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Confirmation Nbr. 1704070

ARTHUR P DUECK, ET AL

CA 18 108008

vs.

JOSEPH KERRIGAN, TRUSTEE, CLIFTON, ETC., ET  
AL

**Judge:**

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**COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO**

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

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

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## INTRODUCTION

This appeal turns on the following two questions: (1) was the issue of whether the Trust Deed gave the Trustees the power 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<sup>1</sup>; 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 Declaratory Judgment Action was limited to the issues of whether Club Members were Trust beneficiaries and had a right of Beach use under the Trust Deed. The answer is no. Under Ohio law, the Plaintiffs were not required to bring any other issues to the Court. Contrary to the Trustees' arguments, Plaintiffs did not seek "coercive relief" that required them to raise the current issues in the prior action – instead they only sought relief for litigation conduct unrelated to the declarations sought in that case. Plaintiffs retained the right to challenge the Trustees' conveyance of a right of use to Club Members, to which *res judicata* is not a bar because the issue of Trustee authority was never at issue, litigated, or decided.

The Trustees also claim – without any support in the *Dueck Opinion* – that this Court granted Club Members a legally binding permissive right of use. *See Dueck v. Clifton Club Co.*, (hereinafter "Dueck Opinion") 8<sup>th</sup> Dist. Nos. 103868 and 103888, 2017-Ohio-7161. Instead, this Court said Club Members were not beneficiaries and ***have no direct or indirect legal rights under the Trust***. This Court rejected the prior trustees' and the Club's arguments in the Declaratory Judgment Action that the Trust Deed and the Club Deed gave Club Members beneficial rights. This Court referenced the evidence of the Trustees' historical practice of granting annual permission to Club Members to use the Beach for a negotiated fee only in (1)

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<sup>1</sup> All capitalized and defined terms have the same meaning as stated in the Appellants' Opening Brief unless stated otherwise.

rejecting those arguments and (2) concluding that the non-beneficiary Club Members have no legal rights. It did not reference that evidence, as the Trustees claim, to hold that the settlors intended for the Club to use the Beach through its members, that Club Members had legally binding permissive rights, or that the Trustees had authority to grant permissive rights to the Club Members absent lot owner approval. Whether the historical practice was lawful or authorized by the Trust Deed was never litigated.

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. Rather, the Trust deed specifically directs the Trustees to maintain the Beach *solely for the lot owners*, who have all purchased properties with corresponding deed restrictions and promised benefits. Plaintiffs respectfully ask this Court to reverse the Trial Court's judgment and remand for further proceedings.

### **ARGUMENT**

#### **I. The Record Is Complete and Appellees' Request to Overturn the Assigned Errors for an Incomplete Record Should Be Denied.**

Appellees' argument that the record here is incomplete is not based on any legal rule and does not apply here. The two cases they cite are based on unique facts and are inapposite. *See Trojanski v. George*, 8th Dist. No. 83472, 2004-Ohio-2414 ¶¶ 6-7 (case dismissed based on finding of identical complaint); *Kechtel v. Bainbridge Twp.*, 79 Ohio App.3d 174, 177 (11th Dist. 1992) (summary judgment case in which the "exact wording of the appellants' complaint in" the first action was "[o]f paramount importance" to the analysis). Unlike those cases, the Trustees' Motion to Dismiss below and Trial Court's Judgment Entry was based on the *Dueck Opinion*, not the "exact wording" of the complaint in the Declaratory Judgment Action. [See Mot. to

Dismiss p. 1 (“In short, the Eighth District and this Court in its March 19, 2018 final Judgment Entry have already decided the issues set forth in Count I.”.)] The Trustees cited only the *Dueck Opinion* below to describe the Declaratory Judgment Action—not the Declaratory Judgment Action complaint. [*Id.* pp. 5-6.] The Trial Court did the same. [11/20/2018 Judgment Entry (basing decision on *Dueck Opinion*).] The “wording” of the complaint is thus irrelevant. Further, there is evidence in the record here showing what issues were actually litigated and decided. [*E.g., Dueck Opinion* ¶¶ 26, 37, 41.] Appellees’ incomplete record claim is baseless.<sup>2</sup>

## **II. Res Judicata Does Not Bar Plaintiffs’ Claims Here.**

Because the Declaratory Judgment Action sought declaratory relief only, the critical inquiry for *res judicata* purposes is what question was litigated and decided in the prior case. [Appellants’ Br. pp. 19-21.] Only the issues specifically litigated are barred by *res judicata*. [*Id.*] This allows the Plaintiffs to “pursue further ... relief in a subsequent action” even if “that the further relief could have been requested initially.” Restatement Judgments (2d) § 33, cmt. c.

Plaintiffs posed only three questions in the Declaratory Judgment Action: “(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). The litigated and decided

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<sup>2</sup> Appellees ironically rely on documents not in the record below to support their argument – including, the April 25, 2013 First Amended Complaint, January 6, 2014 Brief in Opposition to the Club’s Motion for Judgment on the Pleadings, June 25, 2015 Motion for Attorney Fees, October 31, 2014 Motion to Remove Trustees filed in the Declaratory Judgment Action, and the March 31, 2016 Appellants’ Brief in the Declaratory Judgment Action. As the Trustees state, “[T]he Court of Appeal is bound by the record before it and may not consider facts extraneous thereto.” [Appellees’ Br. at p.12 (quoting *Community First Bank v. Holland*, 3d Dist. No. 6-05-04, 2005-Ohio-4751, ¶ 10).] For that reason, such references must be stricken. Further, the quotations are selective and misleading such that the Court cannot consider them.

question was whether Club Members are beneficiaries such that they had Beach use rights under the Trust Deed. *Id.* ¶ 41. The answer is no, and they have no legal rights under the Trust Deed.

This Court did not consider or decide the question posed here: whether the Trustees have unilateral authority to convey to 224 non-beneficiary 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 until now, is found in the Trust Deed only, and is no. The prior trustees and the Club recognize that the Trust Deed is the sole grantor of rights, and for that reason, in the Declaratory Judgment Action, they 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 Club Members to use Trust Property – the issue in the pending litigation. This Court decided and rejected the prior trustees’ Trust Deed and Club Deed argument only. As such, the Trial Court erred when concluding that this Court granted Club Members a legally binding permissive right and dismissing Count I with prejudice.

The Trustees’ claims to the contrary are wrong because they (1) ignore what issues were actually litigated in the *Dueck Opinion*, (2) incorrectly claim that this Court granted legally binding permissive rights, (3) rely on the false premise that Plaintiffs agreed Club Members have legally binding permissive rights, (4) wrongly interpret the Restatement’s rule on the effect of declaratory judgments, and (5) do not show claim preclusion or issue preclusion.

**a. This Court determined only two issues in the *Dueck Opinion*: (1) Club Members are not Beneficiaries, and (2) they have no legal rights.**

The Trustees wrongly assert that the Court’s detailed analysis in the *Dueck Opinion* reached conclusions that cannot be found in the opinion:

This Court’s Decision could not be clearer: ... the Trust settlors intended that the Club have a right to use the Beach, through its nonresident Club Members ... and ... 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.

[Appellees' Br. p. 17.] The Trustees do not cite a *Dueck Opinion* paragraph for these conclusions because ***this Court never made those statements***. Rather, in response to the actually requested declaration this Court held that: (1) Club Members have no legal rights to use the Beach, and (2) Club Members are not Trust beneficiaries. *Dueck Opinion*, ¶¶ 1, 2, 41, 67, 125-126; *id.* ¶¶ 130-131 (J. Gallagher concurring). That was the extent of the holdings. The Club's rights as beneficiary were not intended by the settlors to extend to its Members and there was no decision that the Trustees have "full authority to grant" Club Members access. The Trustees' attempts to contort this Court's rejection of the claim that the Club's rights were passed to its members and this Court's reference to the historical evidence to reject the claim that Club Members had legal rights under the Trust do not support the Trustees' conjured conclusions. [Appellees' Br. pp. 15-17 (incorrectly citing *Dueck Opinion* at ¶¶ 54, 57-67.)]

**b. This Court did not grant Club Members a legally binding permissive right.**

Like the Trial Court, the Trustees premise their *res judicata* argument on the flawed claim that this Court found that the Club Members have a legally binding permissive right to use Trust Property. [Appellees' Br. p.18] That is wrong because this Court did not grant Club Members rights to use the Beach. 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 conveyance under the Trust. *Dueck Opinion*, at ¶ 126. Plaintiffs were not required to challenge the Trustees' authority to convey a "permissive right" in the Declaratory Judgment Action as the prior trustees claimed the Club Members had rights of use under the Trust Deed and Club Deed. At best, this Court noted what the Trustees had been doing historically: granting permissive use rights for a fee. Further, the Court's statement that regulation of Club Member's Beach use must be "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. Instead, this Court held that the Club Members have no legal rights, they are not beneficiaries, and the Trustees must follow the Trust. *Dueck Opinion*, ¶¶ 1, 2, 41, 67, 125-126; *id.* ¶¶ 130-131 (J. Gallagher concurring). Thus, the Trial Court's judgment is erroneous.

**c. Plaintiffs did not agree that the Trustees have the authority they claim here.**

The Trustees incorrectly claim that the Plaintiffs agreed on the issue of Trustee authority in the Declaratory Judgment Action. [Appellees' Br. p.17.] The plaintiffs in that action responded to the 2012 Trustees' position that the Club Members must have legal rights under the Trust Deed and Club Deed because Club Members have used the Beach for "100 years." To disprove that claim, those plaintiffs showed the historical evidence which provided context to claimed "100 years" of use showing that Club Members had merely been granted annually negotiated permission to access the Beach in exchange for the Club's increased contribution, not by legal right. Those plaintiffs did not agree the Trustees had full authority under the Trust Deed to convey permissive rights—which issue was never raised or litigated. Thus, this Court did not state a holding regarding the central issue of Trustee authority.

**d. The Appellees' arguments regarding coercive relief do not overcome the Declaratory Judgment Rule.**

Appellees agree that the Restatement's declaratory judgment rule has been adopted by Ohio and that *res judicata* has no application in prior declaratory judgment actions, except to the extent that an issue was specifically litigated and determined in the prior action. They only claim that the complaint in the Declaratory Judgment Action—that only included three requested declarations—included a "coercive relief claim" and thus, prevents application of that rule here.

The "coercive relief claim" the Appellees point to is the attorney fees motion arising from

the Trustees' litigation conduct in the Declaratory Judgment Action – advocating for the Club (breach of impartiality)<sup>3</sup> and failure to disclose information (breach of duty to inform and report). Restatement § 33 states that the declaratory judgment rule does not apply when a plaintiff “interpolates[s] declaratory prayers redundantly in standard actions .... Thus a pleader demanding money damages may also ask for a corresponding declaration. For res judicata purposes, the action should be treated as an adversary personal action concluded by a personal judgment with the usual consequences of ... issue preclusion.” *Id.*, cmt. d. Appellees' case law shows that the Restatement limits application of the declaratory judgment rule only when the declaratory relief is redundant of the requested coercive relief – *i.e.*, arises from the same set of facts, as opposed to a claim unrelated to the requested declaratory relief. *Bridge v. Ocwen Fed. Bank FSB*, No. 1:07-CV-02739, 2013 WL 331095, at \*7 (N.D. Ohio Jan. 29, 2013) (requested declaration related to property interest paired with claims for quieting title and for injunctive relief for same interest); *Bridgestone Americas Tire Operations, LLC v. Pac. Employers Ins. Co.*, No. 5:11CV350, 2013 WL 774565, at \*2 (N.D. Ohio Feb. 27, 2013) (declaratory relief sought regarding rights under contract paired with claim for damages arising from breach of contract).

Accordingly, a party must plead “coercive relief” that is redundant of the declaratory relief to bar application of the declaratory judgment rule in contrast with a claim for declaratory relief and a separate request for sanctions due to litigation conduct in the declaratory action. Here, the record shows that the complaint in the Declaratory Judgment Action included only a request for a declaratory judgment on the three specific issues identified by this Court. *Dueck Opinion*, ¶¶ 3, 22, 26, 37, 41. The attorney fees this Court awarded was a sanction for the prior

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<sup>3</sup> Plaintiffs never brought a claim that conveying permission to Club Members to use the Beach was a breach of fiduciary duty until now because the issue of whether the Club Members were beneficiaries or had any legal rights under the Trust needed to be resolved first – and the Trustees never claimed permissive rights existed until after losing the Declaratory Judgment Action in order to continue the status quo and save face with the Clifton Park community.

trustees' conduct during the dispute – withholding information from Trust beneficiaries and advocating one beneficiary's position to the detriment of other beneficiaries instead of petitioning the Court for guidance – not “coercive relief” redundant of the declaratory relief to obtain both money damages and a declaration. *Id.* ¶ 27-28, 68, 121. Plaintiffs did not request that the Court find that the prior trustees breached their fiduciary duty for wrongly interpreting the Trust – rather the breach was advocating for the Club's position instead of just petitioning the court for guidance as this Court found they should have done. *Id.* ¶ 103. For that reason, no redundant “coercive relief” was paired with the declaratory relief claim in the complaint, the Trustees' argument fails, and *res judicata* does not bar Plaintiffs' claims here.

**e. The Trustees cannot prove the elements of claim preclusion in any event.**

The Trustees incorrectly claim that the Declaratory Judgment Action was a final judgment on the merits of the Trustees' authority to convey a right of Beach use to Club Members. [Appellees' Br. p. 14.] As shown above, that claim has no support in the *Dueck Opinion* and the Trial Court's judgment cannot contradict the *Dueck Opinion*. For the same reasons, there is not a common nucleus of operative facts between the two actions because the Trustees and Trial Court have created a new claim that the *Dueck Opinion* granted the Club Members a legally binding permissive right – which it did not do. Indeed, the Second Amended Complaint heavily cites the *Dueck Opinion* because Plaintiffs contend that the Trustees are violating the Trust as interpreted by this Court. Accordingly, there is no claim preclusion and the Plaintiffs cannot be barred from enforcing their rights as set forth in the *Dueck Opinion*.

**f. The Trustees cannot show the elements of issue preclusion**

Issue preclusion or collateral estoppel does not apply because the identical issues raised in Count I below were not litigated, determined or essential to the judgment in the Declaratory Judgment Action. “Due process requires a party asserting collateral estoppel to prove that the

identical issue was (1) actually litigated, (2) directly determined, and (3) essential to the judgment handed down in the prior action.” *Buckeye Union Ins. Co. v. New Eng. Ins. Co.*, 87 Ohio St. 3d 280 (1999); *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 201 (1983) (same). “It is not enough that a similar issue...was litigated and decided.... [P]recisely the *same issue* must have previously been litigated and decided.” *Thompson v. Wing*, 70 Ohio St. 3d 176, 185 (1994) (emphasis in original). Moreover, “[c]ollaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little ... incentive to litigate fully and vigorously in the first action due to the ... factual circumstances presented therein.” *Goodson*, 2 Ohio St.3d at 201 (citations omitted).

The question in the Declaratory Judgment action was “whether the nonresident Club Members are direct Beneficiaries under the Trust Deed, as stated in Count I of the complaint, arguably entitling them to equal access and commensurate status as the owner Beneficiaries.” *Dueck*, 2017-Ohio-7161, ¶ 41. The answer is no. Those were the only actually litigated issues. The parties never litigated similar, let alone the identical, issues presented here: whether the Trustees have unilateral authority to convey to 224 non-beneficiaries the same rights to use Trust Property as the lot owner beneficiaries—thereby making the Club Members de facto beneficiaries. Further, there was no incentive to litigate the Trustees’ authority to convey Club Members rights equal to the beneficiaries’ rights because the prior trustees did not claim such authority but rather argued that the Club Members had access due to legal rights under the Club Deed and Trust Deed.<sup>4</sup> *Dueck Opinion*, 2017-Ohio-7161, ¶ 21. That was their position for the whole case and it was rejected. *Id.* ¶¶ 23-24. Accordingly, there is no issue preclusion.

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<sup>4</sup> Plaintiffs could not foresee that the historical practices that were abandoned and rejected by the 2012 trustee defendants would be used to estop Plaintiffs from challenging the Trustees’ 2018 Rules – another due process requirement. *Goodson*, 2 Ohio St. 3d at 200-01.

**III. The Trial Court Erred When It Determined There Was No Conveyance or Dedication of Trust Property.**

The Trust Deed's requirement that Trust Property cannot be conveyed or dedicated to public use without the unanimous consent of all of the lot owners is an essential protection of their rights. Tellingly, the Trustees ignore the question of whether the Trustees' grant of Beach use rights to the Club Members that are equal to the rights of beneficiaries is a sale or conveyance. Ohio law is clear that property is a bundle of rights (or interests) in land, which includes the right of use. The Trustees have granted a right of use – a license or permission – directly to the non-beneficiary Club Members in consideration for the Club's increased contribution. That is a sale or conveyance to the public. The Trustees' Beach Rules expressly do not give the Club – the actual beneficiary – any right of use. Rather, the Trustees convey the right to reserve and use the Trust Property – to the exclusion of others – directly to the Club Members, who are not beneficiaries and no different than members of the public. Through this conveyance, members of the public merely need to join the Club and become indistinguishable from Trust beneficiaries who pay significant costs to become a lot owner and thus, a beneficiary. Ironically, this demonstrates how the Trustees' grant of permission violates this Court's holding in the *Dueck Opinion* because the Club Members cannot be *de facto* beneficiaries and cannot be conveyed rights under the Trust. That can only occur with lot owner consent. Without that consent, the Trustees' actions violate the terms of the Trust and breach their fiduciary duties.

**CONCLUSION**

For the foregoing reasons, the Plaintiffs respectfully request that the Court reverse the Trial Court and remand for further proceedings.

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 8th day of May, 2019, upon the following counsel of record:

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