motion as to certain documents and ordered the Trustees to produce the original documents for inspection at the Plaintiffs' expense.

On October 31, 2014, the Plaintiffs sought to remove the Trustees due to their conduct both before and during the litigation. (10/31/2014 Mot.) Plaintiffs based their motion on the Trustees' breach of their duty of impartiality by taking sides in the litigation between two beneficiaries as to who has rights to use Trust property and thwarting the Plaintiffs' access to Trust documents. (*Id.* at 3-9.) The Trustees opposed the motion, by relying on extrinsic evidence regarding the administration of the Trust to support their evolving interpretation of the Trust. (11/26/2014 Trustees Opp.) The Plaintiffs filed a reply showing that the Trustees' interpretation of the Trust was wrong and deviated from the historical Trust interpretation and that the Trustees' extrinsic evidence was consistent with the Plaintiffs' interpretation of the Trust and Club Deed. (12/24/2014 Reply in Support of Mot.) On August 24, 2015, the Trial Court denied the Plaintiffs' motion without opinion. (08/24/2015 Journal Entry.)

On June 25, 2015, the Plaintiffs moved the Court for an order requiring the Trustees to pay their attorneys' fees pursuant to R.C. 5810.04. (06/25/2015 Mot.) The Trustees responded with many of the same arguments from their opposition to the Plaintiffs' motion to remove. (07/23/2015 Trustees' Opp.) Plaintiffs filed their reply on August 21, 2015. (08/21/2015 Reply

Br.) On August 24, 2015, the Trial Court denied the Plaintiffs' motion without an opinion. (08/24/2015 Journal Entry.)

On September 1, 2015, the Trustees filed a motion for summary judgment claiming that the Club Members have a right to use Trust property under the Trust Deed, the Club Deed, and a 1902 Lease to the Club of four sub-lots in Clifton Park (the "Lease"). (09/01/2015 Trustees Mot. for Summary Judgment ("MSJ").) The Trustees claimed that the Trust Deed and Club Deed unambiguously made the Club a beneficiary—a fact which was not disputed—and then claimed that the Club's rights to use Trust property as a beneficiary necessarily included the Club Members. (*Id.* at 7-10.) The Trustees also relied on evidence extrinsic to the Trust, including the Club Deed, the Lease, a portion of this Court's opinion reported in the Ohio Supreme Court's opinion at *Wallace v. Clifton Land Company*, 92 Ohio St. 349 (1915), and the Club Members' purported 100-plus year use of the Beach. (*Id.* at 8, 10-15, 19.)

On October 15, 2015, the Plaintiffs filed their brief in opposition to the Trustees' motion. (10/15/2015 Pls. Opp. Br. to MSJ. ("Pls. Opp.")). The Plaintiffs argued that the Club Members were not beneficiaries and because they were not beneficiaries and were not granted rights under the Trust or Club Deed, they had no rights to use Trust property. (*Id.* at 20-27.) The Plaintiffs also noted that to the extent that a right is argued from those documents, an ambiguity exists. The Plaintiffs presented substantial evidence supporting their interpretation of the Trust. (*Id.* at 9-17, 28-31.) On October 26, 2015, the Trustees filed their reply brief in support of their motion for summary judgment, notably acknowledging that the Club Members are not beneficiaries and setting forth the basis for their interpretation which was not based on the Trust's terms, but again on extrinsic evidence. (10/26/2015 Trustees Reply Br. at 1-4, 6-7.)

On November 11, 2015, the Trial Court granted summary judgment in favor of the Trustees. (11/10/2015 Judgment Entry.) The Trial Court stated that it would not consider any



parol or extrinsic evidence because it found that the “language of the Trust Deed is unambiguous.” (*Id.* at 2-3.) The Trial Court confirmed the undisputed fact that the Club was a beneficiary because it was a lot owner. (*Id.* at 3-4.) The Trial Court, however, never identified any Trust language that was intended to give Club Members rights or that made them beneficiaries. (*Id.* at 2-5.) Instead, the Trial Court examined the Trustees’ extrinsic evidence while ignoring Plaintiffs’ evidence. The Court then (1) found that the plain language of “*these documents*”—the Trust and the Club Deed—showed the intent that “the Club’s Members have all the privileges inherent in the Club’s ownership rights” (*id.* at 7) and (2) relied on the other extrinsic evidence to find that the Club Members have a right to use the Trust property through the Club subject to the rules and regulations as set forth in the Trust. (*Id.* at 8-10.) The Court never addressed whether the Club Members were beneficiaries of the Trust. (*See generally id.*)

Plaintiffs then filed this timely appeal of the Trial Court’s grant of summary judgment, denial of the motion to remove the Trustees, and denial of the motion for attorney fees.

### **STATEMENT OF FACTS**

This case involves the use of a private beach located in Clifton Park in Lakewood by Club Members, who are indisputably not residents or lot owners in the Park. The deeds for all lots in the Clifton Park obligate the lot owners to pay a portion of the maintenance costs to maintain Trust property for the use of the lot owners and members of their households. That portion is proportionate only to the lot value of the property. The lot owners must pay a mandatory assessment every year to meet this obligation or they will have a lien placed on their property. The lawsuit arises from the Club’s attempt to reinterpret the Trust’s definition of Trust beneficiaries to include all of the Club Members, and the Trustees support of the Club’s attempt to conjure beneficial rights under the Trust for the Club Members. Accordingly, certain lot owners within the Park—the Plaintiffs—initiated this lawsuit to obtain a declaratory judgment

that only persons owning property in the Park are (1) beneficiaries of the Trust and (2) have a right to use Trust property under the terms of the Trust.

**I. The Development of Clifton Park Begins With the Development of a Suburb with a Promise to Grant Lot Owners a Common Right to Use Land Devoted for Beaches and Park Spaces.**

The Park was the creation of the Clifton Park Association (the “CPA”) under the guidance of William Starkweather in the late 1800s. Documents relating to the Park development created prior to and contemporaneous with the creation of the Trust Deed showed that the park spaces developed in Clifton Park were for the common use of residential lot owners. (Pls. Opp. at 6-7, citing 10/15/2015 Affidavit (“Aff.”) Ex. 1, Ex. 2, Ex. 3.) The deed transferring the land to CPLIC provided that all lots had to be sold for residential purposes except for the possibility of lots used for “stables, canal slips, boat houses, casinos or club houses, ice houses or bathing houses for the use of the owners of the lots in said allotment.” (*See* 12/24/2014 Pls. Reply Br. in Support at 9-10, citing Ex. 11; 01/14/2015 Pls. Exs. at Ex. 11.) In fact, early articles written about Clifton Park described the Trust property as being reserved for use by “dwellers in the Park” and there was no mention of Club Members having access to the Beach. Rather, the Club was referred to as providing a means to recruit new homeowners to Clifton Park. (*See Id.*)

**II. The Trust Confers Rights to Use the Trust Property on Lot Owners in the Park and Does Not Confer Rights on Non-Residents.**

On March 25, 1912, CPLIC conveyed the Trust property to the then Clifton Park trustees to hold the Trust property for the benefit of the lot owners:

[CPLIC] ... does by these presents absolutely give, grant ... and forever quitclaim unto said grantees [trustees] ... all such right and title as [CPLIC] has ... in the following described pieces and parcels of land ..., which have been reserved for the use and benefit of the owners of land in said allotment . . . for the sole use and benefit of all owners of sub lots or parts of lots, in the [Park] ... subject to the terms, conditions, and regulations herein contained....

(Pls. Opp. at 7-8, citing Aff. Ex. 6, at p. 1, 3.) Those terms, conditions and regulations included the “Trustee Duties.” Those duties included the duty to “hold title to and preserve all the land deeded to them for the common use of *all the lot owners* in the Clifton Park allotment, *and their successors in title, and members of their households.*” (*Id.* at Ex. 6, pp.3-4 (emphasis added).) The Trust Deed does not mention the Club or any of its non-resident members. Finally, the trustees must “establish regulations for the use of” such property (by those persons specified in the Trust), and must assess each “sub lot, or part of sub lot” for the proportion of the annual Trust property maintenance expenses based on the tax value of the sub-lot. (*Id.* at Ex. 6, p.4.) That is, the Trust specifies that each resident lot owner and the Club alike only pay the assessment based on the tax value of his or her lot. The Trust does not contain any provision to assess maintenance costs to Club Members as they are not lot owners, or to increase the assessment of the Club to account for any Club Member’s Beach usage.

The Trustees eventually agreed that the Trust does not name the Club Members as beneficiaries and, admitted that they “do not owe fiduciary duties to individual Club Members.” (*See* Pls. Opp., at 8, citing Exs. 54-58, at p.5.)

### **III. Neither the Club’s Deed Nor the Club’s Lease Grants a Right to Use Trust Property to the Club Members.**

The Club was formed as a for-profit corporation on May 29, 1902. (Pls. Opp., citing Aff. Ex. 4.) The Club’s connection to Clifton Park began with the Lease. (*Id.*, citing Aff. Ex. 5.) In the Lease, CPLIC leased four sub-lots to the Club, gave the Club an option to purchase the leased lots at the expiration of the lease along with an option to lease an unspecified strip of beach along Lake Erie. The Lease *did not* grant the Club a right to use land reserved for and dedicated to park purposes for the common use of the lot owners. (*Id.*) On July 1, 1912, *nearly four months after* CPLIC transferred the Trust property to the then trustees (*id.*, citing Aff. Ex.

6), CPLIC conveyed the leased lots to the Club in the Club Deed. (*Id.* at 7-9, citing Aff. Ex. 7.) Notably, no lease of a strip of beach to the Club was mentioned or included. (*See generally id.*) The Club Deed included the then standard language granting a right to lot owners to use Trust property that was required to be in all the deeds for the Clifton Park sub-lots. (*Id.*, citing Aff. Ex. 7 at p.1.) This language was consistent with the already created Trust. Even though the Club Deed allowed it to build a social club, it did not grant a right to the Club Members to use the Trust property. (*Id.*, citing Aff. Ex. 7, p.2.) The Trustees admitted this fact when Trustee Pyke assembled an incomplete history of the “Clifton Club’s Beach Privileges.” (*Id.*, citing Aff. Ex. 50 at 12082.)

**IV. Until 2011, the Trustees and Club Recognized that Club Member Use of Trust Property Was Permissive and Not by Right Granted Under the Trust Deed.**

Both the Trustees’ records and the Club’ records regarding the use of the Beach by the Club Members only date back to the early 1940s. And those records show five key facts:

- The prior trustees did not interpret the Trust Deed or Club Deed as granting Club Members a right to use the Beach; treating their use as permissive based on the trustees negotiation of an agreement with the Club whereby the Club would make a significant financial contribution to the maintenance cost of the Beach. (*Id.* at 9-14.)
- The Club had outside counsel review its Beach use rights in the early 1940’s, and thereafter paid the Trustees for such use by its members. (*Id.*)
- The scope and extent of the Club Members’ use of the Beach was based on the amount of the Club’s contribution to the Beach operating budget, such that if the Club decreased its contribution, then the number of Club Members allowed to use the Beach decreased. (*See, e.g.* Pls. Opp. at 15-16, citing Aff. Ex. 27, at 00339, Ex. 28, at 00358, Ex. 29, at 8776, Ex. 30, at 4701, Ex. 36 at 4189, Ex. 37, at 00227, Ex. 38, at 00225, Ex. 39, at 00348, Ex. 36, at 4189, Ex. 43, at 7633, Ex. 44, at 12185.)
- The Club effectively disclaimed that its Members were beneficiaries of all the Trust property, rather the Club claimed that its contribution to the Trustees’ budget should be based only on expenses for maintaining the Beach. (*Id.* at 16.)
- The prior trustees and current Trustees took the position that only residential lot owners are granted a right to use Trust property under the terms of the Trust. (*Id.* at 17-18, citing Aff. Ex. 15, at 10917, Ex. 25, at 2663; Ex. 45, at 2566, Ex. 46, at 2560, Ex. 47, at 2555,

Ex. 48, at 12171.)

The earliest records show that the Club Members' use of the Beach required an agreement between the Club and the then trustees that was voted on and approved by both the Club's membership and the residents of Clifton Park. (*Id.* at 10-12, citing Aff. Ex. 8, at 1837-38, Ex. 9, at 1840-42, Ex. 10, at 1852, Ex. 11, at 1857, Ex. 12, at 1861, Ex. 13, at 1883, Ex. 14, at 12265, Ex. 14, at 12265.) This fact is critical as it shows that the prior trustees' authority to grant Club Member permissive use of Trust property was not derived from the Trust but from the lot owners. That agreement was a negotiated agreement and granted the Club Members a permissive right to use the Beach for a fee. (*Id.*) Importantly, that right was not described as arising from the Trust or Club Deed as the then Trustees had determined that the Trust required a person to own property to be a beneficiary. (Pls. Opp. at 12, citing Aff. Ex. 15, at 10917.)

In subsequent years, the prior trustees repeatedly made it clear to the Club that its members' use was permissive only. The Club agreed with that assessment. (*Id.* at 12-15.) Specifically, in 1963, the prior trustees told the Club that the Club's prior resolution to pay for Club Member beach use<sup>2</sup> "made it perfectly clear" that the use of the Beach "was a *permissive use* afforded to the Club members." (*Id.* at 12-13, citing Aff. Ex. 18 at pp. 2-3 (emphasis added); Opp. Ex. 19, at 8102, Ex. 20, at 8100.) Later, on November 10, 1964, the prior trustees again stated that the "arrangement between the Trustees and the Club" is that the "Trustees have afforded the Club and its members permission on the year-to-year basis to use the beach ...." (*Id.* at 13, citing Aff. Ex. 22, at 1248-49.) Finally, in the early 1970s the prior trustees again reminded the Club that its Members had "*no rights to the Beach under the land deed* as these rights were *reserved for lot owners*" and that they were "*given these rights only because of [the Club's] agreement* to carry a large portion of the assessment." (*Id.* at 13-14, citing Aff. Ex. 24,

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<sup>2</sup> This resolution refers back to the resolutions in the 1940s.

at 00080-81 (emphasis added), Aff. Ex. 26, at 1257-58.) There was no evidence of the Club disputing that claim. And the Trustees admitted on February 26, 2015 that historically the Club Members' use was based on this annual permission. (*Id.* at 14, citing Aff. Ex. 51, at p.1.) The Club also has admitted this fact when it told its members that "Members of the Club enjoy beach privileges (on the same basis as Clifton Park residents) through year-to-year arrangements and fees negotiated with the Clifton Beach Association." (*Id.* at 14-15, citing Aff. Ex. 40, at 00513.)

**V. In 2011, the Club Changed Its Position and the Trustees Sided with the Club.**

As shown in the history of the Trust's administration, the use of the Beach by Club Members has been an issue between the residents, the past and present trustees, and the Club. Further, the past trustees had only permitted the Club Members to use the Beach based on a negotiated annual permission in exchange for a fee while re-asserting to the Club that its members had no beneficial right to use the Beach without the trustees' consent. This changed in 2011 when the current Trustees abandoned their obligations to resident lot owner beneficiaries and decided to side with the interests of the Club.

Specifically, the evidence below showed that an issue of Beach overcrowding came to a head in early 2011, and certain residents presented their concerns to the Trustees. The result of those pre-litigation issues involved the Trustees rejecting the resident lot owners' requests for Beach regulatory changes reducing Beach use by Club Members while instead instituting certain rule changes applying equally to resident sub-lot owners and the Club Members after the Trustees consulted with the Club and not with the resident sub-lot owners. (10/31/2014 Mot. at 3-4, citing 10/31/2014 Dueck Aff. at ¶¶ 4-6.) The Trustees claimed they did not know whether Club members were Trust beneficiaries and the controversy regarding who the beneficiaries of the Trust are began.

The Trustees acted inappropriately as they failed to disclose a letter from the Club threatening to claim a breach of fiduciary duty for the rule changes despite holding a meeting with certain resident lot owners regarding Club Member beneficial rights just days after receiving the letter and denying several requests from the certain Plaintiffs to join them in seeking a judicial clarification of the Club Members' rights to use the Beach. (*Id.* at 4-5, citing Ex. 3, at 00001-000002, Dueck Aff. at ¶¶ 7-9.) Moreover, the evidence below showed that while denying a request to seek judicial clarification, the Trustees retained counsel to provide a legal memorandum concluding that the Club Members have a legal right to access the Beach in an unrestricted manner, while limiting counsel's review of documents to the Club Deed, the Lease, and the Trust. (*Id.* at 5-6, citing Ex. 4, at ¶ 9, Ex. 5, at 2.)

Faced with the Trustees' and the Club's attempts to reverse a century of Trust administration and interpretation, Plaintiffs filed their Petition on June 6, 2012 to protect the rights of resident beneficiaries. When the Club filed a Motion to Dismiss, the Trustees, who were previously unwilling to seek a judicial declaration, filed an amicus brief supporting the Club's Motion and advocating for the Club's position. (10/16/2012 Amicus Br.) The Trustees not only stood with the Club in Court, they also used their position to advocate against the Plaintiffs in the court of public opinion with written missives advancing their positions and disparaging the Plaintiffs. (10/31/2014 Mot. at 6-8, 11-15, citing Ex. 4, at ¶¶ 10-11; Ex. 5, Ex. 6; Ex. 7; *see also* 06/25/2015 Mot. Ex. 10, at ¶¶ 10-11; Ex. 12.) The Trustees did not act as neutral stakeholders and provide information necessary for resolution of the issues before the Trial Court. Instead, they advocated for the Club to the detriment of the Trust and other resident sub-lot owners.

## ARGUMENT

### **I. This Court Reviews the Grant of a Motion for Summary Judgment *De Novo*.**

When reviewing the granting of a motion for summary judgment, the appellate court makes an independent review of the entire record, and stands in the shoes of the trial court. *Giffin v. Crestview Cadillac*, 10th Dist. No. 09AP-278, 2009-Ohio-6569, ¶ 19. The review is guided by the same standards as the trial court: the movant must show that (1) there are no genuine issues of material fact, (2) it is entitled to judgment as a matter of law, and (3) reasonable minds can reach only one conclusion that is adverse to the non-movant after construing all evidence in favor of the non-movant. *Chase Home Fin., LLC v. Dougherty*, 10th Dist. No. 12AP-546, 2013-Ohio-1464, ¶ 10; *see also Ditto v. Jent*, 3d Dist. No. 15-05-14, 2006-Ohio-6929, ¶¶ 8-9. The court has a duty to examine all relevant materials filed in opposition to the motion. *Id.* And if the court finds that the reasonable minds could find for the non-movant, the court must reverse the trial court. *Renner v. Derin Acquisition Corp.*, 111 Ohio App.3d 326, 332-333 (8th Dist. 1996).

### **II. The Trial Court Failed to Address the Fundamental Question of Whether Club Members are Beneficiaries and Based Its Judgment on a Selective Consideration of Extrinsic Evidence Which Ignored Evidence that Showed that Club Members Have No Beneficial Right to Use Trust Property.**

Plaintiffs FAC asked the Trial Court to resolve two fundamental questions: (1) whether the Club Members are beneficiaries of the Trust and (2) whether the Club Members have a right to use the Trust property under the terms of the Trust. The answer to those two questions is no. The Trial Court did not address the first question. The Trial Court then erred by granting summary judgment for the Trustees by considering extrinsic evidence without considering the Plaintiffs' evidence at all and determining that the plain language of the Trust (which makes no mention of Club Members) grants rights to Club Members while ignoring the fundamental question of whether they are beneficiaries. (11/11/2015 Journal Entry at 7-10.)



The terms of the Trust are not clear and unambiguous as the Trial Court demonstrated by relying on extrinsic evidence to find that the Club Members have a right to use the Trust property. In fact, the Trust is silent as to the rights of Club Members, meaning that they could not be beneficiaries of the Trust. Further, neither the Trust's terms nor the Club Deed demonstrate an intent to grant Club Members any rights to use Trust property. Neither document grants any rights to the Club Members. This, coupled with the history of Trust administration, shows no intent to confer any rights on Club Members. Because there is no language or intent to grant rights to Club Members, they cannot be beneficiaries and cannot have any rights to use Trust property, except by way of annual fee-based permission, which the Plaintiffs did not ask the Trial Court to prevent.

**A. The Court Erred By Granting Summary Judgment Because It Did Not Answer the Fundamental Question Regarding Whether the Club Members Are Beneficiaries.**

Under Ohio law, a trustee must “administer the trust solely in the interests of the beneficiaries.” R.C. 5808.02(A). 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. (“In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this article, particularly the obligation not to place the interests of others above those of the beneficiaries.”); R.C. 5808.02, Official cmt. (“This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee.”). Accordingly, the first and most fundamental question is who are the beneficiaries of the Trust.

The Plaintiffs requested in the FAC that the Trial Court determine and declare that the Club Members are not beneficiaries of the Trust. (FAC Prayer ¶ 1.) The Trustees did not dispute that Club Members were not beneficiaries of the Trust. Despite this undisputed fact, the Trial Court did not address this fundamental question and granted judgment in favor of the

Trustees. That was a clear error of law and warrants reversal of the summary judgment in favor of the Trustees.

**B. The Language of the Trust Is Not Clear and Unambiguous as to the Rights of Club Members.**

The Trial Court’s finding that the plain language of the Trust, when coupled with the Club Deed, “shows the Grantor’s intention that the Club Members have all the privileges inherent in the Club’s ownership rights” was in error for three reasons. First, no Trust language supports that conclusion. Second, the Court did not read the Trust as a whole, instead it ignored key Trust terms. And third, the Court relied on extrinsic evidence to reach that conclusion, proving that the terms of the Trust do not plainly and unambiguously show such an intent.

Determining who has rights to the Trust property starts and ends with determining the meaning of the terms of the Trust. “When construing provisions of a trust, a court must ascertain, within the bounds of the law, the intent of the donor.” *PNC Bank, N.A. v. Camping & Educ. Found.*, 1st Dist. No. C-990690, 2000 Ohio App. LEXIS 1348, at \*4-5 (Mar. 31, 2000) (citing *Domo v. McCarthy*, 66 Ohio St.3d 312, 314, (1993)). The intent can be ascertained from the express terms “[w]hen the language of the trust instrument is not ambiguous.” *Id.* (citing *In the Matter of the Trust U/W of Brooke*, 82 Ohio St.3d 553, 557 (1998). Further, “[t]he settlor’s intention is determined by considering the language used in the trust; reading all the provisions of the trust together.” *Poston v. Schuster*, 6th Dist. No. H-07-037, 2008-Ohio-2085, at ¶ 8 (citing *Zahn v. Nelson*, 170 Ohio App.3d 111, 118-119, 2007-Ohio-667, at ¶ 26); *In re Arnott*, 190 Ohio App. 3d 493, 2010-Ohio-5392, at ¶ 49 (4th Dist.). Finally, a court presumes that the settlor used the words in the trust “according to their common, ordinary meaning.” *Poston*, at ¶ 8.

The language of a trust is ambiguous where it is susceptible to more than one interpretation and the meaning cannot be determined solely from the language used in the trust.

*Evans v. Evans*, 4th Dist. Nos. 12CA5 & 12CA6, 2014-Ohio-4450, ¶ 23 (“[A]mbiguity is defined as the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time.”); *Ohio, Pa. and W.Va. Coal Co. v. Panhandle E. Corp.*, No. C-2-95-80, 1996 U.S. Dist. LEXIS 22830 (S.D. Ohio Apr. 18, 1996) (“Where the meaning of a contract cannot be determined from its terms, it is ambiguous and the intent of the parties may be determined from extrinsic evidence. Words are ambiguous when they are reasonably susceptible to two different meanings.”) When the terms of the Trust are ambiguous, a court can consider extrinsic evidence to determine the intent, and it may also consider extrinsic evidence to find the parties’ intent where the circumstances surrounding the document give the language special meaning. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St. 3d 635, 638 (1992).

Here, the Trial Court found that the Club is a beneficiary of the Trust because it is a lot owner. That fact was never in dispute. Notably missing from the Trial Court’s opinion is reference to any language in the Trust granting rights to Club Members. That is because the Trust is silent on that issue. Instead, the Trial Court erroneously ignored the whole Trust and focused on just two terms of the Trust, (1) “lot owners” and (2) “residents,” to the exclusion of other key terms, to stretch the language “lot owners in the Clifton Park allotment, and their successors in title, and members of their households” to include the Club Members. Specifically, the Court found that the term “lot owner” was the “fundamental term by which to judge the intent of the grantor” and that “members of their household” does not restrict use to residents of Clifton Park. The Court also reached its conclusion with its incongruous finding that the one-time use of the term “residents” is significant and the one-time use of “members of their household” was insignificant while ignoring the fact that the term “members of the Clifton Club”

is not used at all. (11/11/2015 Journal Entry at 4-5.) But the rules of Trust construction do not allow such a conclusion and show the Plaintiffs' interpretation.

In fact, the Trust's language actually excludes Club Members as beneficiaries or persons with a right to use Trust property. Under the terms of the Trust, the Trust property was conveyed to the Clifton Park trustees to hold that property for the "use and benefit of the owners of land in said allotment." (Pls. Opp., citing Aff. Ex. 6, at 1, 3.) And the language further provides that the individuals with a right to "common use" of Trust property are the "lot owners in the Clifton Park allotment, and their successors in title, and members of their households." (*Id.*, citing Aff. Ex. 6 at 3-4.) In fact, nowhere in the Trust are the Club Members named as beneficiaries or as persons with a right to use Trust property. The Trustees admit as much. (*Id.*, citing Aff. Exs. 54-58, at p.5.) Because those members were not named as beneficiaries and were not named as persons who have a right to use Trust property in common with the other beneficiaries, they have no right to use Trust property under the terms of the Trust.

1. **The Principle of *Expressio Unius Est Exclusio Alterius* Leads to the Conclusion That the Club Members Are Not Beneficiaries and Do Not Have a Right to Use the Beach.**

As discussed above, the court must consider all Trust terms as a whole. *Poston*, 2008-Ohio-2085, at ¶ 8; *Arnott*, 2010-Ohio-5392, at ¶ 49. Ohio courts have long recognized the maxim of *expressio unius est exclusio alterius* as an interpretative aid. *Downey v. 610 Morrison Rd., LLC*, 10th Dist. No. 2008-Ohio-3524, ¶ 47. That maxim applies "'when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.'" *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 229, 2010-Ohio-6280, ¶ 35 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). While the Trial Court found that the Plaintiffs' interpretation of the Trust was unpersuasive because there is no language forcing residency as a prerequisite to using Trust

property (11/11/2015 Journal Entry at 5), no such language is necessary. The phrase “members of their households” is significant. As the Trial Court found, the term “‘members of their households’ ... expounds upon the term ‘lot owners’ to include persons living within Clifton Park who are not themselves owners of land.” (*Id.* at 5.) When the settlors expressly expounded on the term “lot owners” and added “members of their households,” they expressly defined a group of like individuals with beneficial rights and that group did not include Club Members. The inclusion of this language and the absence of the term “Club Members” showed that the Club Members were not beneficiaries and did not have a right to use the Trust property. Thus, an express residency restriction was unnecessary and Plaintiffs’ interpretation is correct. The irony of the Trial Court’s finding is demonstrated by its finding (supported only by extrinsic evidence from the *Wallace* case) that there were non-resident Club Members in 1912. (*Id.* at 8.) If this was indeed the fact, the grantors were aware that non-resident Club Members existed and still chose not to include them in the list of beneficiaries.

2. **The Trial Courts’ Interpretation Adds Terms to the Trust, Which It Cannot Do.**

A court does not have the power to add terms to the Trust that do not exist: “the rules of construction for interpreting wills are equally applicable for interpreting trusts. Where the language of a will is clear, words cannot be added or changed, even if the consequences seem harsh to some.” *Evans*, 2014-Ohio-4450, at ¶ 94. To read the plain language of the Trust or Club Deed as granting rights to Club Members would require adding words not found in either of those documents, which the Trial Court could not do. Had the settlors intended that conclusion, they could have added Club Members to the list of persons with a right to use Trust property. Tellingly, they chose not to include this obvious term when drafting the Trust, even though as the Trial Court found the Club had members not residing in Clifton Park at the time of the Trust’s

and Club Deed's creation. *See, e.g., Premier Assocs., Ltd. v. Loper*, 149 Ohio App. 3d 660, 674 (2d Dist. 2002) (Where it was simple for a party to include a forum selection clause in contract and it did not, the Court would not read that clause in where none existed.).<sup>3</sup> Yet, contrary to this rule, the Trial Court added terms to the Trust that do not exist. Accordingly, the Trial Court erred by inserting a right to use Trust property for Club Members in the Trust.

**3. The Trial Court's Selective Reliance on Extrinsic Evidence Proves the Existence of an Ambiguity.**

While the Trial Court claimed that it did not need to rely on extrinsic evidence, it did just that by selectively relying on the Club Deed, the Club's Lease, and the *Wallace* decision to reach its erroneous conclusion that the plain language of the Trust confers rights on Club Members. (11/11/2015 Journal Entry at 5-6, 7-9.) Specifically, the Trial Court relied on the Club Deed's language allowing the Club to operate a social club and the uniform (and required) covenant in Clifton Park allotment deeds that a lot owner has "the right to use in common with other owners of the land in said allotment, all portions of said allotment which shall be the grantor be devote to the purposes of parks and park spaces for the exclusive use and benefit of such lot owners ...." (*Id.* at 5-6.) The Trial Court then found that the "language in *these documents* shows the Grantor's intention that the Club's Members have all the privileges inherent in the Club's ownership rights." (*Id.* at 7.) The Trial Court was not relying solely on the Trust's terms. Moreover, the Trial Court goes even further as it relies on the *Wallace* decision and the Club's 1902 Lease to find that they were evidence of an intent to grant Club Members the same rights as the "lot owner" Club. (*Id.* at 8-9.) The Trial Court's reliance on documents, *i.e.* reading the Trust in conjunction with Club Deed, and other extrinsic evidence contradicts its finding that the

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<sup>3</sup> *Cf. Dugan v. Dugan*, 1st Dist. No. C-890261, 1990 Ohio App. LEXIS 2918, at \*8, n.2 (July 18, 1990) ("Where, as here, an agreement is drafted by counsel, and there is an obvious omission of familiar language which, if used, would have sustained the construction urged by one of the parties, "the logical presumption is that the omission was intentional."). It was undisputed below that the drafters of the Trust were sophisticated real estate developers, accordingly, the omission of rights for the Club's members cannot be lightly assumed away.

terms of the Trust are clear and unambiguous as it considered extrinsic evidence necessary to interpret the Trust. In fact, the Trial Court could not refute the Plaintiffs' reading of the Trust without selectively using extrinsic evidence. (*Id.* at 5-9.)

Accordingly, the Trial Court erred when it found that the language of the Trust was clear and unambiguous as to the rights of the Club Members based on consideration of the Trustees' extrinsic evidence and the exclusion of Plaintiffs' evidence. When considering the Trust's terms as a whole, a court can only conclude that the Club Members, who are not mentioned in the Trust, have a right to use Trust property if an ambiguity exists in the Trust as to whether Club Members have a right to use Trust property because the common right of use is expressly restricted to lot owners and their household members.

**C. The Trial Court Erred When It Found That the Trust Confers Rights of Use on All Club Members by Relying on The Trustees' Extrinsic Evidence and Excluding the Plaintiffs' Evidence That Showed No Such Rights Existed Without Conducting a Trial to Hear and Consider All of the Facts.**

“[W]here ambiguity exists or the settlor's intent is unclear, a court may look to extrinsic evidence to determine the settlor's intent.” *McDonald & Co. Secs. v. Alzheimer's Disease & Related Disorders Ass'n*, 140 Ohio App. 3d 358, 363 (1st Dist. 2000) (collecting authorities); *see also Nat'l City Bank v. de Laville*, 170 Ohio App. 3d 317, 326, 2006-Ohio-5909, at ¶ 39 (6th Dist.) (finding that “any extrinsic evidence is appropriately considered to ascertain” intent where the court was “forced to conclude that the language of the trust document is ambiguous.”). Such appropriate extrinsic 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)).

When the Trial Court found that Club Members have rights under the Trust through the Club, it did so by relying on extrinsic evidence that does not support that conclusion. Further, the Trial Court improperly excluded the Plaintiffs' significant evidence relating to history of Trust administration which is relevant to the fundamental questions, including (1) the Club's and Trust's minutes regarding permissive use agreements, (2) Trustees' letters regarding permissive use, (3) the Club's letter to its members advising them that their use is permissive use, and (4) the past and current trustees' letters to other non-resident lot owners refusing them Beach access because they were not residents. That evidence was sufficient to create a genuine issue of material fact as to what rights, if any, Club Members have, and thus, the Trial Court erred in granting summary judgment.

1. **The Lack of Evidence Showing That the Club Members Were Intended Beneficiaries of the Trust Also Demonstrates That Plaintiffs' Interpretation Is Correct.**

Under uniform law, a "person is not a beneficiary of a trust if the settlor does not manifest an intention to give him a beneficial interest, although he may incidentally benefit from the performance of the trust." Restatement (2d) Trusts, § 126. Following this principle, Ohio law provides that a party only has rights under a trust if it is an intended beneficiary of the trust. *BancOhio Nat'l Bank v. Cardinal Constr. Co.*, 10th Dist. Nos. 89AP-1510, 90AP-90, 1991 Ohio App. LEXIS 574, at\*18-19 (Feb. 7, 1991) (noting that if the party "is merely an incidental beneficiary of the agreement, then it has no enforceable rights."). The intent of the contracting parties determines whether the third-party is an intended or an incidental beneficiary. *Id.* at \*19. Applying these principles in *BancOhio*, the court found that the defendant was not an intended beneficiary of the subject trust because its language provided that "its covenants, conditions, and provisions are intended to be for the sole and exclusive benefit of the parties thereto." *Id.* Such a clear statement of the parties' intent showed that the defendant who was not named as a



beneficiary was not an intended beneficiary of the trust. *Id.*; *see also Nixon v. Wilmington Trust Co.*, No. 3:06 CV 3046, 2007 U.S. Dist. LEXIS 53931, at \*9-10 (N.D. Ohio July 25, 2007) (same). Here, the relevant Trust language clearly states that the Trust property is held for the sole common use of **lot owners**, their successors in title, and the **members of their households**. (Pls. Opp., citing Aff. Ex. 6.) Accordingly, that language cannot be a statement of the settlors' intent that the Club Members have a beneficial or legal right to use the Trust property because the Club is a lot owner and Club Members are not. The repeated use of the phrase "lot owners" excludes Club Members as it was undisputed that the Club Members did not own sub-lots in Clifton Park.

Despite the lack of language conferring rights on Club Members, the Trial Court found that the phrase "lot owners" is the fundamental term by which to judge the settlors' intent because it is used "first and foremost and appear[s] in multiple locations throughout the Trust document ...." (11/11/2015 Journal Entry at 4-5.) But the Trial Court took a leap when it found that Club Members can use Trust property through the Club as it found that term "unambiguously fails to be limiting in nature." (*Id.*) A court must give undefined terms their plain and ordinary meaning. *See May v. Lubinski*, 9th Dist. No. 26528, 2013-Ohio-2173, at ¶ 13. The term "lot owners" has only one plain and commonsense meaning, a person who owns a lot in Clifton Park. The Club Members indisputably do not own a lot in Clifton Park. Accordingly, the term "lot owners" cannot be extended by any reading of the Trust language to imply a right of use to Club Members.

**2. The Trustees' Extrinsic Evidence Did Not Establish an Indisputable Right in Favor of Club Members.**

The Trustees urged that the Club Deed specifically granted the Club a right to use the Beach and that by operation of unidentified law, that right devolves upon the Club Members.

But that argument is unsupported under well-established corporate law (*See* Pls. Opp. at 26-27), and no such right exists in the Club Deed. Thus, reading such a right into the Club Deed was the result of an incorrect interpretation of the Club Deed and Lease.

First, under Ohio law, a deed can only convey the extent of the grantor's title and interest in real property to the grantee. 35 Ohio Jur.3d Deeds § 176, at 412; *Kamenar R. S., Inc. v. Ohio Edison Co.*, 79 Ohio App. 3d 685, 689 (3d Dist. 1992) (finding that a deed transfers only those rights which a grantor has at the time of the conveyance); *Parthe v. Parthe*, 6 Ohio App. 317, 325 (5th Dist. 1917) (same). Because CPLIC did not own an interest in the Trust property at the time of the Club Deed, it could not grant Club Members a right to use that property which was conveyed in the Trust Deed. The Trial Court's rejection of this argument was wrong. (11/11/2015 Journal Entry at 6-7.) The question is whether the Club Deed could grant rights to persons not named in the Trust as an individual with a right to use Trust property. The answer is no because CPLIC no longer owned the property and could not grant a right it did not have. The Trial Court's finding that this argument would exclude subsequent purchasers of lots (*id.* at 7), is wrong because later purchasers of sub-lots had rights under the Trust because they are either (1) lot owners, (2) successors in title, or (3) members of the lot owner's household, all of whom have an express right of use under the Trust. The Club Members do not fit in any of these categories, and thus, the Club Deed could not grant such rights to them.

Second, the Trustees admitted that there was no express grant of a right to use Trust property in the Club Deed (*See* Pls. Opp., citing Aff. Ex. 50, at 12082), and thus, they were required to show that the Club Members were intended to be a third-party beneficiaries. *See Sedlak v. Solon*, 104 Ohio App.3d 170, 176 (8th Dist. 1995) ("Courts presume that the parties' intentions at the time of the execution of a deed reside in the language they chose to employ in the deed."). The rights related to the Trust property referenced in the Club Deed are explicitly

limited to “lot owners,” not Club Members. Moreover, the inclusion of the right of use language in the Club Deed, like the other Park deeds, does not show that Club Members were intended beneficiaries as the covenants in the founding Park deeds required such a universal inclusion. (See Pls. Opp. at 6-7.) In fact, the Trustees’ reading of a non-existent right relies on a version of corporate law that Ohio does not follow. Specifically, the Trustees contorted *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819) and incompletely cited 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 reduce it to the shareholder’s possession. Bogert, at § 16, at pp. 221-22 (quotations omitted). Ohio follows that view. See *Jost v. Burr*, 69 Ohio App.3d 354, 358 (9th Dist. 1990) (“It is a fundamental principle of corporate structure that shareholders have no ownership interest in corporate-owned property.”); *Kiddie Co. Enrichment Ctr. v. Cuyahoga Cnty. Bd. of Revision*, 8th Dist. No. 98515, 2012-Ohio-5717, at ¶ 13 (“The idea that a corporation is a legal entity separate and distinct from its members is an accepted principle of law.”). It is undisputed that the Club was a for-profit stock corporation when it was formed and when CPLIC conveyed the Club its Deed. (Pls. Opp., citing Aff. Ex. 4.) Accordingly, well-established Ohio law shows that the granting of rights to the Club does not make a Club Member the beneficiary of those rights.

Finally, the Lease does not establish any rights for the Club Members. First, the Lease is not material to defining the Club Members’ rights under the Trust because it is not an operative document and was extinguished by the Club’s Deed. *37 Robinwood Assoc. v. Health Indus., Inc.*, 47 Ohio App. 3d 156, 157-158 (10th Dist. 1988) (“The doctrine of ‘merger by deed’ holds that whenever a deed is delivered and accepted ‘without qualification’ pursuant to a sales

contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants of the deed only.”). Thus, the Club Deed is the document that defines the Club’s title, and the Trust defines the rights to use Trust property. Further, the Lease actually disproves an intent to grant rights to Club Members because it contained an option to lease an unspecified strip of beach, which was not performed, and the Lease *did not* include a right to use the park lands and Beach in 1902. (Pls. Opp., citing Aff. Ex. 5.) Accordingly, the Lease does not show that the Club Members have a right to use the Beach.<sup>4</sup>

3. **The Evidence Presented by the Plaintiffs Shows That the Only Conclusion That the Court Could Reach Is That Club Members Do Not Have Rights to Use Trust Property Under the Trust or Club Deed and Only Had Annual Permission Granted by the Trustees.**

As shown above, the Trust and the Club Deed is susceptible to the Plaintiffs’ interpretation. Accordingly, the Court should have considered the circumstances surrounding the formation of the trust, the course of dealing and conduct of the prior trustees and Club in treating the Club Members’ use as a permissive use in exchange for the Club’s contribution to the Beach budget along with the history of Trust administration and Club’s contributions. This evidence shows that the Plaintiffs’ interpretation is correct.

i. **The Pre-Trust History Demonstrates the Grantors’ Intent to Place Property in Trust for Park Residents.**

Plaintiffs presented a number of historic documents relating to the early days of the Clifton Park Allotment. The historical record established a number of facts. The Clifton Park

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<sup>4</sup> The reliance on *Wallace v. Clifton Land Company*, 92 Ohio St. 349 (1915) was also erroneous. It does not support the Trustees’ or the Club’s position. First, the Ohio Supreme Court held that “[t]he only question presented in this record is the question of the right of the Clifton Land Company to devote these lots, covered by these restrictions, to street purposes, and that question must be answered in the negative.” See *Wallace*, 92 Ohio St. at 361. Second, the Ohio Supreme Court did not find the Club’s members have rights to use Trust Property. See *generally id.* Finally, the quote in the Trustees’ Motion is from a Court of Appeals decision that the Ohio Supreme Court reversed and was not the Court’s reported opinion.

Association, predecessor to the grantor, CPLIC, intended that any property in Clifton Park not used for residential purposes, but used instead for a club house was to be for the use of the owners of lots in said allotment. (See 12/24/2014 Reply at 9-10, citing Ex. 11.) The Club's 1902 Lease provided for an additional lease of unspecified beach and riverfront property "the size and location of [the property] to be hereafter agreed to by the parties." (Pls. Opp., citing Aff. Ex. 4.) There is no evidence that the Club and CPLIC ever agreed to the size and location of any leased land. The lease also foreshadowed the creation of the Trust and stated that lands reserved for Park use would be placed in the hands of not less than three trustees "with the power to hold said property "for the use and benefit of persons owning land in said allotment." (*Id.*) This evidence demonstrates the grantor's intent to have the Trustees hold Trust property for the residents of Clifton Park.

**ii. The Club Members' Past Use Has Only Been Permissive.**

Supporting Plaintiffs' requested relief is the indisputable fact that the Club Members' use of the Beach has historically (since 1942, the beginning of the available records) been by virtue of annually negotiated permission of the past trustees in return for the Club's agreement to pay a large portion of the operating budget. (See Statement of Facts, pp. 9-14, *supra*; see also Pls. Opp. at 28-29.)

The Club's 1942 and 1948 approval of an *agreement* with the prior trustees to contribute to the Beach budget (and continued payment per those agreements) was contingent upon the members being reassured that the prior trustees had "legal authority" and a "right to agree" with the Club regarding Club Members' Beach use. Such agreements are not consistent with an intent or interpretation that the Club's rights under the Trust and Club Deed flowed to Club Members. (*Id.* at 10-12, 28-29, citing Aff. Ex. 8, at 1837-38; Ex. 9, at 1840-42; Ex. 10, at 1852; Ex. 11, at 1857; Ex. 12, at 1861; Ex. 13, at 1883.) Similarly, in the 1960s and 1970s the Trustees

repeatedly reminded the Club and others that its members' use of the Beach was permissive and based on an annual agreement between the Club and Trustees. (*Id.* at 12-15, 29, citing Ex. 18, at 1, Ex. 22, at 1249, Ex. 24, at 00080, Ex. 26, at 1257-58.) Such an agreement is consistent only with annual permissive use. And the Club agreed that such use was permissive as evidenced by (1) its continued payment of the negotiated fee, based on the number of Club Members using the Beach, not the assessment formula paid by resident lot owners, and (2) its report to its members that they enjoy beach privileges through year-to-year arrangements negotiated with the Trustees. (*Id.* at 14, 29, citing Ex. 40, at 00513.) Finally, the Trustees confirmed these historical facts.

If, in fact, the Club Members had a right to use the Beach under the terms of the Club Deed or the Trust, such an annual agreement would have been unnecessary. But since the beginning of the records regarding the relevant course of dealing and the use of the Beach, this annual agreement was necessary because the operative documents do not grant them any rights.

iii. **The History of Trust Administration and the Calculation of the Club's Contribution/Assessment to the Trustees' Beach Budget Confirms That Club Members Are Not Beneficiaries and Have No Legal Rights Under the Trust.**

As shown above, throughout the history of the Trust's administration, the trustees, including the current Trustees, and the Club took other positions that are inconsistent with the Club Members having rights to use Trust property by virtue of their Club membership. Such evidence is relevant in interpreting an ambiguous trust. *Curtis*, 1980 Ohio App. LEXIS 13755, \*11-12. First, the prior trustees made it clear that the number of members permitted to access the Beach was dependent on the size of the Club's contribution to their budget. (*See* Pls. Opp. at 30; *see also* pp. 9-13, *supra*.) That is, if the Club's contribution decreased, so did the number of its members allowed access to the Beach. (*Id.*, citing Ex. 29, at 8776; Ex. 30, at 4701; Ex. 37, at 227; Ex. 38, at 225; Ex. 39, at 348.) Unlike the Club Members, the resident lot owners and members of their household all have access to the Beach regardless of the size of the household

or their assessment. Finally, the Clifton Park trustees' historical interpretation of the Trust, as confirmed by the current Trustees, that an owner of non-residential lot in Clifton Park is not a beneficiary further shows that non-residents were not intended to have a right to use the Beach under the Trust. (*See* pp. 9-13, *supra*.) Accordingly, the Trustees' own interpretation proves that Club Members are not beneficiaries and do not have rights under the Trust or Club Deed.

III. **This Court Reviews the Denial of the Motion to Remove and Motion for Attorney Fees for Abuse of Discretion.**

The Trial Court's decisions regarding the Motion to Remove and Motion for Attorney Fees are reviewed for an abuse of discretion. *Cartwright v. Batner*, 2d. Dist. No. 25938, 2014-Ohio-2995, ¶ 105 (finding that "review[ing] awards of attorney fees" for violation of R.C. 5810.04 is abuse of discretion); *Ulinski v. Byers*, 9<sup>th</sup> Dist. No. 27267, 2015-Ohio-282, at ¶ 14 ("The decision whether to remove a trustee lies within the sound discretion of the probate court, and an appellate court will not reverse that decision absent a showing of a clear abuse of that discretion.") (quoting *In re Trust Estate of CNZ Trust*, 9th Dist. No. 06CA008940, 2007-Ohio-2265, ¶ 16)). Abuse of discretion means more than an error of law or judgment; it implies an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. *Blakeman's Valley Office Equip., Inc. v. Bierdeman*, 152 Ohio App.3d 86, 90 (7th Dist. 2004). A trial court acts unreasonably and abuses its discretion where it "completely misconstrues the letter and spirit of the law." *Warner v. Waste Mgmt.*, 36 Ohio St. 3d 91, 99 (1988); *State v. Conner*, 8th Dist. No. 84073, 2005-Ohio-1971, at ¶ 38.

**IV. The Trial Court Erred When It Denied Plaintiffs’ Motion to Remove Because the Plaintiffs’ Established by Clear and Convincing Evidence That the Trustees Committed Serious Breaches of Trust.**

In denying Plaintiffs’ motion to remove the Trustees, the Trial Court abused its discretion by misconstruing the facts and uniform trust law. Applying that law to the Trustees’ multiple and serious breaches of trust, removal was warranted under Ohio trust law.

Removal of a trustee is a proper remedy for breach of trust where the “trustee has committed a serious breach of trust” or when the court “determines that removal of the trustee serves the interests of the beneficiaries.” R.C. 5807.06(B)(1), (3) (UTC<sup>5</sup> 706); 5810.01(B)(7). A “serious breach of trust may consist of a single act that causes significant harm or ... may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.” R.C. 5807.06(B)(1), (3) (UTC 706), Official Cmt. A “particularly appropriate circumstance justifying removal of the trustee” is where the trustee fails “to comply with a beneficiary’s request for information as required by Section 813.” *Id.* Further, “[r]emoval for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee.” *Id.*, UTC Official. Cmts. (citing Restatement (Third) of Trusts § 37, cmt. d; Restatement (Second) of Trusts § 107, cmt. a (1959)); *see also*, *Tomazic v. Rapoport*, 8th Dist. No. 97937, 2012-Ohio-4402, at ¶¶ 34-35 (removing trustee where his actions to disqualify beneficiary were “not in the furtherance of the terms of the Trust”).

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<sup>5</sup>“UTC” refers to the Uniform Trust Code as used herein. The official comments and the text of the UTC are instructive to interpreting Ohio’s Trust Code, R.C. 5801, *et seq.*, provisions that are comparable to provisions of Ohio’s Trust Code. *Newcomer v. Nat’l City Bank*, 6th Dist. No. WM-12-007, 2014-Ohio-3619, ¶ 25 (“Ohio courts have cited and considered comments to the UTC in applying comparable provisions of the OTC.” (citing *Vaughn v. Huntington Natl. Bank Trust Div.*, 5th Dist. No. 2008-AP-03-0023, 2009-Ohio-598, at ¶¶ 20-25)); *Cartwright*, 2014-Ohio-2995, at ¶ 36; *Damas v. Damas*, 6th Dist. No. L-10-1125, 2011-Ohio-6311, at ¶ 25 (finding that subject Ohio Trust Code Provision incorporates the UTC official comments); *Wills v. Kolis*, 8th Dist. No. 93900, 2010-Ohio-4351.



Here, removal was warranted because (1) the undisputed evidence showed that the Trustees sided with the Club to the detriment of the resident beneficiaries and in violation of their duty to remain impartial in this dispute over the meaning of the Trust and (2) the Trustees breached their fiduciary duties by improperly disallowing beneficiaries access to the Trust documents upon reasonable request.

**A. The Trial Court Erred by Failing to Remove the Trustees When the Trustees Seriously Breached Their Duty of Impartiality in the Dispute Between the Plaintiffs and the Club.**

“If a trust has two or more beneficiaries, the trustee shall act impartially in ... managing, ... the Trust property, giving due regard to the beneficiaries’ respective interests.” R.C. 5808.03 (UTC 803)<sup>6</sup> The duty of impartiality is crucial when there is a dispute among beneficiaries concerning their rights and use of Trust property. Restatement (3d) Trust § 79, cmt. a. “In managing real estate . . . held in the trust estate, impartiality is important in matters ranging from decisions concerning leasing to third parties or allowing one or more beneficiaries the use of Trust property....” *Id.*, cmt. c. Despite this clear rule, the Trustees intervened in the dispute between the Plaintiffs and the Club as advocates for the Club’s position that seeks to confer beneficial rights upon Club Members who are not beneficiaries of the Trust. The Trustees breached their duties in two ways: (1) favoring the Club and its members and (2) advocating for the Club in the litigation.

First, “a trustee must treat all beneficiaries impartially unless a preference is expressed” in the trust. *Park Nat’l Bank v. Burlison*, 5th Dist. No. 98 CA 00077, 1998 Ohio App. LEXIS 6560, \*5 (Dec. 17, 1998) (citing *In re Estate of Sells*, 15 Ohio App. 2d 23, 29-31, 238 N.E.2d 803 (10th Dist. 1968)); *see also, Shelton v. Tamposi*, 62 A.3d 741, 750 (N.H. 2013) (“unless [the trust terms] provide otherwise, trustee’s fiduciary duty to each beneficiary precludes her from

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<sup>6</sup>R.C. 5808.03 is based on section 803 of the Uniform Trust Code.

favoring one beneficiary over another” citing *Northern Trust Co. v. Heuer*, 560 N.E.2d 961, 964 (Ill. App. Ct. 1990)). Here, no language in the Trust authorized the Trustees to treat one beneficiary more favorably than other beneficiaries. But the Trustees decided to favor the Club and its Members to the detriment of the undisputed resident beneficiaries, *i.e.* the Plaintiffs. (10/31/2014 Mot. at 11-15, citing Amicus Br. at 1-3, Ex. 4, at ¶ 10, Ex. 5.) Specifically, the undisputed evidence showed that the Trustees repeatedly showed favoritism to the Club, criticized the Plaintiffs as antagonists and “dissidents,” improperly threatened that adverse consequences from this litigation would result against residents, including but not limited to increased assessments and decreased Beach operations, and made misrepresentations concerning the case to the community residents, including how the Trustees were brought into the case. (*Id.*; *see also* 12/24/2014 Reply at 4-5, Exs. 16-19.) Accordingly, the evidence was clear and convincing that the Trustees continually revealed their bias for the Club in breach of their duty of impartiality.

The Trustees further breached their duty of impartiality by advocating on behalf of the Club’s position and failing to remain neutral in this litigation. Trustees must remain neutral in a controversy between beneficiaries regarding the interpretation of beneficial interest provisions of a trust. Restatement (3d) Trusts, § 79(1)(a), cmt. c. Courts stand in harmony with the Restatement and have held that that a trustee breaches his duty of impartiality where he takes sides in such a dispute. *Shelton*, 62 A.3d at 750; *Barnett v. Barnett*, 340 So.2d 548, 550 (Fla. Dist. Ct. App. 1st Dist. 1976) (breach of impartiality to argue for one side of the beneficiaries, including opposing beneficiary’s motion for summary judgment against opposing beneficiary); *Heuer*, 560 N.E.2d at 964 (trustee cannot argue that trust be interpreted in manner beneficial to one beneficiary over another); *Matter of Duke*, 702 A.2d 1008, 1024 (N.J. Super. Ct. Ch. Div. 1995); *State ex rel. Strykowski v. Wilkie*, 261 N.W.2d 434 (Wis. 1978); *In re Cudahy Trust*, 131

N.W.2d 882, 884 (Wis. 1965) (where conflict is between two persons claiming to be beneficiaries, the trustee must remain impartial and not advocate for either side). The trustee's duty in that situation is simply to "participate in the investigation of the claims, secure relevant documents and procure other evidence" without advocating for one beneficiary over another. *Barnett*, 340 So.2d at 550.

In *Shelton*, the court found that a trustee did not have standing to appeal an adverse ruling against a trust beneficiary where the "ruling affects only one of several beneficiaries," the beneficiary "had a personal interest sufficient to enable her to appeal," and the beneficiary "was fully capable of protecting her own interests." *Shelton*, 62 A.3d at 750. The court relied on the duty of impartiality and noted that by pursuing the appeal on behalf of one beneficiary improperly placed the trustee in a position adverse to all other beneficiaries. *Id.* Similarly, in *In re Cudahy Trust*, the court relied on the apparent ability of the beneficiaries to represent their positions regarding trust interpretation when it affirmed the trial court's finding of breach of impartiality. *In re Cudahy Trust*, 26 N.W.2d at 885. Here, instead of just securing documents and producing evidence relevant to this dispute, the Trustees disregarded their duty of impartiality and advocated the Club's re-interpretation of the Trust to the detriment of the resident lot owners through their Amicus Brief and their motion for summary judgment. (*See* 10/31/2014 Mot., citing Amicus Br. at 1, 3.) Indeed, the Club could represent its own position, and the Trustees did not need to advocate that position. But in breach of the Trustees' duty of impartiality, they actually moved for summary judgment to redefine and extend the meaning of the beneficial-interest provisions in the Trust. That was a clear violation of their duty of impartiality. Accordingly, the Trustees should have been removed for their breach of the duty of impartiality.

**B. The Trustees Breached Their Fiduciary Duties by Denying the Beneficiaries Access to Trust Documents and Information.**

Under Ohio law, a trustee has a duty to “keep the current beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary’s request for information related to the administration of the trust.” R.C. 5808.13(A) (UTC 813).<sup>7</sup> This ensures that a beneficiary can protect himself. R.C. 5808.13, Official Cmt. (emphasis added). Failure to provide information to a beneficiary upon request justifies removal because that conduct thwarts a beneficiary’s ability to protect his interests. *Id.* Here, the Trustees breached their duty to furnish information to the Plaintiffs (and other resident sub-lot owners) that was necessary to protect their rights under the Trust. This conduct was a serious breach under R.C. 5808.13 and warranted their removal.

First, the Trustees failed to furnish information to the Plaintiffs upon request. The first request for information occurred on February 7, 2012, before this litigation commenced. (12/24/2014 Reply Ex. 25.) The Trustees denied that request outright. Then, in the course of discovery, the Trustees refused to produce original documents for inspection upon the Plaintiffs’ request due to holes in production. (10/31/2014 Mot. Exs. 8, 9, 10.) The Plaintiffs were forced to file a motion to compel those original documents for inspection, which was ultimately granted. (04/06/2015 Mot. to Compel; 08/24/2015 Journal Entry.) Moreover, the Plaintiffs were forced to move to compel the production of purportedly privileged documents that were, in fact, not privileged. (*Id.*) One of those documents was a key document that showed that the prior trustees believed that the Club Members’ use of the Beach was only permissive. But no motion should have been necessary because under R.C. 5808.13, the Trustees had a duty to allow the Plaintiffs

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<sup>7</sup> This is consistent with uniform law. Restatement (2d) Trusts, § 173; *see also* Restatement (3d), § 82.

to inspect those documents. *See also* Restatement (3d), § 82, cmt. e (“a trustee ordinarily has a duty ... to provide information that is requested regarding the Trust property or its administration by any beneficiary.... The trustee is also to grant [a beneficiary] access to books and records of the trust....”). The Trustees, however, took obstreperous positions, wrongfully asserted privilege, and treated the requests as if they were adversaries, not neutral stakeholders.

Second, the Trustees failed to inform the resident lot owners of the threat from the Club to claim a breach of fiduciary duty if the Trustees instituted Beach regulations that applied to Club Members only. Such information was necessary for the resident beneficiaries to protect their rights under the Trust, and such information should not have been withheld.

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The Trustees breached their duty to remain impartial in this dispute between resident beneficiaries and the Club by taking the side of the Club and its members to the detriment of resident beneficiaries. And, as result of that breach, the Trustees improperly refused the Plaintiffs access to key Trust documents. Accordingly, under the undisputed facts and clear Ohio law, the Trustees should have been removed, and the Court acted unreasonably and arbitrarily by misconstruing the facts and law to deny Plaintiffs’ Motion.

**V. The Trial Court Erred When It Denied the Plaintiffs Their Attorneys’ Fees Because They Were Forced To Defend Against Unsupportable Claims That Were Abandoned by the Trustees.**

The conduct of the Trustees in taking sides in favor of one beneficiary against all other beneficiaries and shifting their positions during this litigation also warranted an award of attorney’s fees. An award of attorney fees is proper when a trustee breaches its fiduciary duties. *Kolis*, 2010-Ohio-4351, at ¶ 53 (reversing denial of attorney fees and remanding to trial court to determine if beneficiary’s attorney fees should be paid by fiduciary breaching trustee under Ohio Rev. Code § 5810.04). *Cartwright*, 2014-Ohio-2995, at ¶ 106 (where appellate court found

trustee breached fiduciary duty, reversing the denial of attorney fees to beneficiary in bringing accounting action and the award of fees to trustee in defending the action).<sup>8</sup> Here, the Trustees should have been ordered to pay the Plaintiffs' attorney fees under R.C. 5810.04.<sup>9</sup> Courts have discretion under R.C. 5810.04 in allocating attorney fees in an action involving the administration of a trust and may award fees as "justice and equity" require. *Kolis*, 2010-Ohio-4351, at ¶¶ 51-57. The phrase "'justice and equity' does not state specific guidelines or criteria for use .... The phrase connotes fairness and invites flexibility in order to arrive at *what is fair on a case by case basis*." *Atwood v. Atwood*, 25 P.3d 936, 947 (Okla. 2001). A "trustee's payment of beneficiary's costs [including attorney fees] is especially significant and appropriate with regard to violations of fiduciary duty that are unlikely to cause losses [to the value of the trust] considered in Comment (b)(1), such as the trustee's improper refusal to provide information requested by a beneficiary." Restatement (3d) Trusts § 100, cmt. b(2).

In deciding whether an award of attorney's fees is warranted, courts apply the following factors: (1) "reasonableness of the parties' claims, contentions, or defenses"; (2) "unnecessarily prolonging litigation"; (3) "relative ability to bear the financial burden"; (4) "result obtained by the litigation and prevailing party concepts"; and (5) "whether a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in the bringing or conduct of the litigation." *See id.* These factors are known as the *Atwood* factors. *See Atwood*, 25 P.3d at 947. Applying the *Atwood* factors here, justice and equity required the Trial Court to award the Plaintiffs' their reasonable attorney fees against the Trustees.

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<sup>8</sup> Courts from other jurisdictions have also found that awarding fees to a beneficiary under UTC 1004 is proper when the trustee commits a serious breach of trust. *Shelton*, 62 A.3d at 752 (where trustee breached duty of impartiality and acted in bad faith, the trustee "rather than innocent beneficiaries" should "bear the burden of paying fees to the parties."); *Corr v. Smith*, 178 P.3d 859, 864-65 (Okla. 2008) (reinstating trial court's award of fees to prevailing beneficiary against trustee where beneficiary succeeded in setting aside trust amendment procured by trustee's breach of trust); *Duval v. Fox*, 842 N.W.2d 680 (Iowa 2013) (holding that where beneficiaries prevailed on breach of trust claims due to trustee's self-dealing, fee award to beneficiaries against trustee was proper).

<sup>9</sup> R.C. 5810.04 was adopted verbatim after Uniform Trust Code Section 1004 ("UTC 1004").

First, as shown above, the Trustees took unreasonable and indefensible positions both in this litigation and publicly regarding the Club Members' rights to access the Beach. (*See* p. 14-15, *supra*.) And those positions unnecessarily prolonged the litigation and its costs. The Trustees acted in bad faith by breaching the duty of impartiality by favoring one beneficiary over another, *i.e.*, the Club over the Plaintiffs. *See Shelton*, 62 A.3d at 750-52. Further, they initially took the unsupported position that all of the Club Members are beneficiaries of the Trust, which was later proved to be unreasonable when on February 25, 2015, when they reversed course and admitted that the Club Members were not beneficiaries and only have access by way of annually negotiated permission. But for unknown reasons, the Trustees vigorously opposed and demeaned the Plaintiffs who have advocated that position since before this litigation and wrongfully forced the Plaintiffs to enlist the aid of attorneys. Accordingly, the first, second, and fifth factors supported awarding the Plaintiffs their attorney fees to be personally paid by the Trustees.

Second, the Plaintiffs should not be forced to bear the burden of correcting the Trustees' unreasonable positions that the Trustees have now abandoned and that breached the duty of impartiality. The key inquiry is fairness. *Shelton*, 62 A.2d at 751-52. And courts have found that it is unfair for one beneficiary to bear the financial burden of bringing claims to protect the Trust and its beneficiaries from a trustee's breaches of fiduciary duty. *In re Keller*, 65 Ohio App.3d 650, 656-657 (8th Dist. 1989). As explained in the Plaintiffs' Motion for Attorney Fees, they were forced to incur significant expenses and fees to correct the Trustees' breach of trust. (06/25/2015 Mot. at 15.) Accordingly, the third factor favored awarding the Plaintiffs their fees.

Finally, the FAC has protected and benefited the Trust and preserved the Trust's purpose. Ohio courts have long found that a beneficiary who successfully brings an action that benefits the trust and other beneficiaries should be awarded his fees. *In re Keller*, 65 Ohio App.3d at

659; *Wills vs. Union Savings & Trust Co.*, 11th Dist. No. 3155, 1983 Ohio App. LEXIS 12578, at \*8 (June 24, 1983). This includes a declaratory judgment action to construe the terms of a trust. *Lloyd v. Campbell*, 120 Ohio App. 441, at syllabus ¶ 5 (8th Dist. 1964). And under UTC 1004, those fees can be ordered to be paid by the Trustees when the beneficiary is forced to bring an action to protect the trust from a trustee's breach of fiduciary duty and improper conduct. *Duval*, 842 N.W.2d 680. As shown above, the Trustees breached their fiduciary duties, and the Plaintiffs' defense of the Trust benefited the whole Trust and protected its purpose to hold the Beach for the common benefit of *all lot owner beneficiaries only* and not the Club Members who live outside of the Park. (See 06/25/2015 Mot. at 15-16.)

### CONCLUSION

The Trial Court's November 10, 2015 Judgment Entry granting summary judgment to the Trustees failed to address, let alone answer, the fundamental question of whether Club Members are beneficiaries of the Trust and selectively relied on extrinsic evidence to reach its conclusion that all Club Members have a legal right to use Trust property. For these reasons and the reasons set forth above, Appellants 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. Given the Trustees' actions in taking sides against some of their beneficiaries in favor of another and stonewalling discovery efforts, Appellants 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 the Trial Court to enter judgment on those Motions in favor of the Plaintiffs.

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