

COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

ARTHUR P. DUECK, *et al.*,) CASE NO. CA-18-108008
)
Plaintiffs-Appellants,)
)
v.) Civil Appeal from Cuyahoga County
) Court of Common Pleas, Probate Division
) Case No. 2018ADV234080
JOSEPH KERRIGAN, TRUSTEE,)
CLIFTON PARK TRUST, *et al.*,)
)
Defendants-Appellees.)

**BRIEF OF APPELLEES,
TRUSTEES OF THE CLIFTON PARK TRUST**

Dennis R. Rose (0039416)
Casey J. McElfresh (0088083)
Hahn Loeser & Parks LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Telephone: 216.621.0150
Facsimile: 216.241.2824
Email: drrose@hahnlaw.com
cmcfresh@hahnlaw.com

Attorneys for Plaintiffs-Appellants,
Arthur P. Dueck, Paul A. Bjorn,
Nancy Binder, and William R. Keller

Karen Soehrlen McQueen (0016883)
Terry J. Evans (0088399)
Krugliak, Wilkins, Griffiths
& Dougherty Co., L.P.A.
4775 Munson Street, N.W./P.O. Box 36963
Canton, Ohio 44735-6963
(330) 497-0700 / Fax: (330) 497-4020
kmcqueen@kwgd.com; tevens@kwgd.com

Attorneys for Defendants-Appellees,
Trustees of the Clifton Park Trust, Joseph
Kerrigan, Mary Ellen Fraser, Robert Frost,
Warren Coleman, and Ryan Meany

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APPELLANTS' 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.)

APPELLEES' ISSUES PRESENTED FOR REVIEW

1(A). Under the appellate rules, Appellants must provide this Court with a record of facts, testimony, and evidence necessary to support the assigned errors. Without such a record, this Court must presume regularity of the proceedings below. Here, Appellants challenge the Trial Court’s application of res judicata based on a prior action, but they failed to include the complaint from the prior action in the record. Does Appellants’ failure preclude this Court from considering the assigned errors? (*See, infra*, Argument and Law, Section I(A).)

1(B). Under res judicata, a right, question, or fact put in issue and determined by a court bars a subsequent suit between the same parties. In the underlying action, Appellants seek relief based on the assertion that nonresident Club Members do not have the right to access the Beach

without the lot owners' unanimous consent. But in a prior action, this Court held that Club Members have a "right" to use the Beach—with access subject to the Trustees' permission and regulation. It further found that the Club Lease, Trust Deed, and Club Deed indicate an intent that the Club have access to the Beach subject to the Trustees' rules and regulations. Relying on the same Trust language, Appellants now argue that the Trustees granting Beach-use rights to Club Members amounts to a dedication to public use requiring the lot owners' unanimous consent.

- Are Appellants' claims and issues regarding Club Members' Beach-access rights and Trustees' authority barred by res judicata, based on this Court's decision and the Trial Court's consequent Judgment Entry?
- Did the Trial Court err in its interpretation of the authority this Court attributed to the Trustees in the prior action?

(*See, infra*, Argument and Law, Section I(B).)

2. The Trustees cannot sell, convey, or dedicate the Beach to public use without the lot owners' unanimous consent. Here, the Trustees did not transfer title to the Beach, so sale and conveyance are not at issue. Under Ohio law, there can be no "dedication to public use" where the use at issue is private or the enjoyment of such use is restricted to a limited part of the public. The Trustees permitted 224 Club Members to use the Beach and in exchange the Club paid the Trustees an annual fee. Did the Trustees dedicate the Beach for public use? (*See, infra*, Argument and Law, Section II.)

STATEMENT OF THE CASE

This appeal concerns rights granted to Members of The Clifton Club Company (“Club”) to use the Clifton Park Beach. The extent and propriety of those rights was the focus of a 2012 action. *See Dueck v. Clifton Club Co.*, 2017-Ohio-7161, 95 N.E.3d 1032 (8th Dist.). After more than (6) years of litigation, this Court and the Trial Court held that Club Members have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed. *Id.* at ¶ 126. Unsatisfied with the outcome, rather than appealing the prior rulings, Appellants filed a new action seeking to relitigate the same issues. Recognizing as much, the Trial Court appropriately dismissed and barred Appellants’ claims and issues based on res judicata. This interlocutory appeal is yet another attempt by Appellants to collaterally attack the prior rulings.

I. The 2012 Action (*Dueck I*)

A. Less than 2% of the Clifton Park residents filed an action seeking a broad determination of the parties’ rights and obligations under the Trust.

Four¹ Clifton Park residents filed an action against the remaining 200 residents—including the Club and the Trustees—seeking a declaration that nonresident Club Members have no legal right to use the Beach under the Trust. (*Dueck v. Clifton Club Co.*, Case No. 2012ADV179424 (“*Dueck I*”), 04/25/13 First Am. Compl.)² *Dueck I* Plaintiffs alleged:

15. The Deed of Trust provides that no part of the lands held for the benefit of persons owning sublots “shall be sold, conveyed or dedicated to the public use *without unanimous consent of all the lot owners in said allotment.*” *No such consent has ever been given.*

(Emphasis added) (*Id.* at ¶ 15.) Thus, *Dueck I* Plaintiffs raised the issue whether the Trustees need the Clifton Park residents’ unanimous consent to grant nonresident Club Members permissive access to the Beach.

¹ Arthur Dueck, Todd Gilmore, Nancy Binder, and William Keller.

² The First Amended Complaint filed in *Dueck I* is not in the record.

The prayer for relief requested, in part, a declaration that “the Members of the Clifton Club who are not subplot owners have no legal right to use Trust property (including the Beach)[.]” (*Id.* at 23.) It also broadly requested “that the Court enter an order defining the rights of and relationship between the Plaintiffs and the Club members as to the use of the Trust property, including the Beach.” (*Id.* at 24.) Which this Court, in fact, did.

But “[t]he gravamen of the Amended Complaint is much broader than [the last prayer for relief].” (*Dueck I*, 01/06/14 Brief in Opp’n to Club’s Motion for Judgment, at 4.) In addition to declaratory relief, *Dueck I* Plaintiffs requested coercive relief against the Trustees for purported breaches of fiduciary duty. (*Dueck I*, 06/25/15 Motion for Attorney Fees and 10/31/14 Motion to Remove Trustees.) *Dueck I* Plaintiffs asserted that their “attorney’s fees and costs stem from almost six years of litigation concerning [Club Members’] rights under the Clifton Park Trust Deed that the Plaintiffs were forced to incur as a result of the breaches of fiduciary duties by the Clifton Park Trustees* * *.” (*Dueck I*, 05/01/18 Motion for Attorney’s Fees, at 2.)

In turn, the Club and Trustees asked the Court to “interpret the Trust, the Club’s Deed, and the Club’s Lease to provide the Non-Resident Club Members with a right to use the Trust property, including the Beach.” (*Dueck II, infra*, 05/15/18 Brief in Opp’n, Ex. B (*Dueck I*, 10/19/15 Pls.’ Trial Brief) at 1-2.) *Dueck I* Plaintiffs posited that “the evidence is clear that the Non-Resident Club Members only have access to the Beach by way of annual permission, not through any rights under the Trust, the Club’s Deed, or the Club’s Lease.” (*Id.* at 8.) In fact, *Dueck I* Plaintiffs stated:

[T]he Trustees finally admitted * * * that the Non-Resident Club Members have only “been allowed access to Clifton Beach by annual permission of the Trustees in exchange for a substantial contribution to the Trustees’ operating budget.” * * * ***Plaintiffs have advocated that same position.***

(Emphasis added) (*Dueck I*, 06/25/15 Motion for Attorney Fees, at 2.)

B. The Trial Court interpreted the Trust in the Trustees' favor.

The Trustees moved for summary judgment to determine whether (1) the Club is a beneficiary with a legal right to use the Beach, and (2) the Trustees have the right to regulate the use of the Beach. (*Dueck II, infra*, 05/21/18 Pls.' Reply, Ex. L (*Dueck I*, 09/01/15 Motion for Summary Judgment).) *Dueck I* Plaintiffs opposed the motion, stating “the Club’s members do not have a right to use the Trust property under the terms of the Trust or Club Deed” and “the only use that the Non-Resident Club Members enjoy is negotiated permissive use.” (*Dueck II, infra*, 05/15/18 Brief in Opp’n, Ex. A (*Dueck I*, 10/15/15 Brief in Opp’n) at 4.)

The Trial Court agreed with the Trustees:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that as a lot owner, the Clifton Club is hereby declared to be a beneficiary of the Deed of Trust dated March 25, 1912, and by virtue of this status, the Club, and through it, all of its members, has a legal right to use the Trust property, including the beach, subject to the regulations and restrictions as set forth in the Trust Deed and Club Deed.

(Emphasis in original) (*Dueck I*, 11/10/15 Judgment Entry.) *Dueck I* Plaintiffs appealed.

C. On appeal, this Court comprehensively analyzed the parties' rights and responsibilities under the Trust.

Dueck I Plaintiffs framed two broad issues for this Court to decide:

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.*

(Emphasis added) (*Dueck v. Clifton Club Co.*, Case No. CA-15-103868, 03/31/16 Appellants' Brief, at 3.) *Dueck I* Plaintiffs asserted: “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.” (Emphasis added) (*Id.* at 17.)

To address *Dueck I* Plaintiffs’ broad issues, this Court deemed it necessary to comprehensively analyze the parties’ rights and responsibilities under the Trust. *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032, at ¶¶ 2-67. This Court evaluated extrinsic evidence “to determine the settlor’s intent regarding the scope of the Clifton Club’s use of the Beach, including the Trustees’ historical interpretation and administration of the rights accordingly.” *Id.* at ¶ 58.

This Court held: “The Club Lease, Trust Deed, and Club Deed indicate an intent that the Clifton Club, as lessees and successor lot owners, have access to the Beach, but that such access was subject to the rules and regulations implemented by the Trustees.” *Id.* at ¶ 59. The evidence “confirm[ed] a historical understanding by the Trustees and the Clifton Club that the Club Members’ right to access the Beach is permissive, and that the Trustees have full authority to regulate Beach access.” *Id.* at ¶ 66. The Court then concluded:

[T]he trial court correctly determined that the Club Members have a “right” to use the Beach. However, in 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. This Court expressly held: “The Club Members’ [sic.] have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed.” *Id.* at ¶ 126. At *Dueck I* Plaintiffs’ urging, the Court also concluded that the Trustees breached their fiduciary duty and awarded damages. *Id.* at ¶¶ 68-128 (“We find that appellants have demonstrated that a breach has taken place.”).

Therefore, the parties litigated—and this Court decided—*Dueck I* Plaintiffs’ claims for declaratory relief and coercive relief. *Id.* This Court remanded to the Trial Court to enter judgment accordingly. *Id.* at ¶ 128.

D. The Trial Court entered Final Judgment consistent with this Court’s broad analysis and determinations of the parties’ rights and responsibilities.

On remand, the Trial Court entered judgment consistent with this Court’s findings. (*Dueck I*, 10/10/17 Judgment Entry.)³ Specifically, the Trial Court held that nonresident Club Members “have a permissive right to access the Beach, as regulated by the Trustees pursuant to the Trust Deed.” (*Id.* at 2.) The Trial Court further held that “the Trustees breached fiduciary duties owed [sic.] to the Trust and its beneficiaries.” (*Id.* at 1.) *Dueck I* Plaintiffs did not appeal.

II. The 2018 Action (*Dueck II*)

A. The same Clifton Park residents filed an action duplicating issues litigated and decided in *Dueck I*.

Apparently unsatisfied with this Court’s decision—and instead of appealing the Trial Court’s final Judgment Entry—three of the four *Dueck I* Plaintiffs and one other resident (“Appellants”)⁴, filed the underlying action seeking relief nearly identical to that litigated and decided in *Dueck I*. (*Dueck v. Kerrigan*, Case No. 2018ADV234080 (“*Dueck II*”), 05/02/18 Second Am. Compl.) Appellants allege:

18. The Trust Deed also mandates* * *: “[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.”

* * *

31. The Trust Deed does not give the Trustees authority to allow, give, or grant Club Members rights to use Trust Property, including the Beach and Beach Property, unless the Clifton Park lot owners provide unanimous consent.

* * *

97. The Trustees have no authority under the terms of the Trust to grant a right to use the Trust Property, including the Beach and Beach Property, to any person who is not a beneficiary of the Trust without unanimous consent of the lot owners.

* * *

³ This Judgment Entry was stayed pending appeal, which was lifted when the Ohio Supreme Court declined to accept jurisdiction. (*Dueck I*, 03/19/18 Judgment Entry.)

⁴ *Dueck*, Binder, Keller, and Paul A. Bjorn.

99. The Trustees have no authority under the terms of the Trust to grant a right or permission to use the Trust Property * * * to any person who is not a beneficiary of the Trust that is equal to the rights of the Trust beneficiaries without the unanimous consent of the lot owners.

* * *

105. The Trustees' grant to 224 Club Members of a permissive right to use the Trust Property * * * without the unanimous consent of the Clifton Park lot owners is a breach of fiduciary duty.

(*Id.* at ¶¶ 18, 31, 97, 99, and 105.) The prayer for relief demands judgment, in part:

(1) Enjoining the Trustees from granting to the Club Members of a right to use the Trust Property, including the Beach and Beach Property;

(2) Enjoining the Trustees from granting to the Club Members of a permissive right to use the Trust Property, including the Beach and Beach Property, that is equal to the rights of any other individual Trust beneficiary[.]

(*Id.* at 17.) Despite alleging breach of fiduciary duty, the claim requires the Trial Court to determine that Club Members do not have the right to access the Beach without the Clifton Park residents' unanimous consent. (*Id.*) Notably, Appellants invoked jurisdiction under R.C. §2721.05, which allows a person interested in a trust to seek a declaration of rights. (*Id.* at ¶ 10.)

This contradicts *Dueck I* Plaintiffs' position on this precise issue: "[Club Members] 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.**" (Emphasis added) (*Dueck*, Case No. CA-15-103868, 03/31/16 Appellants' Brief, at 17.) And it contradicts this Court's prior holding: (1) "the Club Members' right to access the Beach is permissive, and that the Trustees have full authority to regulate Beach access" and (2) "[a]ccess by the Club Members is by permission and regulation of the Trustees." *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032, at ¶¶ 66-67, 126.

Therefore, Appellants seek to enjoin the Trustees from exercising the precise powers granted to them by the Trust, as confirmed by this Court and the Trial Court in *Dueck I*.

B. The Trial Court denied Appellants’ request for injunctive relief and dismissed their claims concerning Club Members’ Beach-access rights based on res judicata.

Appellants immediately moved for a temporary restraining order and preliminary injunction, which the Trustees opposed. (*Dueck II*, 05/11/18 Motion for TRO and 05/15/18 Brief in Opp’n.) After a hearing, the Trial Court denied Appellants’ motion:

This Court further finds that the Club Members have a permissive right to access the Beach as regulated by the Trustees. The Eighth District Court of Appeals stated: “The Club Members are not equal or direct Beneficiaries of the Trust. The Club Members’ have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed.” Consequently, upon remand, this Court also held that the members of the Clifton Club who are not resident lot owners are not equal or direct beneficiaries of the Trust and thus have no legal right to access the Beach under the Trust, although they do have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed. This order was not appealed by the Plaintiffs, and it is therefore the final order of this Court and the controlling law in this case.

This Court further finds that the Defendant Trustees have the responsibility to determine if the Clifton Club members may have access to the Beach, and if the Clifton Club members are permitted access to the beach, the Trustees must determine the rules and regulations of their use.

(*Dueck II*, 06/25/18 Judgment Entry, at 1-2, quoting *Dueck* at ¶ 126.) Appellants did not appeal.

The Trustees also moved to dismiss Appellants’ complaint because, *inter alia*, Appellants asked the Trial Court make a declaration directly contravening its prior Judgment Entry and this Court’s decision. (*Dueck II*, 05/15/18 Motion to Dismiss.)⁵ The Trial Court agreed:

The matter of whether Clifton Club Members are permitted access to the Beach and Beach Property was directly at issue in the Plaintiffs’ prior complaint and decided by the Eighth District Court of Appeals[.] * * * Further, as the Eighth District Court of Appeals previously held, the Clifton Club Members have a permissive right to access the Beach

⁵ At least one resident is frustrated with Appellants’ litigation tactics: “[Appellants’] Complaint in this matter seeks declaratory relief that would have a direct and deleterious effect on Intervenor’s property and her beneficiary interest in the Trust. [Appellants] gave Lansdowne and other lot owners no notice of the filing of the action and no notice of the ill-advised and ill-fated Motion for a Temporary Restraining Order.” (*Dueck II*, 07/19/18 Motion to Intervene, at 1.)

Property. *Id.* at ¶ 126.

* * *

The doctrine of res judicata bars Plaintiffs from relitigating whether the Clifton Club Members have a permissive right to access the Beach and Beach Property. Further, Clifton Club Members have a permissive right to access the Beach and Beach Property, and as such, the access permitted by the Trustees' regulation does not qualify as public use which would require unanimous consent of the lot owners.

(*Dueck II*, 11/20/18 Am. Judgment Entry, at 3-4.) Appellants instituted this interlocutory appeal.

STATEMENT OF FACTS

This Court is fully aware of the underlying facts. *See Dueck* at ¶¶ 2-33, 48-67. Additional facts pertinent to this appeal are set forth below.

Appellants and Trustees are residents in the Clifton Park Allotment in Lakewood, Ohio.

(*Dueck II*, 05/02/18 Second Am. Compl., at ¶ 2.) The Trustees hold legal title to certain real property located in Clifton Park, including the Beach, as set forth in the Trust:

[I]n consideration of the covenants and agreements entered into by said company with the several owners of lots and lands in its allotment herein described * * * [grants to the Trustees] all such right and title as the said grantor has or ought to have in the [property] * * * ***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 of the owners of sub lots, or parts of lots***, in the Clifton Park Allotment * * * and the heirs, representatives, successors or assigns, of such owners

DUTIES OF TRUSTEES

(1) The Trustees 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***. (2) No 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. (3) The trustees shall collect money from the persons interested as hereinafter provided, and from such sums so collected, * * * [to pay taxes, maintenance, etc.]; ***shall establish regulations for the use of, and provide for proper policing * * * for the use of lot owners in said allotment***, as the same is now maintained.

(Emphasis added) (*Id.* at ¶¶ 12-13, Ex. A.) *See Dueck* at ¶ 48.

Based upon a good-faith reading of this Court’s decision and the Trial Court’s final Judgment Entry in *Dueck I*, the Trustees determined they may grant nonresident Club Members permissive access to the Beach, in exchange for an annual fee and subject to the Trustees’ regulation of such access (as has occurred for decades). (*See Dueck II*, 05/11/18 Motion for TRO, Exs. D and K.) Consistent with that good-faith understanding, the Trustees promulgated new regulations controlling nonresident Club Members’ permissive access to the Beach during 2018. (*Id.*) The Trustees also established a committee comprised of Clifton Park residents to study Beach use and assist in the promulgation of future Beach rules. (*Id.*)

Appellants continued to take issue with the Trustees allowing nonresident Club Members to access the Beach. (*Id.* at Ex. F.) Appellants asserted that “nowhere in the 8th District’s decision is there any discussion of where the Trustees are given authority to permit access to the Beach by non-beneficiaries.” (*Id.*) Appellants posited that the Trustees “have not changed the Beach rules in any way to make them consistent with the fact that the Beach is held for the sole use of the lot owners, not the Club Members.” (*Id.*) Appellants asserted that the Trustees continued to “maintain the status quo of treating Club Members equally to lot owner beneficiaries for the 2018 Beach season.” (*Id.* at Ex. J.) When efforts to resolve the dispute with the Trustees broke down, Appellants filed the underlying action. (*Id.* at Exs. E-J.)

ARGUMENT AND LAW

- I. The Trial Court correctly held that res judicata bars Appellants from relitigating whether the Club Members have a permissive right to access the Beach.**
- A. Appellants’ assigned errors should be overruled based on the incomplete record before this Court.**

It is Appellants’ duty to transmit the record of the proceedings below. App.R. 9, App.R. 10, Loc.App.R. 9, Loc.App.R. 10. Appellants must provide this Court with a record of the facts,

testimony, and evidentiary matters which are necessary to support Appellants' assigned errors. *Trojanski v. George*, 8th Dist. Cuyahoga No. 83472, 2004-Ohio-2414, ¶ 6. "In the absence of such evidence within the record, this court must presume regularity of the proceedings below." *Id.* "[T]he Court of Appeals is bound by the record before it and may not consider facts extraneous thereto." *Community First Bank v. Holland*, 3rd Dist. Hardin No. 6-05-04, 2005-Ohio-4751, ¶ 10, quoting *Paulin v. Midland Mutl. Life Ins. Co.*, 37 Ohio St.2d 109, 112, 307 N.E.2d 908 (1974).

In *Ketchel v. Bainbridge Twp.*—relied on by Appellants—the Eleventh District decided "whether the trial court erred in granting summary judgment against appellants' coercive and damage causes of action based on res judicata." 79 Ohio App.3d 174, 177, 607 N.E.2d 22 (11th Dist.1992). The court noted: "Of paramount importance to the discussion is the exact wording of appellants' complaint [from the first action]. The Complaint from [the first action] is *not* in the record." (Emphasis in original) *Id.* The court used the appellees' brief to "shed light on what was prayed for in the complaint in [the first action]." *Id.* But it concluded: "because the original complaint from [the first action] is not part of the record before this court, the assignment cannot be properly addressed and appellants cannot, therefore, demonstrate this portion of the claimed error under this assignment." *Id.* at 178.

Additionally, in *Trojanski*, this Court considered whether the trial court erred by finding that appellant's claim was barred by the doctrine of res judicata. *Id.* at ¶¶ 5-9. The appellant argued the first action and the second action were unrelated, but failed to include the complaint from the first action in the record. *Id.* at ¶ 7. Thus, this Court presumed "regularity in the trial court's finding that the two complaints are 'substantially the same'" and held "that the trial court did not err by concluding that res judicata bars the instant action." *Id.* at ¶¶ 7-8.

Here, like *Ketchel* and *Trojanski*, Appellants’ notice of appeal limits the record to *Dueck II*. Appellants failed to include the Amended Complaint from *Dueck I* in the record. In the absence of such evidence within the record, this Court must presume regularity in the Trial Court’s findings that:

- The “alleged breach in Count I of the Complaint is based on the assertion that Clifton Club Members do not have the right to access the Beach and Beach Property without unanimous consent of the Clifton Park lot owners.” (*Dueck II*, 11/20/18 Am. Judgment Entry, at 2-3.)
- The “matter of whether Clifton Club Members are permitted access to the Beach and Beach Property was directly at issue in the Plaintiffs’ prior complaint and decided by the Eighth District Court of Appeals[.]” (*Id.* at 3.)
- “The doctrine of res judicata bars [Appellants] from relitigating whether the Clifton Club Members have a permissive right to access the Beach and Beach Property.” (*Id.* at 4.)

Thus, based on the incomplete record before it, this Court should overrule all of Appellants’ assignments of error.

B. Res judicata bars Appellants’ breach of fiduciary duty claim, which seeks to relitigate claims and issues already litigated and decided by this Court.

Res judicata encompasses two concepts—claim preclusion and issue preclusion. *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. Under claim preclusion, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), at syllabus. Claim preclusion applies when: “(1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) there is a second action that involves the same parties, or their privies, as the first action; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of a transaction or occurrence that

was the subject matter of the first action.” *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 123, 2006-Ohio-954, 846 N.E.2d 478. A transaction or occurrence is defined as a “common nucleus of operative facts.” *Grava* at 382.

Issue preclusion prevents parties from relitigating facts and issues that were fully litigated in a prior action. *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 395, 395, 692 N.E.2d 140 (1998). A litigant may not split a cause of action “by asserting in a second lawsuit different reasons for the same relief sought in an earlier lawsuit.” *Brubaker-Schaub v. Geon Co.*, 8th Dist. Cuyahoga No. 75694, 2001-Ohio-4118, at *9. Issue preclusion applies when a “fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.” *Rizvi v. St. Elizabeth Hosp. Med. Ctr.*, 146 Ohio App.3d 103, 108, 2001-Ohio-3412, 765 N.E.2d 395 (7th Dist.). Res judicata “applies to matters actually litigated as well as those issues which might have been litigated incident to or in connection with the same subject matter.” *Boyd v. Boyas Excavating Co.*, 8th Dist. Cuyahoga No. 37980, 1978 WL 218274, *1 (Dec. 7, 1978). Whether under claim preclusion or issue preclusion, Appellants cannot reasonably dispute that the elements of res judicata are satisfied.

First, Appellants cannot dispute that there is a valid, final decision on the merits. The Trial Court entered a final judgment on the merits in *Dueck I*, pursuant to this Court’s directive in *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032. (*See Dueck I*, 10/10/17 Judgment Entry.) This Court fully considered and decided the issue whether the Trustees have authority to grant nonresident Club Members access to and use of the Beach. Consistent with this Court’s decision, the Trial Court ruled that nonresident Club Members “have a **permissive right** to access the Beach, *as*

regulated by the Trustees pursuant to the Trust Deed.” (Emphasis added) (*Id.* at 2.) *Dueck I* Plaintiffs did not appeal. Thus, the Trial Court’s Judgment Entry is a valid final judgment.

Second, Appellants cannot dispute the continuity of parties. All parties in *Dueck II* were parties in *Dueck I*. Appellants are three of four *Dueck I* Plaintiffs, and the additional Appellant was a party in *Dueck I*. The then-Trustees are named Defendants in *Dueck I* and *Dueck II*.

Third, Appellants cannot dispute that *Dueck I* and *Dueck II* arise out of a common nucleus of operative facts. Nonresident Club Members’ Beach-access rights are at the heart of both actions. (*Compare Dueck I*, 04/25/13 First Am. Compl., ¶ 15 with *Dueck II*, 05/02/18 Second Am. Compl., ¶¶ 18, 31, 97, and 99.) Both cases require the Trial Court to interpret the Trust. (*Id.*) In fact, Appellants’ complaint and brief focus on this Court’s decision. (*Dueck II*, 05/02/18 Second Am. Compl., ¶¶ 34-39, 78-80; Appellants’ Brief at 11, 13-15, and 17-18.)

The sole basis for Appellants’ appeal appears to be the erroneous contention that the claims and issues asserted in *Dueck II* were not decided in *Dueck I*. The record demonstrates otherwise. Appellants primarily assert two substantive issues on appeal: (1) the Trustees have no authority to grant nonresident Club Members access to or use of the Beach, and (2) any grant of access to or use of the Beach to nonresident Club Members amounts to dedication for public use. (Appellants’ Brief at 1 and 21-30.) These issues were directly resolved by this Court’s decision in *Dueck I*, as confirmed by the Trial Court. Even assuming, that these issues were not explicitly raised, litigated, stipulated and/or resolved in *Dueck I*, they certainly could (and should) have been. Appellants cannot collaterally attack the rulings in *Dueck I* by asserting different reasons for the same relief sought in *Dueck I*.

Dueck I Plaintiffs requested a declaration “that Club Members have no *legal right* to use the Beach.” *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032, at ¶ 37. This sweeping request required

the Trial Court and this Court to engage in a comprehensive analysis of the parties' rights and responsibilities under the Trust. Granted, this Court disagreed with this Trial Court's original analysis. But this Court analyzed the evidence and information *Dueck I* Plaintiffs provided to determine the Trust settlors' intent regarding the rights conveyed to the Club and nonresident Club Members. *Id.* at ¶ 54 (“shifting our attention to the question posed by [*Dueck I* Plaintiffs] regarding the scope of the rights conveyed to Members via the Club Deed * * *.”).

This Court initially analyzed the Club's status as a corporation to understand “the Club Members' legal status in 1912 as it related to the settlors' intent.” *Id.* at ¶ 56. Relying on Ohio law that “[a] member of an incorporated club * * * does not have any title to any of the [Club] property,” this Court concluded that nonresident Club Members did not have rights as direct beneficiaries by virtue of being Club Members. *Id.* at ¶ 57. But, in fully determining the Club's rights (again, at the direct request of *Dueck I* Plaintiffs) this Court went on to state:

In discerning the settlor's intent, we find that the Club Members are not defined Beneficiaries under the Trust Deed and were vested with no legal rights thereunder. However, it is clear by the terms of the Trust Deed that the Clifton Club's rights as a Beneficiary are also to be protected, to the extent they comport with the settlors' intent that the conveyance was “for the sole use and benefit of all of the owners of sublots, or parts of lots, in the Clifton Park Allotment.” Therefore, we determine that extrinsic evidence is required to determine the settlors' intent regarding the scope of the Clifton Club's use of the Beach, including the Trustees' historical interpretation and administration of the rights accordingly.

Id. at ¶ 58. This Court noted that the “Club Lease capped [Club] membership at 250 Club Members,” and determined that the “Club Lease, Trust Deed, and Club Deed indicate an intent that the [Club], as lessees and successor lot owners, have access to the Beach, but that such access was subject to the rules and regulations implemented by the Trustees.” *Id.* at ¶ 59. This Court also reviewed documentation from 1942 through the 1970s including meeting minutes of the Trustees and the Club's board of directors. *Id.* at ¶¶ 60-65.

After reviewing the evidence and arguments, this Court determined:

...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. We conclude that *the trial court correctly determined that the Club Members have a "right" to use the Beach.* However, in 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.*

(Emphasis added) *Id.* at ¶¶ 66-67.

This Court's decision could not be clearer: (1) the Club is a beneficiary, and its rights as a Trust beneficiary—including its rights to access and use the Beach—must be protected; (2) the Trust settlors intended that the Club have a right to use the Beach, through its nonresident Club Members, but such use was not unfettered as evidenced by a 250-Club Member cap; and, (3) the Trust settlors intended that the Trustees have full authority to grant nonresident Club Members access to the Beach and to regulate that access to allow for all lot owners' Beach enjoyment. This Court did not, as Appellants now claim, ignore the broader issues concerning nonresident Club Member Beach use or the Trustees' authority to grant and regulate Beach access. The access and authority issues were decided, Appellants did not appeal, and Appellants may not relitigate those issues.

Appellants attempt to confuse the issues to justify their collateral attack. For example, Appellants' claim that this Court merely acknowledged the parties' agreement in *Dueck I* that nonresident Club Members have a permissive right to use the Beach, but that the parties did not actually "litigate the issue," is without merit. *Dueck I* Plaintiffs cannot agree to an issue in *Dueck I* and then attempt to litigate it in this case. Regardless, Appellants' position completely ignores this Court's prior decision and comprehensive review.

Additionally, Appellants agree that, under the Trust, the Trustees hold title to the Beach for the sole use and benefit of lot owner beneficiaries, including the Club. (Appellants' Brief at 24.) Appellants also agree that the Trust grants the Trustees the power to regulate Beach use. (*Id.* at 25.) Yet, Appellants continue to erroneously assert that "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." (*Id.* at 2, 23-24.) Again, this position completely ignores this Court's prior decision and comprehensive review.

This Court did not rely solely on the parties' agreement as to Club Members' permissive rights. It exhaustively reviewed the evidence before finding that "the trial court *correctly determined* that the Club Members have a '*right*' to use the Beach." (Emphasis added) *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032, at ¶ 67. This Court evaluated extrinsic evidence to determine the settlors' intent with respect to the "Club's use of the Beach, including the Trustees' historical interpretation and administration of the rights accordingly." *Id.* at ¶ 58. It went on to note that the "Club Lease, Trust Deed, and Club Deed indicated an intent that the Clifton Club, as lessees and successor lot owners, have access to the Beach, but that such access was subject to the rules and regulations implemented by the Trustees." *Id.* at ¶ 59. Again, the Court's holding is clear and unconditional: "The Club Members' [sic.] have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed." *Id.* at ¶ 126.

Further, *Dueck I* Plaintiffs and this Court were well aware of the Trust's prohibition concerning dedicating Trust property for public use when these issues were litigated. *Id.* at ¶ 48. But *Dueck I* Plaintiffs never asserted there was an improper dedication for public use. Instead, *Dueck I* Plaintiffs "consistently argued that the Club Members do not have a 'legal right' to use the Beach, but that the right is by permission, and subject to regulations by the Trustees." *Id.* at ¶

40. Appellants cannot take contradicting positions in the two actions—i.e., Appellants cannot agree in *Dueck I* that the Trustees can permissively admit and allow nonresident Club Members access to the Beach, and then attempt to relitigate that very issue with a different conclusion in this case.

Thus, the Trial Court’s Judgment Entry should be affirmed because the Trial Court—and this Court—already correctly found that the Club Members have a permissive right to access the Beach as regulated by the Trustees pursuant to the Trust Deed. If *Dueck I* Plaintiffs disagreed with this Court’s and/or the Trial Court’s rulings, their remedy was to appeal those rulings, not file a second action to relitigate those issues. This Court should overrule all of Appellants’ assignments of error.

C. The declaratory judgment exception to claim preclusion does not save Appellants’ claim.

Appellants erroneously rely on the declaratory judgment exception to defeat claim preclusion: “When a plaintiff seeks *solely* declaratory relief, * * * he is seen as merely requesting a judicial declaration as to the existence and nature of the relation between himself and the defendant. * * * [So] the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.” (Emphasis added) (Appellants’ Brief at 19.) But a complaint is not eligible for this exception if a declaratory relief claim is paired with a coercive relief claim. *See Bridge v. Ocwen Fed. Bank FSB*, N.D.Ohio No. 1:07-CV-02739, 2013 WL 331095, *6 (Jan. 29, 2013)); *Bridgestone Americas Tire Operations, LLC v. Pacific Employers Ins. Co.*, N.D.Ohio No. 5:11CV350, 2013 WL 774565, *2 (Feb. 27, 2013). Thus, the fatal flaw in Appellants’ argument is that they sought—and this Court granted—coercive relief in *Dueck I*.

The declaratory judgment exception does not apply because *Dueck I* Plaintiffs did not *solely* seek declaratory relief. Instead, *Dueck I* Plaintiffs paired their declaratory relief claim with

a coercive relief claim in the form of a breach of fiduciary duty claim. *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032, at ¶¶ 68-128 (“We find that appellants have demonstrated that a breach has taken place.”). Almost half of this Court’s decision was dedicated to whether the Trustees breached their fiduciary duties. *Id.* The issue whether the Trustees breached their fiduciary duties was litigated and decided in *Dueck I. Id.* For this reason alone, Appellants’ argument fails as a matter of law.

Appellants also misplace reliance on *Ketchel*. (Appellants’ Brief at 19.) The court in *Ketchel* actually overruled landowners’ claim that the declaratory judgment exception applied. 79 Ohio App.3d at 177-179, 607 N.E.2d 22. In that case, landowners initially failed in their claim against a township that zoning of their land was unconstitutional, then sued the township again alleging that the zoning worked an inverse condemnation. *Id.* at 176-77. The trial court entered summary judgment for the township in the second action. *Id.* Affirming, the court of appeals held that claim preclusion applied since the landowners could not demonstrate that the first action was solely a claim for declaratory relief. (*See, supra*, Argument and Law, Section I(A).) But the court of appeals also noted that “[t]here is also the need to discuss issue preclusion.” *Ketchel* at 178-179. It then held that landowners’ claim was barred by issue preclusion because it was based on issues litigated in the first action. *Id.* That is, landowners could not establish that zoning deprived them of all land use as required for their second action (federal taking claim), since they could not show in the first action that all possible uses were economically infeasible. *Id.* at 179. Thus, *Ketchel* supports the application of res judicata to the facts here.

Assuming *arguendo* that the declaratory judgment exception prevents claim preclusion—which it does not—the facts and issues now argued by Appellants are nevertheless barred by issue preclusion as set forth above. Thus, Appellants’ issues are barred by res judicata.

II. The Trial Court properly determined that the Trustees did not sell, convey, or dedicate Trust property for public use.

It is undisputed that under the Trust, “[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.” (*Dueck II*, 05/02/18 Second Am. Compl., Ex. A.) But there is no support—in the record before this Court or under applicable law—for Appellants’ assertion that the Trustees’ grant of permissive rights to Club Members to use the Beach “proves a dedication or conveyance to public use.” (Appellants’ Brief at 29.) Clearly, the Trustees did not sell or convey the Beach; instead, Appellants rely on dedication. Regardless, Appellants’ argument misses the entire point of this Court’s broad analysis in *Dueck* and ignores applicable law.

The Trial Court correctly held that “the access to the Beach and Beach Property permitted and regulated by Defendant Trustees to the Club Members does not qualify as a public use” because “the Clifton Club is a direct beneficiary to the Trust and Club Members have a permissive right to access the Beach and Beach Property.” (*Dueck II*, 11/20/18 Am. Judgment Entry at 3-4.) Assuming *arguendo* that Appellants’ claim that the Trustees dedicated the Beach for public use is not barred by res judicata—which it is, as set forth above—such claim fails as a matter of law. (Appellants’ Brief at 28-30.) “A dedication is a voluntary and intentional gift or donation of land, or of an easement or interest therein for some public use, made by the owner of the land, and accepted for such use, by or on behalf of the public.” *Dolan v. City of Parma*, 8th Dist. Cuyahoga No. 81183, 2003-Ohio-294, ¶ 9. Ohio courts recognize two forms of dedication: statutory and common law. *Id.*

“To show a statutory dedication it is necessary to prove that the land was conveyed to the public by deed or plat duly recorded and accepted by the proper authorities. A failure to comply with the steps made necessary by the statute in any essential particular would show that there

was no statutory dedication.” *Id.* at ¶ 12. “A common-law dedication can be proven upon the showing of the following three elements: (1) the existence of an intention on the part of the owner to make such dedication; (2) an actual offer on the part of the owner, evidenced by some unequivocal act, to make such dedication; and (3) the acceptance of such offer by or on behalf of the public.” *Id.* at ¶ 20. “There can be no dedication to private uses, or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public.” *Monroe Bowling Lanes v. Woodsfield Livestock Sales*, 17 Ohio App.2d 146, 152, 244 N.E.2d 762, 766 (7th Dist.1969); 35 Ohio Jur.3d Dedication § 2.

Here, Appellants do not even suggest that the elements of statutory dedication are satisfied, and there is no evidence that the Trustees dedicated Trust property under common law. Appellants do not assert that the Trustees provided a gift or donation of land or an easement to the public. No public records exist evidencing dedication of the Beach to the public. Appellants solely take issue with the Beach-access rights the Trustees granted to Club Members.

But the Club’s status as a Trust beneficiary allows the Club to access and use the Beach. This Court determined “it is clear by the terms of the Trust Deed that the Clifton Club’s rights as a Beneficiary are also to be protected, to the extent they comport with the settlors’ intent that the conveyance was ‘for the sole use and benefit of all the owners of sublots, or parts of lots, in the Clifton Park Allotment.’” *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032, at ¶ 58. Trustees merely permitted a non-public group—i.e., Club Members, by and through the Club as a beneficiary—to use the Beach. *Id.* at ¶ 67 (“the trial court correctly determined that the Club Members have a ‘right’ to use the Beach* * *. Access by the Club Members is by permission and regulation of the Trustees.”). If this Court accepts Appellants’ position, then Trustees cannot permit guests of Clifton Park residents to access the Beach without the unanimous consent of all Clifton Park

residents. (See *Dueck II*, 05/11/18 Motion for TRO at Ex. K, applying Beach rules to guests.) Such a result is nonsensical.

Appellants also offer no authority to support that such limited, permissive access by the Trustees equates to “public use.” The essence of “public use” is that land will be open for use by the public at large, and the contemplated use must be a public one. Here, it is undisputed that the Trustees have solely permitted 224 Club Members—not the public at large—to access the Beach subject to certain rules and regulations. (*Dueck II*, 05/02/18 Second Am. Compl. ¶¶ 32, 47, 49, and 105.) Club Members must join the Club and pay an annual fee, and the “Club Lease capped Clifton Club membership at 250 Club Members.” *Dueck*, 2017-Ohio-7161, 95 N.E.3d 1032, at ¶ 59. The Club then makes significant annual payments to the Trustees for the use of the Beach by the Club Members. *See id.* at ¶ 16; 35 Ohio Jur.3d Dedication § 2 (“There can be no dedication for a purpose bearing an interest or profit in the land.”). There is no right for the public at large to use the Trust property. And Club Members’ rights to access the Beach and other Trust property are not without limit—rather, Club Members enjoy rights to privately use the Beach, as permitted by the Trustees and subject at all times to regulation by the Trustees. *Id.* at ¶ 126. And as set forth above, granting such permissive rights to Club Members is properly within the Trustees’ authority.

Thus, the Trial Court’s decision should be affirmed, and Appellants’ third assignment of error should be overruled.

CONCLUSION

For the foregoing reasons, this Court should, as a matter of law, overrule Appellants’ assigned errors and affirm the Trial Court’s Amended Judgment Entry granting the Trustees’ Motion to Dismiss. The Trustees, like all past and future trustees, have the power to grant

nonresident Club Members permissive access to the Beach in exchange for a negotiated fee and subject to applicable regulations. Any claim premised upon or rooted in the contention that the Trustees' grant of Beach-access rights to nonresident Club Members is improper or amounts to conveying or dedicating the Beach to public use has been litigated and decided.

Respectfully submitted,

/s/ Terry J. Evans

Karen Soehnlén McQueen (0016883)

Terry J. Evans (0088399)

Krugliak, Wilkins, Griffiths

& Dougherty Co., L.P.A.

4775 Munson Street, N.W./P.O. Box 36963

Canton, Ohio 44735-6963

(330) 497-0700 / Fax: (330) 497-4020

kmcqueen@kwgd.com; tevens@kwgd.com

Attorneys for Defendants-Appellees,
Trustees of the Clifton Park Trust, Joseph
Kerrigan, Mary Ellen Fraser, Robert Frost,
Warren Coleman, and Ryan Meany

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellees has been served by electronic mail and ordinary U.S. mail on this 8th day of April, 2019, upon the following counsel of record:

Dennis R. Rose (0039416)
Casey J. McElfresh (0088083)
HAHN LOESER & PARKS LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Email: drrose@hahnlaw.com
cmcfresh@hahnlaw.com

Attorneys for Appellants

/s/ Terry J. Evans

Karen Soehrlen McQueen (0016883)
Terry J. Evans (0088399)
Attorneys for Defendants-Appellees,
Trustees of the Clifton Park Trust, Joseph
Kerrigan, Mary Ellen Fraser, Robert Frost,
Warren Coleman, and Ryan Meany