

COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

ARTHUR P. DUECK, *et al.*,) CASE NO. CA-18-108008
)
Plaintiffs/Appellants,)
)
vs.) Civil Appeal from Cuyahoga County
) Court of Common Pleas, Probate Division
) Case No. 2018 ADV 234080
)
JOSEPH KERRIGAN, TRUSTEE,)
CLIFTON PARK TRUST, *et al.*,)
)
Defendants/Appellees.)

**BRIEF OF APPELLANTS ARTHUR P. DUECK, PAUL A. BJORN,
NANCY BINDER, AND WILLIAM R. KELLER**

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ASSIGNMENTS OF ERROR

(1) The Trial Court erred in concluding that *res judicata* barred litigating the separate issue of whether the Clifton Park Trustees (“Trustees”) have authority pursuant to the Clifton Park Trust Deed’s (“Trust or Trust Deed”) terms to permit non-beneficiaries of the March 1912 Trust Deed to use Trust property based on the Eighth District Court of Appeal’s opinion in *Dueck v. Clifton Club Co.*, 8th Dist. Nos. 103868 and 103888, 2017-Ohio-7161 (“*Dueck Opinion*”), a case which only sought declaratory relief. (11/20/2018 Judgment Entry);

(2) The Trial Court erred by concluding that the Eighth District gave the Trustees authority not found in the Trust to unilaterally permit the non-beneficiary members of The Clifton Club Company (“Club Members”) a right of Trust property use. (11/20/2018 Judgment Entry); and

(3) The Trial Court erred by concluding that use of the Trust property by the Club Members is not public use within the meaning of the Trust. (11/20/2018 Judgment Entry.)

ISSUES PRESENTED FOR REVIEW

(1) Whether the Trial Court erred in concluding that *res judicata* barred litigating whether the Trustees have authority to unilaterally permit non-beneficiaries of the Trust Deed a right to use Trust property—specifically the Clifton Park Beach and its facilities (“Beach”)—pursuant to the Trust Deed’s terms based on its incorrect belief that the Eighth District’s decision in the *Dueck Opinion* granted the Club Members a legally binding permissive right to use the Beach when:

- a. the Eighth District only decided the issue presented in the *Dueck Opinion* – to wit, that the Club Members were not Trust beneficiaries and had no legal rights to use the Beach;
- b. the Eighth District did not grant such a permissive right let alone decide whether the Club Members had such a right or whether the Trustees had the authority to grant such a right of Beach use;
- c. the Eighth District’s description of the Trustees’ historical practice of allowing non-beneficiary Club Members to use the Beach for a fee based on the Trustees’ understanding with the Club as a “permissive right” was not a decision granting legal rights to the Club Members; and
- d. Plaintiffs never agreed that the Club Members had such a permissive right or that the Trustees had such authority when seeking a declaratory judgment in the prior action that the Trustees were wrong when they claimed that the Club Members had rights under the Trust Deed and Club Deed to use Trust property.

(11/20/2018 Judgment Entry).

(2) Whether the Trial Court erred by concluding that the Eighth District gave the Trustees authority, not found in the Trust Deed, to permit Club Members a right to use the Beach without the unanimous consent of the Clifton Park Lot Owners (“Beneficiaries”) when:

- a. the Eighth District in the *Dueck Opinion* ruled on the only issue that was raised and litigated, which was the declaratory relief sought by Plaintiffs in that case;
- b. the Eighth District held that members of the Club who are not lot owners in Clifton Park, are not beneficiaries of the Trust Deed and have no legal rights to use the Beach;
- c. the Trust Deed requires unanimous Beneficiary consent to allow Trustees to grant any non-beneficiary a right of Beach use; and
- d. the question of whether the Trustees had authority to grant a right of Beach use to a non-beneficiary—*i.e.*, the public—was not at issue or decided in the prior declaratory judgment action.

(11/20/2018 Judgment Entry).

(3) Whether the Trial Court erred by concluding that allowing the Club Members who are not Trust beneficiaries to use Trust property is not public use within the meaning of the Trust Deed based on Trial Courts’ consideration of the irrelevant fact that the Club is a beneficiary and its erroneous belief that Club’s members have a legally binding permissive right when:

- a. the Trust Deed provides that no part of the Trust Property shall be conveyed or dedicated to public use without the unanimous consent of all of the lot owners of Clifton Park;
- b. the Club is a club open to the general public for membership; and

- c. the Eighth District in the *Dueck Opinion* did not grant the non-beneficiary Club Members any legal rights under the Trust Deed. Rather, it emphasized that they had none.

(11/20/2018 Judgment Entry.)

INTRODUCTION

Plaintiffs/Appellants Arthur P. Dueck, Paul A. Bjorn, Nancy Binder, and William R. Keller (“Plaintiffs”) appeal the November 20, 2018 Judgment Entry of the Cuyahoga County Court Common Pleas, Probate Court Division (“Trial Court”) dismissing with prejudice Count I of Plaintiffs Second Amended Complaint (“SAC”) seeking to enjoin the Trustees, Joseph Kerrigan, Mary Ellen Fraser, Robert Frost, Warren Coleman, and Ryan Meany, from granting Club Members a permissive right to use the Beach that is equal to the rights of the Beneficiaries without the unanimous consent of the Beneficiaries.

This appeal turns on the following two questions: (1) was the issue of whether the Trust Deed gave the Trustees the power or authority to grant a right to use Trust Property to members of the public who are not beneficiaries actually litigated in the prior declaratory judgment action case captioned as *Dueck, et al. v. The Clifton Club Company, et al.*, Case No. 2012 ADV 179424 (Cuy. Cnty. C.P., Probate Division) (the “Declaratory Judgment Action”) *reversed*, 2017-Ohio-7161; and (2) did this Court grant the Trustees unilateral authority to allow non-beneficiaries a right to use Trust property without lot owner consent. The answer to both is no.

The declaration sought and granted in the Declaratory Judgment Action was that members of the Clifton Club who are not lot owners in the Clifton Park allotment are not beneficiaries under the Trust Deed and have no legal rights to use Trust property. Throughout the litigation of that case, the Trustees and the Club took the position that the Trust Deed and the Club Deed gave Club Members beneficial rights. The 2012 Trustees and the Club also argued that the Club Members must have rights under the Trust and Club Deed because they had been using the Beach for over 100 years. This Court recognized that evidence showed that the Trustees had a historical practice of granting annual permission to non-beneficiary Club Members to use the Beach for an annually negotiated fee. This Court rejected the argument that

the Club Members must have had a right under the Trust and Club Deed due to their historical use of the Beach and concluded the non-beneficiary Club Members have no legal rights. The question of whether the historical practice was lawful or authorized by the Trust Deed was never litigated.

Despite the fact that the issue in this case – whether the Trustees have the lawful authority to permit Club Members to use Trust Property without lot owner approval – was not litigated in the Declaratory Judgment Action, the Trial Court erroneously held that *res judicata* barred Plaintiffs from bringing Count I of the SAC. The Trial Court reached its decision by concluding that this Court granted the Club Members a legally binding permissive right, which this Court did not do. It also misconstrued this Court’s statement that Club Members have a “permissive right to access to the Beach as regulated by the Trustees pursuant to the Trust Deed” as meaning that this Court gave the Trustees unilateral authority to grant non-beneficiaries a right of Beach use. Instead, this Court merely held that Club members had no legal rights.

Thus, this appeal presents this unanswered question: Do the Trustees have authority under the Trust Deed to grant non-beneficiary Club members the right to use Trust property without the unanimous consent of the lot owners? The answer is no, as there is no language in the Trust Deed that gives the Trustees such authority. Plaintiffs respectfully ask this Court to reverse the Trial Court’s judgment and remand for further proceedings.

STATEMENT OF THE CASE¹

I. THE DECLARATORY JUDGMENT ACTION

On June 6, 2012, certain beneficiaries of the Clifton Park Trust – including Plaintiffs Arthur Dueck, Nancy Binder, and William R. Keller – filed the Declaratory Judgment Action in

¹ Because the basis for the Trial Court’s judgment was *res judicata*, a summary of the Declaratory Judgment Action is included.

the Probate Division of the Cuyahoga County Common Pleas Court. *Dueck Opinion*, ¶¶ 1, 22. That case arose when the then trustees (“2012 Trustees”)² under the March 2012 Trust Deed established rules giving Club Members an equal right to use the Beach – which is held in trust for the benefit of the lot owners of Clifton Park – as if they were Beneficiaries, and claimed that the Club Members had equal rights under the Trust Deed which prevented the Trustees from specifically limiting or regulating their use of the Beach. *Id.* ¶¶ 17, 21, 30, 97.

The Plaintiffs in the Declaratory Judgment Action requested that the trial court declare that the Club Members are not Beneficiaries and, as a result, have no legal entitlement to use the Beach. *Id.* ¶¶ 1, 2, 22, 30, 41, 67. The Clifton Club and the 2012 Trustees disagreed. “The Clifton Club and [2012] Trustees posit[ed] that the Club Members have the same legal right to use the Beach as the Beneficiaries pursuant to the Trust Deed and Club Deed.” *Id.* ¶ 21. This Court recognized that the 2012 Trustees believed that Club Members were Beneficiaries such that they could not “limit” or “regulate” their use of the Beach. *Id.* ¶¶ 17, 97. To bolster the position that the Club Members had rights under the Trust, the common refrain from the 2012 Trustees, the Club, and the Trial Court was “a building cannot use a Beach” and thus, the Trust settlors must have intended Club Members to have rights to use the Beach under the Trust. *Id.* ¶¶ 32-33, 131. The 2012 Trustees made that claim despite the history that the original parent deed of the development did not allow a club unless it was for the lot owners and the fact that all deeds of the development state that the Trust Deed is exclusively for the benefit of the lot owners.

² Since the commencement of the Declaratory Judgment Action, the persons serving as trustees have changed. Only one of the individuals who served as a trustee in 2012 is a party to this case. The current trustees will be referred to as “Trustees.”

This Court rejected the 2012 Trustees' position and in response to the declaration requested by Plaintiffs ruled that the Club Members had no legal rights to use the Beach, under the Trust Deed or otherwise. *Id.* ¶¶ 1, 2, 22, 30, 41, 67, 125-126. Judge Gallagher in her opinion concurring in this part of the majority opinion made the holding crystal clear. Judge Gallagher noted the argument made by the Club and the 2012 Trustees and explained that neither the Trust Deed nor the Court's opinion granted Club Members any permissive rights. "The trust simply does not contain any language from which this court can reasonably conclude that the members of the Clifton Club share the same legal rights as the Clifton Club itself. Accordingly, the Trial Court erred in awarding summary judgment in favor of appellees. It is my hope that, on remand, the parties negotiate a fair and equitable agreement that *would* grant members of the Clifton Club access to the beach on a permissive basis." *Id.* ¶¶ 130-131 (J. Gallagher concurring) (emphasis added). If the *Dueck Opinion* gave Club Members a legally binding permissive right, there would be no need for the parties to negotiate a fair and equitable agreement granting Club Members access to the beach on a permissive basis.

II. THE BREACH OF FIDUCIARY DUTY ACTION

Despite this Court's holdings in the *Dueck Opinion*, the Trustees set rules for the 2018 Beach season which maintained the status quo and again granted Club Members the same rights as the beneficiaries of the Trust Deed based on their erroneous claim that Club Members have a legally binding permissive right granted by this Court. Thus, like the 2012 Trustees treatment of the Club Members which gave rise to the Declaratory Judgment Action, the Trustees again granted the Club Members rights of Beach to use as if they were Trust beneficiaries without lot owner consent. Plaintiffs repeatedly questioned what authority in the Trust Deed the Trustees had to grant the Club Members rights to use Trust property. The Trustees had no response and, to this day, have not cited any authority in the Trust.

On May 1, 2018, Plaintiffs filed this case against the Trustees. Count I of the Complaint alleged that the Trustees breached their fiduciary duties and the terms of the Trust by granting Club Members the right to use the Trust property without the consent of the Beneficiaries.³ (05/01/2018 First Am. Compl.) On May 2, 2018, the Plaintiffs filed their Second Amended Complaint (“SAC”), which made the same allegations. (05/02/2018 SAC.)

On May 11, 2018, the Plaintiffs also filed a Motion for a Temporary Restraining Order seeking (a) to prohibit the Trustees from granting rights of Beach use to the Club Members without unanimous consent of the Clifton Park lot owners; (b) to prevent Trustees from enforcing the rules the Trustees established for using the Clifton Park Beach for the 2018 beach season; and (c) to prevent Trustees from restricting the Clifton Park lot owners from using the Beach in any way more restrictive than necessary to carry out the Trust Deed’s directive that the Beach is held exclusively for the common benefit of all lot owners in the Clifton Park allotment. (05/11/2018 Pls. Mot. for Temporary Restraining Order, hereinafter “TRO Mot.”)

On May 15, 2018, the Trustees filed a Partial Motion to Dismiss Count I of the SAC with prejudice and to dismiss the whole SAC for failure to join necessary and indispensable parties. (05/15/2018 Mot. to Dismiss.)

On June 7, 2018, the Trial Court held a hearing on the Motions in chambers. (05/21/2018 Hearing Notice.) No record was made of this hearing.

On June 25, 2018, the Trial Court issued its order denying Plaintiffs’ Motion for a TRO. (06/25/2018 Judgment Entry.)

³ The remaining counts alleged that the Trustees breached their fiduciary duties by treating the Club as a super-beneficiary (Count II), breached their fiduciary duties by reducing the resident lot owners use of certain Trust property to 60% of the Trust property (Count III), and breached their fiduciary duty to inform and report in response to inquiries from the Trust beneficiaries (Count IV).

On August 14, 2018, the Trial Court issued its order granting the Motion to Dismiss Count I with prejudice, and ordering Plaintiffs to re-file the SAC within 90 days naming all lot owners in Clifton Park as parties. (08/14/2018 Judgment Entry.)

Subsequently, the Trial Court ordered a mediation which occurred on November 13, 2018. (11/13/2018 Notice of Submission.) Plaintiffs submitted documents to the Trial Court prior to the mediation setting forth their numerous efforts to resolve the issues in the Breach of Fiduciary Duty Case both before and after the case was filed. (*Id.*) The mediation was unsuccessful.

On November 20, 2018, the Trial Court amended its August 14, 2018 Judgment Entry to be a final and appealable order. (11/20/2018 Judgment Entry.) Plaintiffs filed this timely appeal of the Trial Court's November 20, 2018 Judgment Entry granting dismissal of Count I of the SAC with prejudice.

On January 2, 2019, the Trial Court issued an order staying the remainder of the case pending this appeal.

STATEMENT OF FACTS

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." (Trust Deed, SAC Ex. A.) There are 204 lot owners in the Park, 203 of whom are resident beneficiaries⁴ and one is the Club, a social club with over 250 members. Although the originating deed for Clifton Park

⁴ A "resident beneficiary" is a Trust beneficiary who owns a Clifton Park lot and resides in a home there. Plaintiffs make this distinction because the Trustees have given the Club 224 times the Beach use rights that a resident of Clifton Park enjoys, even though all lot owners—Club and residents—are treated as equal beneficiaries under the Trust Deed's terms.

restricted any club within it to be for the lot owners, most of the current members do not now own lots in Clifton Park. The Trust Deed grants lot owners the exclusive rights to use Trust property and does not mention the Club Members.

I. THE BENEFICIARIES OF THE TRUST

The Trust Deed is the sole source of authority for the Trustees, and it is the sole conveyer of legal rights to the beneficiaries. The Plaintiffs and other lot owners in Clifton Park are the sole legal beneficiaries in common under the Trust. *Dueck Opinion*, 2017-Ohio-7161, ¶ 125. The Club is a lot owner in Clifton Park pursuant to a deed dated July, 1, 1912 (the “Club Deed”). The Club Deed transferred title to the Club’s sublots, but it did not, and could not, convey any greater rights to the Trust Property than those that are set forth in the Trust Deed, because title to, and control of, the Trust Property was vested solely in the Trustees via the Trust Deed. *Id.*

II. THE TRUST PROPERTY

The terms of the Clifton Park Trust are memorialized in the Trust Deed. (Trust Deed, SAC Ex. A.) The Trustees hold legal title to real property as set forth in the Trust Deed together with certain fixtures, buildings, and other personal property (the “Trust Property”). (SAC ¶ 12.) The most valuable part of the Trust Property to the Beneficiaries is the Beach located in the northwest corner of Clifton Park at the entrance to the Rocky River from Lake Erie. (SAC ¶ 13.) The Beach includes about 50 picnic benches, a beach house building, and a sandy beach area about 700 feet long. There are approximately 75 parking spaces (“Beach Property”). (05/11/2018 TRO Mot. Ex. B, Ex. C.)⁵ However, only 15 of the 50 picnic tables are actually placed along the sandy beach area. (*Id.*) The Beach and Beach Property are a limited resource

⁵ A true and accurate copy of an aerial photo of the Beach and Beach Property prepared by the Trustees and posted on the Trustees’ website was attached to Plaintiffs’ TRO Motion as Exhibit “B.” A true and accurate copy of Brochure describing the size of the Beach was attached to Plaintiffs TRO Motion as Exhibit “C.”

and unique property that was intended to be for the exclusive benefit of the 204 lot owners in Clifton Park. (*Id.*; SAC ¶ 14-15.)

III. THE TRUSTEES' POWERS AND DUTIES COME SOLELY FROM THE TRUST DEED.

The Trust Deed mandates that the Trustees hold Trust Property in trust for the sole use and benefit of the lot owners: “in trust, nevertheless, for the sole use and benefit of all the owners of sub lots or parts of lots, in the Clifton Park Allotment” (Trust Deed SAC Ex. A (emphasis added).)

The Trust Deed gives the Trustees the power and duty to maintain the Trust Property only for the common use of the Trust beneficiaries: “shall 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.* (emphasis added).)

The Trust Deed also provides the following duties:

The trustees ... shall keep the weeds and grass cut, and trees, shrubbery and flower beds on said lands in good condition; shall provide for removal of snow and ice as necessary; shall keep the bathing pavilion, stairways, private roadways and sidewalks in repair; shall ***establish regulations for the use of*** and provide for proper policing of private roads, lanes, ***parks and bathing pavilion***; and generally ***maintain*** all of ***said property*** in good order and condition ***for the use of lot owners*** in said allotment

(*Id.* (emphasis added).)

To protect the Beneficiaries from having their rights diluted or limited, the Trust Deed provides that the Trustees cannot convey any interest in the Trust Property or dedicate any portion of the Trust Property to public use, *i.e. to any person who is not a beneficiary*, without the unanimous consent of all the lot owners in Clifton Park: “[n]o part of said land shall be sold, conveyed or dedicated to public use without the unanimous consent of all the lot owners in said allotment.” (*Id.*) Stated differently, the Trustees’ power to transfer any interest in or dedicate to

public use any Trust Property is limited by any individual lot owner's rights to object to that action. The reason for that protection is obvious. Resident Trust beneficiaries pay a hefty premium for the exclusive right of Beach and Beach Property use (and other Trust Property), including buying their house (which price is inflated for being a Clifton Park Trust beneficiary), annually paying the proportionately inflated taxes, and perpetually paying their yearly assessment to help maintain the Trust property regardless of how much they use the Beach, without any return except the promise that their beneficial rights will be protected. Stated differently, the Trustees' power to transfer any interest in or dedicate to public use any Trust Property is limited by any individual lot owner's rights to object to that action.

IV. THIS COURT HELD THAT CLUB MEMBERS ARE NOT BENEFICIARIES AND HAVE NO LEGAL RIGHTS.

The *Dueck Opinion* put to rest a number of issues in this case. Club Members are not beneficiaries of the Trust. *Id.* ¶¶ 41, 126. The Club Members are not named in the Trust Deed and have no legal rights. (Trust Deed, SAC Ex. A); *Dueck Opinion*, 2017-Ohio-7161, ¶ 1. They have no rights under the Trust Deed, and they are not entitled to any rights of use to Trust Property, let alone equal rights or commensurate status as the Trust beneficiaries. *Id.* ¶¶ 41, 125-126. The Trust Deed does not give them any right to use Trust Property. *Id.* And the Trust Deed does not contain any terms allowing Club Members to use the Beach. *Id.* ¶¶ 41, 125-126; *id.* ¶¶ 130-131 (J. Gallagher concurring); (Trust Deed, SAC Ex. A). And the Trust Deed does not give the Trustees authority to grant Club Members rights of Trust Property use, including the Beach and Beach Property, unless the Clifton Park lot owners provide unanimous consent. (Trust Deed, SAC Ex. A.)

On August 10, 2017, this Court stated that the “pending question” before it was “whether the nonresident Club Members are direct Beneficiaries under the Trust Deed, as stated in Count I

of the first amended complaint, arguably entitling them to equal access and commensurate status as the owner Beneficiaries.” *Dueck Opinion*, 2017-Ohio-7161, ¶ 41. In response, this Court made the following holdings based on the language of the Trust Deed:

- “We determine that the *lot owners* are the *sole legal beneficiaries* of the Trust. The Clifton Club is a lot owner and thus a beneficiary. The *Trust Deed is the sole conveyer of legal rights to the beneficiaries*. The Club Deed transferred title to the Club Lots. The Club Deed did not, and could not, convey any greater rights to the Trust property than those that are set forth in the Trust Deed, because title to, and control of, the Trust property was vested solely in the Trustees via the Trust Deed.” *Id.* ¶ 125.
- “After a thorough review of the record, we find that the *nonresident members of the Clifton Club* are not beneficiaries of the Trust and, as a result, *have no legal rights*.” *Id.* ¶ 1 (emphasis added).
- “[I]n response to the declaration explicitly requested by appellants, we find that the Club Members have no legal right of access as Beneficiaries. Access by the Club Members is by permission and regulation of the Trustees.” *Id.* at ¶ 67.
- “Club Members are not equal or direct Beneficiaries of the Trust.” *Id.* at ¶ 126.
- “[T]he *Club Members* are not beneficiaries under the Trust Deed and, therefore, *have no legal right to access the subject beach*.” *Id.* at ¶ 130 (J. Gallagher concurring) (emphasis added).
- “The trust simply does not contain any language from which this court can reasonably conclude that the members of the Clifton Club share the same legal rights as the Clifton Club itself.” *Id.* ¶ 131 (J. Gallagher concurring).

This Court reached these conclusions in response to the 2012 Trustees’ position that Club Members had a right of access under the Trust Deed. *Id.* ¶ 21.⁶ This Court rejected that position

⁶ Paragraph 21 of the *Dueck Opinion* goes on to say that “Appellants agree that the Club Members have the right to use the Beach with the permission of the Trustees, but deny that they are direct Beneficiaries, and further state that neither the language, nor the history, supported the position of the Clifton Club and Trustees.” Contrary to the Trustees’ arguments, Plaintiffs in the Declaratory Judgment Action did not agree that Club Members had legally binding rights. Rather, they recognized that as a matter of historical practice the Trustees had been granting a permissive right and that Club Members’ historical use was nothing more than use via permission the Trustees granted on an annual basis. This responded to the Trustees’ and Club’s claims that the fact that Club Members had been using the Beach meant they must have a right under the Trust Deed and Club Deed to do so.

and, in effect, the prior Beach use rules treating Club Members as if they were equal beneficiaries under the Trust. Despite that strong rebuke and after this Court’s clear rulings, the Trustees—four of whom are Club Members—proceeded in 2018 to establish the same rules and give the same equal rights of Beach use to the Club Members. (05/11/2018 TRO Mot. Ex. D.)

V. THE TRUSTEES GRANT CLUB MEMBERS THE SAME RIGHTS AS BENEFICIARIES AND MAKE THE CLUB A SUPER BENEFICIARY.

The Beach is a limited resource that can be used for only half the calendar year. (SAC ¶¶ 40-43.) It offers only 50 picnic tables and approximately 75 parking spots for the 204 Trust beneficiaries and their households to use. (*Id.* ¶¶ 13-15.) The Trustees define the Beach Season when beneficiaries can use the Beach and Beach Property as May 1 to October 31 of the calendar year—184 days. (*Id.* ¶¶ 40-41, 42-43; 05/11/2018 TRO Mot. Ex. D.)⁷

As set forth in the Rules, the Trustees granted 224 Club Members, their families, and their guests rights to use the Beach and Beach Property for the 2018 Beach season as if they were Beneficiaries. (SAC ¶ 44, 47; 05/11/2018 TRO Mot. Ex. D.) The Trustees treat each individual Club Member as an equal or direct beneficiary of the Trust Deed by giving an individual Club Member the same rights to use the Beach and Beach Property as any Trust beneficiary. (SAC ¶¶ 46, 48-75.) The Rules also inequitably favor the Club itself – by giving it 224 times greater Beach access as any other Beneficiary – to the detriment of the other Beneficiaries. (*Id.* ¶ 45, 48-75.) These actions violate the Trust Deed’s terms. (*Id.* ¶¶ 76-77.)

In fact, the Trustees did not distinguish between a Club Member and Trust beneficiaries as they are all collectively referred to as “Beach Members” in the 2018 Rules, (*id.* ¶ 48), which assert that in 2018, 224 Club Members have an equal right to use the Beach as the Rules state

⁷ A true and accurate copy of the Trustees’ 2018 Clifton Beach Rules (“Rules”) was attached as Exhibit “D” to the TRO Motion.

that “All [Beach] members in good standing, along with their immediate family members living in the residence of the member, may use the Beach facilities (*i.e.*, Beach and Beach Property).” (*Id.*; 05/11/2018 TRO Mot. Ex. D, p. 1 of the Rules, bullet no. 2.)

A comparison of the rights of Beach use Trust beneficiaries inherently have as beneficiaries and that Club Members have due to the grant from the Trustees shows that Club Members have been given the same rights as Trust beneficiaries. (*Compare* SAC ¶¶ 50-51-52, 57, 61, 68 *with* ¶¶ 49, 53-56, 58-60, 62-67, 69-75.) As the 2018 Beach Rules apply equally to a Trust beneficiary’s rights and a Club Member’s rights without distinction, the Trustees make no distinction between a Club Member and a Trust beneficiary in terms of rights of Beach and Beach Property use. (*Id.* ¶¶ 48-75.)

The Trustees have asserted that the basis for their authority to grant such rights to the Club Members and the Club is in the Trust Deed – although they have never set forth what language gives such authority. They also rely on dicta from the *Dueck Opinion*. (05/11/2018 TRO Mot., Ex. E, citing paragraphs 40 and 59 of the *Dueck Opinion*.)⁸ But in paragraph 40, this Court noted only that “it *appears* that the parties agree that the Club Members may use the Beach by permission for an annual fee, with regulatory oversight by the Trustees.” *Dueck Opinion*, at ¶ 40 (emphasis added). While it may have appeared that way to the Court, there simply was no evidence in the court below that the issue was agreed to, litigated and decided. The Trustees’ authority under the Trust Deed to grant this permissive use or whether the trustees had the authority to enter into an agreement with the Club without unanimous lot owner approval was never before this Court or any court.

⁸ A true and accurate copy of the Trustee counsel’s letter to the Plaintiffs’ counsel, dated April 24, 2018, but not sent until April 29, 2018, was attached as Exhibit E to the TRO Motion. The preceding correspondence between these parties was attached as Exhibits F, G, H, I, and J.

VI. COUNT I OF THE SECOND AMENDED COMPLAINT

Count I is a claim for breach of the Trustees' fiduciary duties (1) to administer the Trust Deed according to its terms and solely in the interests of the beneficiaries, the lot owners in Clifton Park and (2) of loyalty to the beneficiaries. (SAC ¶¶ 93-95.) And the breach of those duties and the Trust Deed's terms includes (1) granting 224 Club Members a permissive right to use the Trust Property, including the Beach and Beach Property without unanimous consent of the Clifton Park lot owners; and (2) granting such a right of permissive use to the 224 Club Members that is equal to the rights of the Trust beneficiaries. (*Id.* ¶¶ 97-98, 104-105.)

Plaintiffs have not sought declaratory relief in Count I of the Second Amended Complaint. Rather, Plaintiffs contend that the Trustees have breached their fiduciary duty as they have no authority under the Trust Deed to make this grant of rights to use Trust Property to any non-beneficiary without unanimous consent of the Clifton Park lot owners (*Id.* ¶¶ 99-100.)

VII. THE TRUSTEES REFUSE ANY EFFORT TO COMPROMISE AND NEGOTIATE THE AGREEMENT JUDGE GALLAGHER HOPED THE PARTIES COULD REACH.

In the *Dueck Opinion*, Judge Gallagher made clear that her hope was that the parties would take the Court's guidance and negotiate a fair and equitable agreement allowing Club Members to use the Beach: "It is my hope that, on remand, the parties negotiate a fair and equitable agreement that would grant members of the Clifton Club access to the beach on a permissive basis." *Dueck Opinion*, at ¶ 131 (J. Gallagher concurring). The *Dueck Opinion* was entered on August 10, 2017. Shortly thereafter, the Plaintiffs reached out to the Trustees and suggested a number of possible compromise solutions. (11/13/2018 Notice of Submission.) Unfortunately, the Trustees rejected these and made no overtures of their own. Instead, they implemented the 2018 Beach rules that were essentially the same as when the Declaratory Judgment Actions started in 2012. Despite numerous attempts by the Plaintiffs to negotiate an

agreement for Club Member use that actually involved input and consent from the lot owners, the Trustees always said no.

ARGUMENT

I. THIS COURT REVIEWS THE GRANT OF A MOTION TO DISMISS *DE NOVO*.

An appellate court reviews a lower court’s decision to grant a Civ.R. 12(B)(6) motion using a de novo standard. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 4. 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing to *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 4-5. Like the Trial Court below, this Court must accept all allegations in the SAC as true. *Miller v. Van Wert Cty. Bd. of Mental Retardation & Dev. Disabilities*, 3d Dist. No. 15-08-11, 2009-Ohio-5082, ¶ 7 (citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988)). The Court “must construe any reasonable inferences in favor of the party opposing the motion to dismiss.” *Doe v. Bath Local School Dist.*, 3d Dist. No. 1-14-12, 2014-Ohio-4992, ¶ 4, citing *Perrysburg Twp.*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

ASSIGNMENT OF ERROR # 1 - THE TRIAL COURT ERRED IN CONCLUDING THAT *RES JUDICATA* BARRED LITIGATING THE SEPARATE ISSUE OF WHETHER THE CLIFTON PARK TRUSTEES (“TRUSTEES”) HAVE AUTHORITY PURSUANT TO THE CLIFTON PARK TRUST DEED’S (“TRUST OR TRUST DEED”) TERMS TO PERMIT NON-BENEFICIARIES OF THE MARCH 1912 TRUST DEED TO USE TRUST PROPERTY BASED ON THE EIGHTH DISTRICT COURT OF APPEAL’S OPINION IN *DUECK V. CLIFTON CLUB CO.*, 8TH DIST. NOS. 103868 AND 103888, 2017-OHIO-7161 (“*DUECK OPINION*”), A CASE WHICH ONLY SOUGHT DECLARATORY RELIEF. (11/20/2018 JUDGMENT ENTRY).

ASSIGNMENT OF ERROR # 2 - THE TRIAL COURT ERRED BY CONCLUDING THAT THE EIGHTH DISTRICT GAVE THE TRUSTEES AUTHORITY NOT FOUND IN THE TRUST DEED TO UNILATERALLY PERMIT THE NON-BENEFICIARY MEMBERS OF THE CLIFTON CLUB COMPANY A RIGHT OF TRUST PROPERTY USE (11/20/2018 JUDGMENT ENTRY).

II. **RES JUDICATA DOES NOT APPLY TO THE PRIOR DECLARATORY JUDGMENT ACTION BECAUSE THE ISSUE OF TRUSTEE AUTHORITY WAS NOT BEFORE THE COURT AND THE PLAINTIFFS WERE NOT REQUIRED TO CHALLENGE THEIR AUTHORITY TO GRANT A PERMISSIVE RIGHT OF USE.**

Res judicata encompasses claim preclusion and issue preclusion. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, 899 N.E.2d 975, ¶ 27; 63 Ohio Jur. 3d Judgments §§ 370, 376 (Nov. 2018). However, *res judicata* “has no application in declaratory judgment actions except to the extent a *specific litigated issue* is determined.” *Jamestown Village Condo Owners Assn. v. Market Media Research, Inc.*, 96 Ohio App.3d 678, 685, 645 N.E.2d 1265 (8th Dist. 1994) (emphasis added). “In other words, a declaratory judgment is not *res judicata* on an issue or claim not determined thereby even though it was known and existing at the time of the original action.” *Id.* Accordingly, a “*declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced.*” *Ketchel v. Bainbridge Twp.*, 79 Ohio App. 174, 177, 607 N.E.2d 22 (11th Dist. 1992) (emphasis added), citing Restatement of the Law 2d Judgments, Section 33 (1982). Ohio courts rely on the Restatement on Judgments. *Jamestown* at 685-86; *Ketchel* at 177. Per the Restatement, “[w]hen a plaintiff seeks solely declaratory relief, ... he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, *the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.*” Restatement of the Law 2d Judgments, Section 33 (1982) (emphasis added).

Therefore, the critical inquiry in considering the applicability of *res judicata* is what question was litigated and decided in the prior case. The Plaintiffs posed three questions in the

2012 case: “(1) whether the Club Members are *Beneficiaries* under the Trust Deed; (2) that Club Members have no *legal right* to use the Beach; and (3) whether the Club Deed provision extending use of the Beach to Club Members is valid as the settlors had no control over the Beach after the Trust creation.” *Dueck Opinion*, 2017-Ohio-7161 at ¶ 37 (emphasis in original). This Court was clear that the pending question for it to resolve was “whether the nonresident Club Members are direct Beneficiaries under the Trust Deed, as stated in Count I of the first amended complaint, arguably entitling them to equal access and commensurate status as the owner Beneficiaries.” *Id.* ¶ 41.⁹ In short, the litigated and decided question was whether Club Members are beneficiaries under the Trust Deed such that they had a right to use the Beach under the Trust. The answer was that the Club Members are not Trust beneficiaries, have no legal rights under the Trust Deed and are not entitled to the rights of a lot owner.¹⁰ That was the only issue litigated and decided.

This Court did not decide whether the Trustees have authority to grant 224 Club Members—who are not beneficiaries—rights of Beach use making the Club Members *de facto* beneficiaries. The answer to that question has never been raised or decided until now, and as in any trust case, is found in the terms of the Trust Deed only. That is why the Club and the Trustees previously argued that the Trust Deed and Club Deed gave Club Members rights to use the Trust Property and avoided arguing that the Trustees had authority under the Trust to permit

⁹ The Trial Court focused on this Court’s framing the question as “[w]hile the Clifton Club’s membership is comprised of both resident lot owners and nonresidents, the focus of this case is whether Club Members, due to their status as Club Members, are Beneficiaries under the Trust Deed and entitled to Beach access” (11/20/2018 Judgment Entry, quoting *Dueck Opinion*, ¶ 2). This focus has no impact on the *res judicata* analysis as this Court was merely reciting the arguments made by the Club and the Trustees that Club Members have rights because the Club, which is a beneficiary, has rights. See *Dueck Opinion* at ¶¶ 130-131 (Gallagher, J. concurring).

¹⁰ The trial court in the Declaratory Judgment Action had also “capsulized the issue to be whether the Club Members ‘have a right to use’ the Beach under the [Trust].” *Id.* at ¶ 39.

Club Members to use Trust Property—the issue in the pending litigation. The Club’s and 2012 Trustees’ prior argument was soundly rejected by this Court because the Club Members have no legal rights. Accordingly, it was error for the Trial Court to conclude that this Court granted Club Members a legally binding permissive right and dismissing Count I with prejudice. Count I argues that the Trust Deed requires that the Trustees obtain the lot owners’ consent before making such a dedication of Trust Property to use by the public, *i.e.* granting rights of Beach use to a non-beneficiary, and because they did not, they breached their fiduciary duties. Because barring an action by *res judicata* requires prior litigation and a decision of the claim under Ohio law and as matter of due process, Plaintiffs are not barred from challenging the Trustees’ breaches of fiduciary duty, breach of Trust, and 2018 Rules.

A. **Plaintiffs Never Agreed that the Trustees Have Authority to Grant Non-Beneficiaries Rights of Beach Use Without Lot Owner Consent.**

The reason the issue of permissive rights or Trustee authority was never litigated or decided by this Court is that the 2012 Trustees took the position that the Club Members had Beach access not due to permission they had granted, but due to legal rights under the Club Deed and Trust Deed: “The Clifton Club *and Trustees* posit that the Club Members have the same legal right to use the Beach as the Beneficiaries pursuant to the Trust Deed and Club Deed.” *Dueck Opinion*, 2017-Ohio-7161, ¶ 21. And that was the 2012 Trustees’ position for the whole case. *Id.* ¶¶ 23-24, *see also* ¶ 39 (“The trial court capsulized the issue to be whether the Club Members ‘have a right to use’ the Beach under the Trust Deed.”) The Trustees actively rejected the concept that they were granting permissive access and instead took the position that the access was as a legal right and due to membership in the Club—a lot owning Beneficiary. *Dueck Opinion*, 2017-Ohio-7161, ¶¶ 50-51.

This Court rejected their claim and held that Club Members had no “legal right of access as Beneficiaries[,]” are not “direct Beneficiaries under the Trust” and are not entitled to “equal access and commensurate status as the owner Beneficiaries.” *Dueck Opinion*, 2017-Ohio-7161, ¶¶ 1, 2, 41, 67, 125-126; *id.* ¶¶ 130-131 (J. Gallagher concurring). This Court did not and could not give legally binding permissive rights outside the language of the Trust, but instead described what the Trustees had historically done and noted that the historical practice did not convey any legal rights. ¶¶ 1, 2, 41, 67, 125-126; *id.* ¶¶ 130-131 (J. Gallagher concurring).

Nor did the Plaintiffs agree that the Club Members had a legally binding right or that the Trustees had authority to grant a right of Beach use without lot owner consent. Indeed, the plaintiffs in the Declaratory Judgment Action responded to the 2012 Trustees’ position that the Club Members had legal rights under the Trust Deed and Club Deed – which this Court rejected. Those Plaintiffs also responded to the 2012 Trustees’ and the Club’s argument that the Club Members must have a right under the Trust Deed because Club Members have used the Beach for “100 years.”¹¹ Through information learned through limited discovery, those plaintiffs recited the historical practice that was followed by prior trustees and the Club to provide context to the fact that Club Members had just been granted annually negotiated permission to access the Beach in exchange for the Club’s increased contribution and had no legal rights. It answered the question of how the Club Members had historically used the Beach and informed this Court’s opinion that the Club Members in fact had no legal rights – rather had been given permission by the Trustees.

The description of that permission as a “permissive right” is just that – a description – not a holding, not a decision litigated on the merits, and not an agreement by the Plaintiffs. The

¹¹ There was never any evidence of 100 years of use, just evidence of use from the 1940s.

question of whether that practice was correct or done with authority pursuant to the Trust Deed was never raised or litigated. *Dueck Opinion*, at ¶ 17 (noting that the 2012 Trustees admitted they did not know whether they had authority to limit the number of Club Members use of the Beach). There has been no prior litigation on the authority of Trustees to grant a right of Beach use to non-beneficiaries. And as the case law above shows, Plaintiffs did not need to bring that claim as part of the Declaratory Judgment Action or risk being barred from challenging the Trustees' authority by *res judicata*. Thus, Count I is not barred by *res judicata*.

B. This Court Did Not Grant Club Members a Legally Binding Permissive Right to Use Trust Property.

The Trial Court's dismissal on *res judicata* grounds is premised on the flawed belief that this Court found that the Club Members have a legal binding permissive right to use Trust Property. That is wrong because this Court did not find or otherwise grant Club Members a legally binding permissive right. All this Court did was label the historical grant of permission by the Trustees as a "permissive right" rather than a legal right without opining on the lawfulness of that grant under the Trust. *Dueck Opinion*, at ¶ 126 (emphasis added). But as the above case law shows, Plaintiffs were not required to challenge the Trustees' authority to grant a "permissive right" in the Declaratory Judgment Action – especially where the Trustees claimed the Club Members' use rights were derived from the Trust Deed and Club Deed—not by annual permission. At best, this Court noted what the Trustees had been doing historically: granting permissive use rights for a fee. Further, the Court's reference that regulation of Club Members Beach use is "pursuant to the Trust" means any permission the Trustees grant to the Club Members must comport with the Trust Deed's terms and Trustees' authority thereunder.

For those reasons, this Court did not grant the Club Members some legally binding right as the Trial Court found. Nor could it as this Court held that Club Members have no legal rights.

This Court determined only that the 2012 Trustees incorrectly claimed that Club members had legal rights under Trust Deed and Club Deed and found that they had none. It also noted that, since the Club Members had no legal rights, the 2012 Trustees' concern that they could not limit their use was erroneous, and this Court clearly stated that their use could be limited or regulated by the Trustees. In fact, because the Club Members have no rights under the Trust Deed, the Trustees have no authority to grant them rights to use the Beach. Accordingly, this Court did not authorize the Trustees to unilaterally grant permission to the Club Members to use Trust Property. Judge Gallagher's concurrence, which stated that after remand, the parties would hopefully negotiate an agreement "that *would* grant members of the Clifton Club access to the beach on a permissive basis" shows that evident conclusion. *Id.* ¶ 131 (emphasis added). The bottom line is that the Court was clear that Club Members had no legal rights, were not beneficiaries, and the Trial Court erred in concluding that Club Members had been given some legally binding permissive right. ¶¶ 1, 2, 41, 67, 125-126; *id.* ¶¶ 130-131 (J. Gallagher concurring). Thus, the Trial Court's reasoning for applying *res judicata* is erroneous and warrants reversal.

C. **The Question of Whether the Trustees Had Authority Pursuant to the Trust to Grant a Right of Beach Use Without Unanimous Consent of the Lot Owners Was Never Decided.**

The Trust Deed's terms—the operative and controlling document—instruct the Trustees to hold Trust property solely for the lot owners. They also provide no authority for the Trustees to unilaterally grant 224 non-beneficiaries a right of Beach use, especially rights equal to and commensurate with being a Trust beneficiary. As a result of those two indisputable facts, the Trustees, below, went to great lengths to contort the *Dueck Opinion* regarding the historical use of Trust Property by Club Members as an admission by Plaintiffs and a finding that the Trustees have authority to grant non-beneficiaries rights to use Trust Property. Their argument is wrong.

The Trustees claimed that the phrase “full authority to regulate Beach access” gives them the power to grant non-beneficiaries the same rights as beneficiaries. That was not this Court’s holding. Rather, the Court in paragraph 66 found that the historical understanding was that Club Members had no rights under the Trust Deed, and the Club’s use was restricted so the lot owners could enjoy the Beach:

Recitation of the foregoing events serves to confirm a historical understanding by the Trustees and Clifton Club that the Club Members’ right to access the Beach is permissive, and that the Trustees have full authority to regulate Beach access. The Club Lease, capping the membership number subject to the settlors’ consent, confirms that the Clifton Club’s use, even as a direct Beneficiary, is not unfettered, particularly since the purpose of the Trust is to allow the lot owners to enjoy the Beach.

Dueck Opinion, 2017-Ohio-7161, ¶ 66. This Court did not say that the Trustees’ duty to make regulations meant authority to give non-beneficiaries rights to use Trust Property as if they were beneficiaries. Nor could it have, as the Trust Deed says only that the Trustees “shall establish regulations for the use of, and provide for proper policing of [Trust Property]” (Trust Deed, SAC Ex. A).

The Trustees’ duty to establish regulations for the use of and proper policing of Trust Property did not give them authority to grant non-beneficiaries a right of Beach use. A “regulation” is commonly understood as “an authoritative rule dealing with details or procedure ... safety *regulations*.” <https://www.merriam-webster.com/dictionary/regulation>. This is the consistent meaning Plaintiffs ascribed to the word “regulation” since the 2012 case. (05/15/2018 Trustees’ Br. in Opp. to TRO Mot., Ex. A at p.32.) (“That duty to regulate does not give the Trustees’ discretion to determine who the beneficiaries are and determine who has a legal right to use Trust Property.”). Plaintiffs never substituted the word “permit” for the word “regulate” as both have different plain English meanings. Plaintiffs never agreed or suggested that the

power to establish regulations meant the Trustees could allow non-beneficiaries to use Trust Property. Thus, the Trustees' power under the Trust Deed to make regulations is limited to creating rules governing use of Trust Property by Beneficiaries. It does not include the power to grant rights of Beach use to 224 non-beneficiaries and to create rules which treat Club Members as beneficiaries in violation of the terms of the Trust, the Trustees' duty of loyalty, and this Court's holding that the Club Members are not beneficiaries and do not have commensurate or equal status with lot owners.

Notably, in attempting to appeal the *Dueck Opinion*, the Club recognized this Court did not give the Club Members any rights. (*See* Club's Supreme Court Mot. for Jurisdiction, Ex. T to 05/21/2018 Pls. Reply in Support of TRO Mot.) In the Club's Motion for Jurisdiction, it acknowledged that:

- “[t]he [*Dueck Opinion*] ... [held] that while a private social club has a vested right to access a private beach, the club's members have no such access” (*Id.* at p.1.); and
- this Court “declared ... the Club's members do not have the same access to the beach as other lot owners because, while the Club is a beneficiary of the subject trust, its members are not” and this Court “limit[ed] beach access [rights] solely to the Club” (*Id.* at p.3); and
- “the majority went on to conclude that the right to use the beach does not inure to the benefit of the Club's members” (*Id.* at p.8.)

Despite this Court's rejection of the claim that the Club Members have rights under the Trust, the Trustees created Rules and granted the Club Members rights of Beach use for the 2018 Beach Season commensurate with being a beneficiary – a right this Court rejected. (SAC ¶¶ 44-77, 92-105.)

As justification for their actions, the Trustees wrongfully claim that this Court “analyzed all of the evidence” and determined that Club Members have a right to use the Beach because the Club is a beneficiary. (06/01/2018 Reply in Support of Mot. to Dismiss, pp. 2-5.) To do this, they selectively chose language from the *Dueck Opinion*. (*Id.*) First, “all the evidence” was not before the Court. No evidence was presented on whether the lot owners gave unanimous perpetual consent to allow the Trustees to grant Club Members rights of Beach use. Second, paragraphs 54 to 57 of the opinion made clear that contrary to what the Trustees argue here, the Club’s rights as a beneficiary do not transfer or devolve on Club Members, the Club Members do not have the rights of the Club, and they obtained no rights via the Club Deed. *Dueck Opinion*, 2017-Ohio-7161, ¶¶ 54-57. Third, this Court never held that the Trustees have “full authority to grant non-lot-owning Club Members access to the Beach[;]” rather, the court said the Trustees have “full authority to regulate [*i.e.*, limit] Beach access.” (*Compare* Mot. p.4 with *Dueck Opinion* ¶ 66.) That is the fundamental problem; the Trustees believe that the power to regulate means the power to act contrary to the Trust Deed and treat 224 non-beneficiaries as having equal rights to the actual 204 lot owner beneficiaries. This belief is wrong, contrary to Trust Deed and the *Dueck Opinion*, and a breach of fiduciary duty.

Thus, there was no litigation of the Trustees’ authority to grant a right of Beach use. The *Dueck Opinion* did not grant authority to the Trustees in perpetuity, make their decision incontestable and certainly did not grant some “irrevocable” legal right to the Club Members, especially where the Court said they are not beneficiaries and have no legal rights under the Trust. See *Dueck Opinion*, 2017-Ohio-7161, ¶¶ 1, 67, 125-126, 130-131 (J. Gallagher, concurring).

Accordingly, Plaintiffs’ claim in Count I was not barred by *res judicata*.

ASSIGNMENT OF ERROR # 3 - THE TRIAL COURT ERRED BY CONCLUDING THAT ALLOWING THE NON-BENEFICIARY CLUB MEMBERS TO USE TRUST PROPERTY IS NOT PUBLIC USE WITHIN THE MEANING OF THE TRUST (11/20/2018 JUDGMENT ENTRY).

III. THE TRUSTEES HAD TO SEEK UNANIMOUS CONSENT TO GRANT CLUB MEMBERS A RIGHT OF BEACH USE BECAUSE THE CLUB MEMBERS' USE IS A PUBLIC USE WITHIN THE MEANING OF THE TRUST.

To protect the Beneficiaries' interests, the Trust Deed provides that "no part of [the Trust Property] shall be conveyed or dedicated to public use without the unanimous consent of all of the lot owners in [Clifton Park]." (Trust Deed, SAC Ex. A.) There is no evidence that the lot owners in Clifton Park gave unanimous consent to permit Club Members to use Trust Property.

Ohio law is clear that property is comprised of a bundle of rights. *Dispatch Printing Co. v. Recovery Ltd. P'ship*, 2015-Ohio-381, ¶ 51, 28 N.E.3d 562 (10th Dist.) (citing *United States v. Craft*, 535 U.S. 274, 278 (2002)). Part of that bundle is the right of use. *Paternoster v. United States*, 640 F. Supp. 2d 983, 990 (S.D. Ohio 2009) (Thus, Ohio law ... provides within its bundle of rights the rights to use, exclusion, and income" (internal quotations omitted)). The right to use the Trust Property was conveyed to Club Members by the Trustees for the 2018 Beach season without unanimous lot owner consent. Plaintiffs claim that the conveying of the right to use Trust Property without obtaining the consent of all lot owners is a breach of fiduciary duty. The Trial Court erroneously dismissed Plaintiff/Appellants' claim.

The Trial Court held that the Club Members' use was not "public use" within the meaning of the Trust Deed because (1) the Club is a "direct beneficiary" of the Trust Deed and (2) it believed this Court held that the Club Members have a legally binding permissive right. (11/20/2018 Judgment Entry.) Neither ground supports the Trial Court's decision as this Court already held that the Club's rights as a beneficiary do not flow to the Club Members. *Dueck Opinion* at ¶¶ 125-126. As Judge Gallagher explained in her separate opinion, "[t]he trust simply

does not contain any language from which this court can reasonably conclude that the members of the Clifton Club share the same legal rights as the Clifton Club itself.” *Id.* at ¶ 131. In other words, the Club Members acquire no rights due to their membership in the Clifton Club. Accordingly, the fact that the Clifton Club is a direct beneficiary of the Trust Deed is irrelevant.

The Trial Court’s second ground is flawed because this Court did not and could not grant any rights that are not in the Trust. (*See supra*, Argument § II.B, pp. 23-25.) Because the Trial Court reached its conclusion by accepting the Trustees’ erroneous interpretation of the *Dueck Opinion*, it never reached the issue of whether the Trust Deed required unanimous lot owner consent for the Trustees to grant use to non-beneficiaries, *i.e.*, the public. It does.

Specifically, the fact that Club Members have been granted a permissive right equal to lot owners proves a dedication or conveyance to public use because Club members are not beneficiaries and have no rights under Trust. The Club Members are members of the public who joined a Club open to the public. As the Ohio Supreme Court found in *Wallace v. Clifton Land Co.*, 92 Ohio St. 349, 110 N.E. 940 (1915) “the club has erected on said premises a large, commodious, and substantial clubhouse which it has ever since run and maintained, and that its members have not been or are not confined to residents or lot owners in Clifton Park, but ***is open generally to the public use so far as membership is concerned . . .***” *Id.* (emphasis added). As the court in *Wallace* makes clear, the public includes anyone who is not a beneficiary of the Trust. It does not matter that the Club Members are a limited segment of the public as they are not part of the defined group—lot owners—comprising the Trust beneficiaries. And because they acquired no rights as it relates to Trust Property by becoming Club Members, they are no different than the public. Despite these facts and this Court’s decision, the Trustees granted Club Members rights of Beach use to the detriment of the Trust beneficiaries. Despite the Trust Deed’s directives that no part of the Trust Property should be sold, conveyed, or dedicated to

public use without the unanimous consent of the lot owners, the Trustees have made no attempt to obtain any lot owner consent before granting 224 non-beneficiaries rights of Beach use as if they were beneficiaries. (Trust Deed, SAC Ex. A.) Accordingly, the Trial Court erred in dismissing Count I.

CONCLUSION

The Declaratory Judgment Action was limited to the single issue of whether Club Members were Trust beneficiaries and had a right of Beach use under the Trust Deed. The answer was no, and under Ohio law, the Plaintiffs were not required to bring any other issues to the Court. Under that same law, they now have the right to challenge the Trustees' grant of a right of use to Club Members, and that challenge is not barred by *res judicata* because the issue of Trustee authority was never at issue, litigated, or decided in the Declaratory Judgment Action, and this Court never granted Club Members a legal permissive right of use. Instead, this Court said Club Members were not beneficiaries and have no direct or indirect legal rights under the Trust. Contrary to that decision, the Trustees have treated Club Members commensurately as beneficiaries without the consent of the Trust beneficiaries as required under the Trust Deed. Thus, Plaintiffs/Appellants request that this Court reverse the Trial Court's dismissal of Count I with prejudice and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellants Arthur P. Dueck, Paul A. Bjorn, Nancy Binder, and William R. Keller has been served by electronic mail and regular U.S. mail on this 15th day of February, 2019, upon the following counsel of record:

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