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ARTHUR P DUECK ET AL

vs.

CLIFTON CLUB CO. ET AL

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Judge:

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COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

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

BRIEF OF APPELLEE TRUSTEES OF THE CLIFTON PARK TRUST

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STATEMENT OF THE CASE

A. The Issues and the Parties

This is a declaratory judgment action wherein the Plaintiffs/Appellants—all of whom own sublots in the Clifton Park Allotment in Lakewood, Ohio—seek to prohibit usage by the members of The Clifton Club of a private beach located in the northwest corner of Clifton Park. That beach has been owned for over a hundred years by the Clifton Park Trust ("the Trust"), pursuant to a Deed of Trust, dated March 25, 1912. The Defendants/Appellees who are filing this Brief—Charles Drumm, John Pyke, Jr., Peter A. Kuhn, Philip W. Hall and Warren Coleman—are, or were during the course of the proceedings below, Trustees of the Trust.

Defendant Clifton Club Company ("the Club") is an incorporated social club that was formed in 1902. From 1902 to 1912, the Club leased four sublots (Nos. 38, 39, 40 and 41) in the allotment. In July, 1912, the Club received from the owner of the allotment, the Clifton Park Land and Improvement Company ("CPLIC"), a deed to those four sublots. That deed (hereinafter referred to as "the Club Deed") conveyed to the Club not only the legal title to the four sublots, but also the "**right to use in common with other owners of the land in said allotment,** all portions of said allotment which shall by the Grantor [the CPLIC] be devoted to the purposes of **park or park spaces** for the exclusive use and benefit of such lot owners." In fact, just three months earlier (in March, 1912), the said "park or park spaces"—which included the beach property in the northwest corner of the allotment (hereinafter referred to as "the Beach")—were deeded by the CPLIC to five Trustees, to be held by the trustees "for the common use of all the lot owners in the Clifton Park allotment." (That deed is hereinafter referred to as "the Trust Deed" or "the Deed of Trust.")

B. The Declaratory Judgment Lawsuit Filed by Plaintiffs

On June 2, 2012, Plaintiffs—a group of four (and, ultimately, six) sublot owners in the Clifton Park Allotment—filed, in the Probate Court for Cuyahoga County, a declaratory judgment action against the Clifton Club seeking to prevent usage of the Beach by Club members.

On August 7, 2012, the Club filed a motion to dismiss the complaint, arguing, inter alia, that Plaintiffs had failed to include, as parties to the lawsuit, the Trustees and all Clifton Park lot owners. On October 16, 2012, the Trustees filed an amicus brief relating to the Club's motion to dismiss, which amicus brief argued that the Trustees, as title owners of the Beach and having a fiduciary duty to preserve the terms of the trust, were necessary and indispensable parties to the action.

The Probate Court agreed with the Trustees' position and, on March 12, 2013, ordered that Plaintiffs join the Trustees and all Clifton Park Allotment sublot owners as party defendants. On April 24, 2013, Plaintiffs filed their First Amended Complaint ("FAC"), adding the Trustees and all Clifton Park sublot owners as party defendants and asking the Probate Court to declare that:

> 1) the Members of the Clifton Club who are not sublot owners are not beneficiaries under the Deed of Trust;
>
> 2) the Members of the Clifton Club who are not sublot owners have no legal right to use Trust property (including the Beach); and
>
> 3) the provision of the Clifton Club Deed dated July 1, 1912, allowing use of Trust property by the Members of the Clifton Club who are not sublot owners (including the Beach) in contradiction to the then-existing Deed of Trust is null and void.

C. The Discovery Disputes and Plaintiffs' Motions to Remove the Trustees and For an Award of Attorney Fees

In response to discovery requests served on them by the Plaintiffs, the Trustees produced more than 12,000 pages of material. In addition, the Trustees listed 276 documents that they were not producing because those documents constituted attorney-client communications and were therefore privileged.

On April 6, 2015, Plaintiffs filed a Motion to Compel that related to eight of those documents. In addition, Plaintiffs asked the Court to order the Trustees to re-produce, for Plaintiffs' inspection, the originals of all 12,000 pages of documents of which the Trustees had produced copies, which request the Trustees opposed because of the burden. On August 24, 2015, the Probate Court issued an order that agreed with the Trustees that five of the eight documents that the Trustees were not producing were protected by the attorney-client privilege and need not be produced, but granted Plaintiffs' motion with respect to the three documents remaining.[1] (Journal Entry, Aug. 24, 2015.) In addition, the Probate Court ordered the Trustees to produce for inspection the originals of all documents, but only on condition that Plaintiff bear the cost that the Trustees would incur. (*Id.*) The Plaintiffs elected not to pursue that review.

In the meantime, on October 21, 2014, while Plaintiffs' Motion to Compel was still pending, Plaintiffs filed a Motion to Remove the Clifton Park Trustees. The sole bases asserted by Plaintiffs in support of that Motion to Remove were that the defendant Trustees (a) had "decided to interject themselves into the dispute" between Plaintiffs and the Club, rather than remaining "neutral," and (b) had denied Plaintiffs "access to trust documents and information."

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[1] Those three documents were immediately produced by the Trustees but were of no evidentiary value (and were not relied upon by the Probate Court), as they were created decades after the creation of the Trust.

On June 25, 2015, Plaintiffs moved for an award of attorney fees, based on the same grounds as their Motion to Remove.

On August 24, 2015, the Probate Court issued separate Journal Entries denying Plaintiffs' Motion to Remove, denying Plaintiffs' Motion for Attorney Fees and denying in part, while granting in part, Plaintiffs' Motion to Compel. With respect to each of the first two motions, the Court held that "Plaintiffs' arguments are unpersuasive and without merit."

D. The Trustees' Motion for Summary Judgment

On September 15, 2015, the Trustees filed a Motion for Summary Judgment, arguing that both the Club Deed and the Deed of Trust unambiguously provide the members of the Club with a legal right to use the Beach; that the Trustees alone have the right, responsibility, and power to regulate usage of the Beach; and that Plaintiffs' action was barred by Ohio statutes of limitation.

On November 10, 2015, the Probate Court granted the Trustees' Motion. The Probate Court concluded that, "as a lot owner, the Clifton Club Company is 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 Trust property, including the beach, subject to the regulations and restrictions as set forth in the Trust Deed and Club Deed." (Journal Entry, Nov. 10, 2015, at p. 9.) The Probate Court further found that "Plaintiffs' Petition for Declaratory Judgment and subsequent litigation did not benefit the Trust," and that Plaintiffs should therefore "be responsible for paying their own attorney fees and Court costs." (*Id.* at p. 10.)

STATEMENT OF FACTS

There is no dispute with respect to any of the pertinent facts in this matter. Indeed, virtually all of those pertinent facts are memorialized in legal instruments that were recorded with the Cuyahoga County Recorder more than a hundred years ago.

The Clifton Club Company's relationship with the Clifton Park Allotment started back in 1902, when the Club was incorporated and leased, from the CPLIC, Sublots Nos. 38, 39, 40 and 41, which lots were situated immediately adjacent to the access road to the Beach and made the Club property among the closest to the Beach of any property in the allotment. (First Am. Compl. ("FAC"), at ¶ 7.) That lease was for a term of twenty years and provided that the said four sublots were "to be used solely for the purpose of a social club." (Mem. in Supp. Mot. Summ. J., Ex. A to Pyke Aff. ("Club Lease"), at p. 1.) The lease further stipulated that the Club's membership was to be limited to **250 members** unless the lessor (the CPLIC) consented to a larger number. (Club Lease, at p. 4.) The 1902 lease also gave the Club an option to purchase the leased property, at any time during the term of the lease and provided that the CPLIC "will also give, grant and make to [the Club] without further consideration and for the same period of time a lease of a certain strip of land upon the beach of Lake Erie for bathing purposes and also another strip of land upon the easterly bank of Rocky River for a boat house, and also a strip of land for the purpose of a stable." (Club Lease, at p. 3.) In addition, the lease contained a covenant that the CPLIC would, before its "period of existence expired,"

> convey the fee in the land reserved and dedicated for park purposes in the allotment of the Clifton Park Land and Improvement Company to a Board of Trustees of not less than three members who shall be property owners in said allotment with power to perpetuate said Board of Trustees and with power to hold said property for the *use and benefit of persons owning land in said allotment.*

(Club Lease, at p. 3 (emphasis added).)

By 1905, the Club had erected "a large, commodious, and substantial clubhouse" on those four sublots. *See Wallace v. Clifton Land Co.,* 92 Ohio St. 349, 110 N.E.2d 940, 942 (1915). Then, on July 8, 1912, the CPLIC recorded a deed, dated July 1, 1912, in which the CPLIC conveyed to the Club legal title to the said four sublots ("the Club Deed"). That Club

Deed provided (as did the 1902 lease) that the subject lots were not to be used "for any other purpose than of a private residence or **social club.**" (FAC, Ex. B ("Club Deed"), at p. 2.) That deed also conveyed to the Club

> **the right to use in common with other owners of the land in said allotment,** all portions of said allotment which shall by the grantor be devoted to the purposes of parks or park spaces for the exclusive use and benefit of such lot owners but such use of the parks and of any pavilion or bath or boat houses as may be erected thereon by said company [i.e., the grantor, the CPLIC] for the benefit of owners of property in said allotment, shall be **subject to such rules and regulations as may be established by said company** to provide for the taxes and expenses of the maintenance and preservation of the same, and the proportionate part of such taxes and expenses shall be chargeable to the lot herein conveyed and shall be a lien upon said lot to secure its payment.

(Club Deed, at pp. 1-2.) In addition, the Club Deed reiterated the CPLIC's previous agreement in the 1902 lease that, "before the period of its corporate existence . . . expire[d]," CPLIC would convey

> the fee of the land reserved for park purposes in the allotment . . . to a Board of Trustees of not less than three members who shall be property owners in said allotment, with power to perpetuate said Board of Trustees, and with power to hold said property for the use and benefit of persons owning lots in said allotment, subject to such rules and regulations in regard to the use thereof as herein before provided, and for that purpose the said Trustees shall succeed to all the rights, powers and duties of the company as to use, maintenance, repairs, improvements, and for all purposes whatsoever."

(Club Deed, at p. 2.)

The CPLIC had actually complied with the latter covenant just three months earlier. For on March 27, 1912, the CPLIC recorded a Deed of Trust (dated March 25, 1912) that conveyed to five Trustees certain described "parts and parcels of land in the grantor's said allotment, or lying adjacent thereto, which have been reserved **for the use and benefit of the owners of land** in said allotment." (FAC, Ex. A ("Deed of Trust"), at p. 1.) The Deed of Trust

provided for five Trustees, "all of whom shall be at all times **owners of land and residents** in the Clifton Park allotment," and stated that the five 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." (Deed of Trust, at p. 3.) The Deed of Trust further stated that the Trustees shall "keep the bathing pavilion, stairways, private roadways and sidewalks in repair," **"establish regulations for the use 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." (Deed of Trust, at p. 4.) The Deed of Trust also provided that the Trustees' "necessary expenses in carrying out their duties shall be divided among **the several lot owners** and collected from them by an annual assessment." (Deed of Trust, at p. 4.)

Since 1912—in other words, for more than a hundred and thirteen years—the private beach in the northwest corner of the Clifton Park Allotment (which private beach was part of the parcels of land deeded to the Trustees) has been used not only by individuals who owned sublots in the Clifton Park Estates, but also by individual members of the Club, regardless of whether those individual Club members did (or did not) themselves own lots in Clifton Park and regardless of whether those members were (or were not) residents of Clifton Park. Such usage has been subject only to the "rules and regulations" established by the Trustees. (*See* November 10, 2015 Journal Entry, at page 3, where the Probate Court stated that it was undisputed that non-resident Club members have used the Beach since at least 1912.)

In addition, for at least the last seventy years (the only period of time for which records still exist, prior records having been destroyed in a 1942 fire), the Club has made **annual payments** to the Trustees to cover a major portion of the expenses of operating, repairing and maintaining the Beach due to the usage of the Beach by the Club's members. (*See* Trustees' Opp.

to Mot. to Remove Trustees, at pp. 13-17 and referenced exhibits.) During the past thirty years, the amounts of those annual payments, as mutually agreed to by the Trustees and the Club's directors, have ranged from $12,000 to $112,300 (for 2015), and have been substantially greater than the amount of annual assessments that would otherwise have been due from the Club based on the formula set forth in the Deed of Trust. (*Ibid.*)

ARGUMENT

I. THE PROBATE COURT CORRECTLY HELD THAT DEFENDANT TRUSTEES WERE ENTITLED TO JUDGMENT IN THEIR FAVOR AS A MATTER OF LAW AND THAT SUMMARY JUDGMENT SHOULD THEREFORE BE GRANTED.

A. The Provisions of the 1912 Deed of Trust and the Probate Court's Interpretation Thereof

The Deed of Trust, wherein the CPLIC, on March 25, 1912, deeded to five trustees certain described parcels of land in the Clifton Park Allotment "which have been reserved for the use and benefit of the owners of land in said allotment," expressly stated that 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." (Deed of Trust, at pp. 1, 3.) It is therefore manifest that Clifton Club Company, as the owner of four lots in the allotment (sublots Nos. 38, 39, 40 and 41), had the right to use all of the property deeded to the Trustees (including the Beach).

Based on these provisions of the Deed of Trust, the Probate Court concluded, at page 7 of its November 10, 2015 Journal Entry, that the

> plain language of the Trust Deed shows a distinct intention of the Clifton Park Land and Improvement Company to endow the Club, as a lot owner and beneficiary of the Trust deed, with the right to use Trust property in the Clifton Park allotment in common with all other lot owners within the allotment. This right extends to the use of land reserved and dedicated for park purposes, including the beach.

B. The Provisions of the Club Deed

This intention on the part of the Grantor (the CPLIC) to give the Club the same right to use the Beach (and other Park properties) that the Grantor had given to other lot owners in Clifton Park is also manifest from the language of the deed of four lots issued by the CPLIC to the Clifton Club in July, 1912. That Club Deed provided that the subject lots were not to be used "for any other purpose than of a private residence or **social club.**" (Club Deed, at p. 2.) The Club Deed also conveyed to the Club "**the right to use in common with other owners of the land in said allotment,** all portions of said allotment which shall by the grantor be devoted to the purposes of parks or park spaces for the exclusive use and benefit of such lot owners." (Club Deed, at p. 1.) In addition, the Club Deed reiterated the CPLIC's previous agreement (in the 1902 lease) that, "before the period of its corporate existence . . . expire[d]," the CPLIC would convey

> the fee of the land reserved for park purposes in the allotment . . . to a Board of Trustees of not less than three members who shall be property owners in said allotment, with power to perpetuate said Board of Trustees, and with power to hold said property for the use and benefit of persons owning lots in said allotment, subject to such rules and regulations in regard to the use thereof as herein before provided, and for that purpose the said Trustees shall succeed to all the rights, powers and duties of the company as to use, maintenance, repairs, improvements, and for all purposes whatsoever."

(Club Deed, at p. 2.) "Clearly," concluded the Probate Court in its Journal Entry, the Grantor

> intended that the land deeded to the Clifton Club be used for the purposes of a social club, and that the Club have access to parks or park spaces, including the beach, in common with all lot owners in the Clifton Park allotment.

(Journal Entry, Nov. 10, 2015, at p. 6.)

In addition, stated the Probate Court, the Grantor "also intended that the Club be subject to the Trustees' governance of such property, including the obligation to provide support for [its] maintenance." (*Ibid.*) The Court then quoted the following provision of the Club Deed:

> [B]ut such use of the parks and of any pavilion or bath or boat houses as may be erected thereon by the said company for the benefit of owners of property in said allotment, shall be subject to such rules and regulations as may be established by said Company to provide for the taxes and expenses of the maintenance and preservation of the same, and the proportionate part of such taxes and expenses shall be chargeable to the lot herein conveyed and shall be a lien upon said premises to secure its payment.

(*Ibid.*)

The Probate Court therefore found that "**while the Trust Deed stands on its own** to justify this Court's determination, a reading of the July 1, 1912 **Club Deed supports the finding** that Defendant is entitled to judgment as a matter of law." (*Id.* at p. 5.)

Accordingly, the Probate Court concluded that the language of both the 1912 Deed of Trust and the 1912 Club Deed

> shows the Grantor's intention that the Club's members have all the privileges inherent in the Club's ownership rights. The Clifton Park Land and Improvement Company made such an express intention when it covenanted with the Club in the Club Deed to deliver to a board of trustees all land reserved for park purposes in the allotment, so that the trustees might hold said property for the use and benefit of persons owning lots in said allotment. . . .

(*Id.* at p. 7.)

C. The Club's Right to Use the Beach Necessarily Means That the Individual Members of the Club Could Exercise That Right.

1. The Reasoning of the Probate Court

The Probate Court further concluded that, if the CPLIC intended to allow the Club, an incorporated social club, to have such Beach usage (as the above-described provisions of both the Deed of Trust and the Club Deed clearly demonstrated), the CPLIC must have further

intended that that right and privilege would include usage by the flesh-and-blood members of the Club, since that was the only means by which the Club's right of usage could become a reality. Otherwise, the right of usage "in common with other owners of the land" conveyed to the Club would have been meaningless. Stated the Probate Court:

> It is illogical to reason that the Club, as a lot owner, has a right to use common land deeded to it, but that its members would not also have this privilege. What is a club without its members? A building, a simple structure, cannot enjoy a beach. People can. And for what reason would someone be a Club member if they could not enjoy the legal benefits provided to the club; in fact, that is the only reason a person would become a member.

(Journal Entry, Nov. 10, 2015, at p. 8.)

The Probate Court therefore concluded that the argument made by Plaintiffs in their brief in opposition to the Trustees' motion for summary judgment (namely, that "although the Club might be a lot owner and therefore a beneficiary of the Trust Deed, its members who are not sublot owners have no legal right to use Trust property") was "disingenuous and simply cannot stand. If this were so, then some members of the Club would be allowed access to the beach and other members would not. There is simply no such restrictive language found in the well-drafted Trust Deed or Club Deed." (*Id.* at pp. 8-9.)

The Probate Court then pointed out that the CPLIC

> chose with great care the descriptive terms to be included in this document [the Trust Deed]. **Though it would have been very simple for this Grantor to mandate that access to Trust property be a privilege enjoyed only by resident lot owners, the fact remains that no such restriction exists.** The Grantor chose the term "lot owner" over "resident" to describe which persons were to have access to Trust property, and this Court cannot overlook this distinction, especially when it is abundantly clear that the Grantor knew the term "resident" and chose to use it elsewhere in the same document [when the Grantor stated that the five trustees must be "at all times owners of land and residents in the Clifton Park allotment."]

(*Id.* at p. 9.)

In other words, if the Grantor had intended that usage of the Beach and other trust property was to be limited to persons who were "residents" of Clifton Park, the Grantor could have easily said so, just as the Grantor had specified that only "residents" of Clifton Park could be trustees.

The Court also took note of the "fact that the Clifton Club is located in the same allotment as all of the other lot owners, including the Plaintiffs." That fact, stated the Probate Court,

> supports the conclusion that the Clifton Park Land and Improvement Company desired for Club members to have access to the Trust property, including the beach, when it deeded four sublots in said allotment to the Club. The Clifton Club was already in existence at the time it became owner of the said four sublots in the Clifton Park allotment, having leased those lost since 1902 for the purpose of a social club.

(Journal Entry, Nov. 10, 2015, at p. 9.)

The Court therefore determined that it would be "nonsensical to believe that the Grantor would have conveyed these lots to the Club without intending its members to have access to park spaces, especially a beach, within this allotment." (*Ibid.*) Accordingly, the Court concluded that,

> as a lot owner, the Clifton Club Company is 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 Trust property,** including the beach, subject to the regulations and restriction as set forth in the Trust Deed and Club Deed.

(*Ibid.*)

2. <u>Supporting Case Law</u>

These conclusions by the Probate Court are supported by a number of reported cases that hold that the rights of a corporation (or an association) to enjoy and use the

corporation's or association's property necessarily devolve upon the corporation's (or association's) individual members. See, for example, *Raulston v. Everett,* 561 S.W.2d 635 (Tex. 1978), which involved an incorporated grazing association that had been formed for purposes of purchasing and holding grazing lands for the joint use of its members. The Texas Court of Civil Appeals declared that a membership corporation, "although a corporate entity, is in other respects similar to an unincorporated association," citing cases from some ten different jurisdictions. Hence, a "member of such an organization acquires not a severable right to any of its property or funds, but merely a **right to the joint use and enjoyment thereof** so long as he continues to be a member. 7 C.J.S. Associations s 27b, p. 70." *Id.* at 638.

See also Bogert, *The Law of Trusts and Trustees, Trusts and Estates,* § 16, stating that "[a] corporation is the creature of its stockholders and it holds its property in trust for them. As between themselves and the corporation, the stockholders are the beneficial owners of the property held by the corporation."

The fact that usage by the **members** of a corporate entity (i.e., a corporation or an association) is the same as usage by the entity itself is further evidenced by the analogous case of *Saunders Point Association, Inc. v. Cannon,* 177 Conn. 413, 418 A.2d 70 (1979). In that case, an incorporated club (Oswegatchie Hills Club, Inc.) claimed that it had obtained a prescriptive right (i.e., an easement) over a beach area on the Niantic River, which beach area was owned by the defendants. The trial court found that the members of the club had used the beach in question since 1940 in the belief that they had the right to do so. That belief "derived from their membership and participation in the Oswegatchie Hills Club, Inc. and was not a right which they had as individuals or by reason of mere residence. [In addition, for years] the club paid teenagers to rake the beach." The Connecticut Supreme Court held that the use of the beach by members of the Club constituted acts "done by the club and not independent acts done by

members in their individual capacity." Hence, use of the beach by individual members constituted use by the Club itself.

Similarly, the right given to The Clifton Club (in the 1912 Club Deed) to use the Beach and other park properties of the Clifton Park allotment necessarily meant that the individual members of the Club could exercise that right of usage, since their usage of the Beach would be deemed to be usage by the Club.

See also *McCullough v. Waterfront Park Association, Inc.,* Conn. Super. No. CV-91-0047677-S, 1992 WL 24332 (Jan. 30, 1992), holding, at *13, that the defendant Waterfront Park Associates "had proven by a preponderance of the evidence "that the Association **and its members** had acquired a prescriptive easement to engage in [certain] activities"; and *Newell Rod and Gun Club v. Baver,* 419 Pa. Super. 75, 597 A.2d 667 (1991), where the plaintiff claimed that it had acquired title, through adverse possession, to an abandoned railroad bed that the Club's members had used as a roadway. The Pennsylvania courts held that the Club was entitled to a prescriptive easement with respect to the roadway because "several members of the Club used the road on a regular basis and provided substantial improvements to the road for almost a fifty-year period." This, then, was another case in which the courts deemed usage by "several members of a club" to be usage by the club.

Finally, it should be noted that **Plaintiffs have themselves acknowledged** that the Club Deed gave the members of The Clifton Club the right to use the Beach. Thus, in paragraph (c) of the prayer of their First Amended Complaint, Plaintiffs ask this Court to declare that "the provision of The Clifton Club Deed, dated July 1, 1912, **allowing use of the Trust property by Members of The Clifton Club who are not sublot owners (including the Beach)** * * * is null and void." (FAC, at p. 24.)

D. The Relief Sought by Plaintiffs in This Action Would Violate Ohio Law.

In addition to violating the terms of the Deed of Trust and the Club Deed, the relief sought by Plaintiffs would also violate Ohio law. As pointed out earlier in this Brief (see page 6 above), the Deed of Trust specifically provided that the **issuance of regulations** with respect to the use of the Trust property was to be **the province of the Trustees**. Thus, in the section of the Deed of Trust that is headed "Duties of Trustees," the Deed specifically stated that the Trustees "shall **establish regulations** for the use of private roads, lanes, parks and bathing pavilions" and "generally maintain all of said property in good order and condition." (Deed of Trust, at p. 4.)

The existence of the provision authorizing the Trustees to "establish regulations" with respect to "the use" of the various Trust properties has at least two consequences under Ohio law.

First, this provision gave the Trustees broad discretion as to what regulations they might "establish." As stated in 91 Ohio Jur. 3d 458, *Trusts*, § 379,

> a trustee, in carrying the trust into execution, is not confined to the very letter of its provisions. A trustee has authority to adopt measures and do acts, which though not specified in the instrument, are implied in its general directions and are reasonable and proper for making them effectual.

The second consequence is that the existence of this provision in the Deed of Trust precludes a **court** from now stepping in and prescribing **its own regulations** with respect to usage of the trust property—which is what Plaintiffs were asking the Probate Court to do. See, in this regard, *Hopkins v. Cleveland Trust Co.,* 163 Ohio St. 539, 548, 127 N.E.2d 385 (1955), where the Ohio Supreme Court declared:

> So long as a trustee acts in good faith and within the limits of sound execution of the trust vested in him, a court of equity will

> not undertake to substitute its discretion for that of the trustee, or interfere with that discretion.

Moreover, it was now far too late for Plaintiffs to ask the Probate Court to rescind the rules and regulations that the Trustees have adopted, and the approach that the Trustees have taken, over many decades with respect to Club members, which has been to allow members of the Clifton Club to use the Beach (although subject at times to a numerical cap).

Therefore, to the extent that Plaintiffs now challenge the validity of what the Trustees have done in the past (such as entering into agreements with the Club with respect to Club members' usage of the Beach, requiring the Club to make large annual payments because of the Club members' usage, etc.), Plaintiffs must be held to have ratified those agreements and to have waived any right to challenge the Trustees' handling of that situation. *See, e.g.*, *Harbor Land Co. v. Village of Fairport,* 23 Ohio Law Abs. 44, 49 N.E.2d 194 (7th Dist. 1936) ("[In light of] the fact that no other action was taken by the other interested parties to nullify this act of the trustee, an inference may be properly drawn that he [the trustee] acted by virtue of authority."); *Hopkins v. Cleveland Trust Co.,* 163 Ohio St. 539, 548, 127 N.E.2d 385 (1955) ("[I]t is a well-established principle of law that a *sui juris* beneficiary or co-trustee who consents to, confirms or acquiesces in a claimed breach of trust" is "estopped to claim a breach of trust growing out of the action of the trustee in that regard."); *Estate of Winograd,* 65 Ohio App. 3d 76, 80, 582 N.E.2d 1047 (8th Dist. 1989) (affirming a finding that the beneficiaries' "inaction for so many years acted as a ratification of [the trustee's] conduct and thereby estopped them from complaining at this juncture").

E. Plaintiffs' Arguments Are Contrary to Law.

None of the arguments advanced in Plaintiffs' Brief negate the conclusion that defendant Trustees were entitled to a judgment in their favor as a matter of law. Indeed, those arguments by Plaintiffs are either contrary to law or simply irrelevant.

1. Whether Individual Club Members Are Beneficiaries of the Trust Is Not an Issue in This Case.

Thus, Plaintiffs' first argument is that the defendant Trustees were not entitled to a judgment because the Probate Court "did not find that the Club Members were beneficiaries of the Trust." (Br. of Appellants, at p. 5.)

Whether individual Club members are themselves beneficiaries of the Trust, however, has never been an issue in this case. Defendant Trustees have never made such an argument. Rather, the position consistently taken by the Trustees is that the issue in this case is whether the Club members had **a right to use the Beach,** given the fact that **the Club itself** is a beneficiary of the Trust and clearly has a right to use all of the Trust property. The Probate Court agreed with the Trustees' position.

2. Plaintiffs' Erroneous Argument That the Probate Court Should Not Have Considered the Club Deed

Plaintiffs also argue that the provisions of the Club Deed should not have been considered by the Probate Court when adjudicating the Trustees' summary judgment motion. That argument, however, ignores the fact that Plaintiffs, in their First Amended Complaint, **specifically asked** the Probate Court to declare "null and void" the provision of the Club Deed "allowing use of the Trust property by members of the Clifton Club." (Journal Entry, Nov. 10, 2015, at p. 3.) Hence, it was entirely proper for the Probate Court to consider the provisions of the Club Deed when determining whether summary judgment should be entered with respect to Plaintiffs' claims. Stated the Probate Court: "In conjunction with the Trust Deed, **this Court is**

required to examine [the Club Deed], as Plaintiffs' Complaint requests this Court to declare null and void certain provisions within the Club Deed." (*Id.* at p. 2.)

In any event, the Probate Court made clear that it did not need to consider the Club Deed to justify its determination as to the rights of the Club and, by extension, Club members to use the Beach: "The Court further finds that while the Trust Deed stands on its own to justify this Court's determination, a reading of the July 1, 1912 Club Deed supports the finding that Defendant is entitled to judgment as a matter of law." (*Id.* at p. 5.)

3. Whether the CPLIC, After Having Conveyed the Beach and Other Park Property to the Trustees in March, 1912, Had Authority to Grant to the Clifton Club, in July, 1912, the Right to Use Those Properties

Plaintiffs also argue that the July, 1912 deed of four lots to the Clifton Club should not be deemed to have conferred on the Club any right to use trust property, notwithstanding the express language of the Club Deed, discussed above at pages 9-10, because, three months earlier (in March, 1912), the CPLIC had conveyed to the trustees all of the CPLIC's ownership rights in the trust property. In other words (according to Plaintiffs), "[b]ecause CPLIC did not own an interest in the Trust property at the time of the Club Deed, it could not grant Club members a right to use that property which was conveyed in the Trust Deed." (Br. of Appellants, at p. 26.)

That argument, however, was rejected by the Probate Court, and correctly so, as being "circular in its logic." (Journal Entry, Nov. 10, 2015, at p. 6.) The Court pointed out that the Grantor (CPLIC)

> conveyed land to the trustees in the Trust Deed "to hold title to and preserve all the land deeded to them for the common use of all the lot owners in the Clifton Park allotment, and their successors in title, and members of their households." As the Clifton Park Land and Improvement Company was the owner of the four sublots eventually deeded to the Clifton Club Company at the time the

> Trust Deed was executed, **the Company obtained rights to Trust property by virtue of the Trust Deed.**

(*Id.* at pp. 6-7.) And since the Clifton Club Company was "the successor in title to the Clifton Park Land and Improvement Company, it therefore has a right of use consistent with the Trust Deed." (*Id.* at p. 7.)

Furthermore, stated the Probate Court, Plaintiffs' argument

> is faulty in its logic, as there were inevitably other sublots which had not yet been sold by the Clifton Park Land and Improvement Company at the time the Trust Deed was executed in 1912. Plaintiffs cannot argue that purchasers of these other sublots sold after 1912 are able to claim rights to Trust property under the Trust Deed while the Clifton Club cannot.

(*Ibid.*)

4. <u>The Irrelevance of Opinions Expressed by Prior Trustees</u>

Plaintiffs also argue that the Probate Court should have considered, and given weight to, evidence that, "throughout the history of the trust's administration," certain individuals, including persons who were then trustees, expressed opinions that were "inconsistent with Club members having the right to use Trust property by virtue of their Club membership." (Br. of Appellants, at p. 30.) "Such evidence," say Plaintiffs, "is relevant in interpreting an ambiguous trust." (*Ibid.*)

Ohio law, however is clear that any such evidence is **irrelevant** in this case, since any such opinions stated from time to time over the decades shed no light whatever on the intent of the original grantor (the CPLIC) back in 1912. Ohio law is clear that, in situations where a written instrument is ambiguous, extrinsic evidence is admissible **only** to the extent that it might elucidate the settlor's intent. *See Oliver v. Bank One, Dayton, N.A.*, 60 Ohio St. 3d 32, 34, 573 N.E.2d 55 (1991) ("The court may consider extrinsic evidence **to determine the testator's intention** only when the language used in the will creates doubt as to the meaning of the will."

(emphasis added)); *Steinglass v. Steinglass*, 8th Dist. Cuyahoga No. 97515, 2012-Ohio-1647, ¶ 1 ("Only when the express language of the instrument creates doubt as to its meaning may the court consider extrinsic evidence **to determine the testator's intent**." (emphasis added)).

An illustrative case in this regard is *Woodward v. Ameritrust Co.*, 751 F.2d 157 (6th Cir. 1984). In a dispute over the construction of language contained in a trust, the appellant asked the court to consider the actions of the trustee and of a prior beneficiary's attorney as indicating the views of those individuals on the effectiveness of a disputed amendment to the trust. The Sixth Circuit held that no extrinsic evidence was admissible because the trust language was unambiguous regarding the amendment process. *Id.* at 160-161. The Court further concluded that the particular extrinsic evidence proffered by the appellant would not be probative in any event because such evidence would merely tend to show what the trustee and the prior beneficiary's attorney believed the trust to require, not what the settlor intended. *Ibid.*

See also *Wooster Rubber Co. v. C.I.R.*, 189 F.2d 878, 886-87 (6th Cir. 1951), which held that the interpretation by the Commissioner of Internal Revenue of a trust provision was "of no evidentiary value in establishing the intention of the settlor of the trust, for [the commissioner] was not a party to the transaction."

Similarly, in this case, evidence as to what a former trustee, a Club representative or another beneficiary believed, at a particular point in time, to be the Club's and its members' rights of Beach usage under the terms of the Trust has no bearing on what the CPLIC intended by the language it used in the Deed of Trust or in the Club Deed.

F. Plaintiffs' Attempt to Obfuscate the Nature of their Claim

As pointed out by the Probate Court on page 3 of its November 10, 2015 Journal Entry, Plaintiffs' First Amended Complaint (filed on April 25, 2013) requested the Court to enter a declaratory judgment that declared the following:

> 1) That Members of the Clifton Club **who are not sublot owners** are not beneficiaries under the Deed of Trust;
>
> 2) That Members of the Clifton Club **who are not sublot owners** have no legal right to use Trust property (including the beach); and
>
> 3) That the provision of the Clifton Club Deed dated July 1, 1912, allowing use of Trust property by the Members of the Clifton Club **who are not sublot owners** (including the beach) in contradiction to the then-existing Deed of Trust is null and void.

Accordingly, the principal thrust of the brief filed by Plaintiffs in the court below, in opposition to the Trustees' Motion for Summary Judgment, was that **individual** Clifton Club members who are **not** themselves "sublot owners" or "residents" of Clifton Park do not have any right to use the Beach, an assertion that Plaintiffs made repeatedly in their brief.

The Probate Court therefore concluded (from a reading of Plaintiffs' Brief) that "the principal issue in this case is whether members of the Clifton Club Company who are **non-residents** of the Clifton Park allotment have a right to use property deeded to the Trustees in the Trust Deed, including a beach located on Trust property." (Journal Entry, Nov. 10, 2015, at p. 3.) As pointed out above, the Probate Court then rejected Plaintiffs' position, finding that

> although Plaintiffs espouse a view that the Trust Deed allows only **resident** lot owners of the Clifton Park allotment to benefit from its terms, a plain reading of the Trust Deed can produce no such result.

(*Id.* at p. 4.) To the contrary, the Probate Court concluded that it was

> evident from the plain language of the Trust Deed that the Grantor was aware of the difference between "residents" and "lot owners" when drafting this instrument, as the Grantor expressly imposed as a condition of service **on the trustees** that they be "***owners of land and residents*** in the Clifton Park Allotment." (Emphasis added.) No such requirement of residency is made anywhere else in the Trust Deed. The trustees are instead obligated with a duty to "maintain all of said property in good order and condition for the use of ***lot owners*** in said allotment. . . ." (Emphasis added.) By virtue of its ownership of four sublots, therefore, the Clifton Club may enjoy the same privileges and access to the land deeded to the

> trustees for the common use of all lot owners in the Clifton Park allotment including the beach.

(*Id.* at p. 5.)

Presumably because the Probate Court so persuasively articulated the lack of any support in the Deed of Trust for the distinction that Plaintiffs have attempted to draw between "resident" and "non-resident" Club members, Plaintiffs, in the Brief that they have filed in this Court, have now attempted to restate their claim so as to eliminate that distinction. Thus, at page 4 of their Brief, Plaintiffs assert that they

> asked the Trial Court to issue three declarations: (1) that **the Club Members** are not beneficiaries to the Trust, (2) that **the Club Members** do not have a legal right to use Trust, and (3) to the extent that the Club claimed that the Club's July 1, 1912 Deed ("Club Deed") granted **Club Members** a right to use the Trust property, any such grant was null and void.

Similarly at page 16 of that Brief, Plaintiffs state that they asked the Probate Court to resolve "two fundamental questions. (1) "Whether **the Club Members** are beneficiaries of the Trust and (2) whether **the Club Members** have a right to use the Trust property." (Br. of Appellants, at p. 16.)

In short, gone now is any distinction between members "who are not sublot owners" and members who are, even though that distinction permeated Plaintiffs' pleadings and briefs in the Court below.

G. Plaintiffs' Claims Are Barred by the Statute of Limitations.

Although not discussed by the Probate Court, a further reason supporting defendant Trustees' entitlement to a summary judgment in this case is that Plaintiffs' claims are barred by the statute of limitations.

R.C. § 2305.14 states that "an action for relief not provided for in Sections 2305.04 to 2305.131 and Section 1304.51 of the Revised Code shall be brought within ten years

after the cause thereof accrued." The instant case—wherein Plaintiffs asked the Probate Court to declare "null and void" a provision of the 1912 Club Deed and to declare that neither that deed nor the Trust Deed allows the Trustees to permit usage of the Beach by members of the Club who do not personally own sublots in the Clifton Park allotment—is such an action. *See, e.g., Woodworth v. Banning,* 29 Ohio App. 81, 163 N.E. 60 (1st Dist. 1928) (holding a plaintiff's action to have a deed be declared "null and void" was "an action for equitable relief" and therefore subject to the ten-year limitation imposed by G.C. 11227 (now R.C. § 2305.14)); *Timmons v. Timmons,* 4th Dist. Pickaway No. 98-CA-25, 1999 WL 911 (Dec. 22, 1998) (holding that an action that is equitable in nature must be instituted within ten years after the cause of action accrued); *Lusardo v. Broadview Savings & Loan Co.,* 8th Dist. Cuyahoga No. 58147, 1991 WL 34856 (Mar. 14, 1991) (holding that a "claim for the equitable remedy of cancellation is subject to the ten-year statute of limitations provided in R.C. 2305.14"); and *Kroeger v. Standard Oil Co. of Ohio, Inc.,* 12th Dist. Clermont Nos. CA 88-11-086 and CA 88-11-087, 1989 WL 87837 (Aug. 7, 1989) ("Generally, the ten-year statute of limitations is applied to equitable actions.").

In the instant case, Plaintiffs' claim that provisions of the Club Deed were "null and void" accrued when that deed was recorded, i.e., on March 27, 1912. Therefore, the statute of limitations "ran" on March 27, 1922.

Similarly, the claim by Plaintiffs that the Trustees breached their duties under the trust when they allowed members of the Club who did not personally own sublots in the Clifton Park allotment to use the Beach expired years ago, the Probate Court having found that all members of the Club have used the Beach since at least 1912. (Journal Entry, Nov. 10, 2015, at p. 3.) *See State ex rel. Lien v. House*, 144 Ohio St. 238, 58 N.E.2d 675 (1944) ("[S]ince this action is based upon an **alleged breach of trust** on the part of the defendants, it is one for the 'an

injury to the rights of the Plaintiff not arising on contract nor hereinafter enumerated' and is governed by Section 11224, General Code [now R.C. 2305.09].").

See *Cundall v. U.S. Bank, Trustee,* 122 Ohio St. 3d 188, 2009-Ohio-2523, 909 N.E.2d 1244 (2009), where the Supreme Court stated (in ¶ 28):

> As Professor Bogert explains, "[i]f the trustee violates one or more of his obligations to the beneficiary * * *, there obviously is a cause of action in favor of the beneficiary and *any relevant Statute of Limitations will apply from the date when the beneficiary knew of the breach or repudiation,* or by the exercise of reasonable skill and diligence could have learned of it." (Footnotes omitted and emphasis added.) George Gleason Bogert, The Law of Trusts and Trustees (2d Ed.Rev. 1995) 630-634, Section 951.

Hence, there can be no question but that Plaintiffs' claims for equitable relief—namely, an order preventing certain members of the Club from using the Beach—have long since been barred by the Ohio statute of limitations.

II. THE PROBATE COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO REMOVE THE CURRENT TRUSTEES.

Plaintiffs' second assignment of error is that the Probate Court "abused its discretion" when, on August 24, 2015, it denied Plaintiffs' Motion to Remove the Clifton Park Trustees. In that Motion, Plaintiffs contended that the current trustees had "committed a serious breach of trust" within the meaning of Ohio R.C. § 5807.06(A).

However, the Ohio courts have repeatedly stated that the "removal of a trustee is generally considered a drastic action and the party seeking to remove a trustee must show a basis for removal by **clear and convincing evidence.** *Diemert v. Diemert,* 8th Dist. No. 82577, 2003-Ohio-6496, 2003 WL 22862810, ¶ 11-16." *Tomazic v. Rapoport,* 2012-Ohio-4402, 977 N.E. 2d 1068, ¶ 33 (8th Dist.). *Accord Manchester v. Cleveland Trust Co.,* 84 Ohio Law Abs. 321, 168 N.E.2d 745 (8th Dist. 1960). See also *In re Estate of Bost,* 10 Ohio App. 3d 147, 149, 460 N.E.2d 1156 (1983), where this Court quoted the following rule:

> "The removal of a trustee is a drastic action which should only be taken when the estate is actually endangered and intervention is **necessary to save trust property**." [citations omitted]

No such situation occurred here. Plaintiffs based their Motion to Remove on two purported grounds: (1) that the Trustees breached a duty of impartiality by "taking sides" in this litigation, and (2) that the Trustees breached their fiduciary duty by being uncooperative in discovery. Neither of those claimed reasons had any legal or factual merit, let alone constituted the "serious breach of trust" that Ohio law requires before removal can be ordered.

A. Plaintiffs' Assertion That the Trustees Breached Their "Duty of Impartiality" Is Contrary to Law.

In arguing that the Trustees breached a duty of "impartiality," Plaintiffs quote the statement in R.C. § 5808.03 that "[i]f a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests." (Br. of Appellants, at p. 33.) Plaintiffs then cite cases from other jurisdictions that say that "in a dispute between two parties claiming to be beneficiaries, a trustee may not advocate for either side or assume the validity of either side's position." *Matter of Duke,* 702 A.2d 1008, 1024 (N.J. Super. 1995); *In re Cudahy,* 131 N.W.2d 882 (Wis. 1965); *Northern Trust Co. v. Heuer,* 560 N.E.2d 961 (Ill. App. 1990); *Shelton v. Tamposi,* 62 A.3d 741 (N.H. 2013); and *State ex rel. Strykowski v. Wilkie,* 261 N.W.2d 434 (Wis. 1978).

That, however, is **not** what the Trustees did in the instant case. The Trustees did **not** "take sides" in a "dispute between beneficiaries." Rather, the Trustees opposed a lawsuit that sought to override—or, at a minimum, circumvent—express provisions of the Deed of Trust carefully drafted by the CPLIC back in 1912, that the Trustees had a legal duty to **defend and uphold.** The first of those express provisions was the provision that obligated the Trustees to "preserve all the land deeded to them for the common use of **all the lot owners** in the Clifton

Park Allotment." The second was the provision that stated that the Trustees "shall **establish regulations** for the use of private roads, lanes, parks and bathing pavilions." Under settled rules of law, the Trustees had an **obligation to defend those provisions of the Deed of Trust** and to **oppose** the efforts of the six Plaintiffs to override them. See Bogert, *The Law of Trusts and Trustees (3d Ed.)*, § 581, which states:

> Equity imposes upon the trustee the **duty of defending the integrity of the trust,** if he has reasonable ground for believing the attack is unjustified or if he is reasonably in doubt on that subject.

To the same effect is Ohio R.C. § 5808.16(N), which states that a trustee may "pay or **contest** any claim * * * against the trust." This means that, once the Plaintiffs filed this lawsuit, the Trustees had a statutory duty to **resist** Plaintiffs' demand that the Trustees **cease** "establishing regulations" for the usage of the Beach and allow the Trust to be governed instead by **new** "regulations" written by a small group of beneficiaries (the six Plaintiffs and their allies), or by a court. In short, under the law, the Trustees could not "stand neutral" in the face of Plaintiffs' attack on those provisions of the Trust.

This distinction between (a) the duty of a trustee when a lawsuit is filed that seeks to alter or set aside the express provisions of a trust prescribed by the settlor and (b) a trustee's role in a lawsuit that is simply a dispute between opposing sets of beneficiaries, was clearly delineated by the Court of Appeals for the Second District in *In re Estate of Dawson,* 117 Ohio App. 3d 51, 689 N.E.2d 1008 (2nd Dist. 1996). Stated the Court of Appeals in that case:

> We agree that in general a fiduciary should remain neutral in disputes between beneficiaries. However, where, as here, the testamentary purposes of the decedent are manifest in a validly executed will, the fiduciary has a responsibility to make reasonable efforts to carry out those purposes.

This statement by the Second District accurately describes the Trustees' obligations in the instant case. Just as in the *Dawson* case, the defendant Trustees had "a

responsibility to make reasonable efforts to carry out [the trust] purposes." They could only do so by opposing Plaintiffs' attempts to override those purposes.

To the same effect is *State ex rel. Strykowski v. Wilkie,* 261 N.W.2d 434 (Wis. 1987), a case cited by Plaintiffs wherein, the Wisconsin Supreme Court explained its earlier holding (in *In re Cudahy*, 131 N.W.2d 882, also cited by Plaintiffs) that "a trustee must not assume the advocacy of one of several rival claimants to a private trust." The Wisconsin Court pointed out that the latter rule "is ordinarily applied when the trustee stands as a **stakeholder** for rival claimants to the same trust benefits;" however, that rule "**does not apply** where the trustee reasonably determines that the claim is adverse to the trust." *Id.* at 447. The latter situation, of course, is what we have in the instant case.

See also 91 Ohio Jur. 3d, *Trusts*, § 366, stating that "[w]here the trustee's administration of a trust is challenged, **it is the trustee's duty to defend against such claims,"** and that, in doing so, the "trustee is realizing the settlor's purpose."

Hence, contrary to the Plaintiffs' assertion, the Trustees have **not** favored the Club over "resident" beneficiaries. Rather, the Trustees have only done what the law required them to do: they have opposed an attempt by a small dissident group of beneficiaries to override provisions of the Trust that confer on the Trustees the duty (and the authority) to regulate the usage of the Beach and to preserve such property "for the common use of **all** the lot owners in the Clifton Park Allotment."

B. Plaintiffs' Assertion That the Trustees Have "Breached Their Fiduciary Duties by Denying the Beneficiaries Access to Trust Documents and Information" Is Totally False.

The second "ground" asserted by Plaintiffs in support of their Motion for Removal was that the defendant Trustees, in the course of discovery in this lawsuit, "refused to produce **original** documents for inspection," rather than copies, and certain documents that the

trustees claimed to be privileged, and Plaintiffs were then "forced to file a motion to compel." (Br. of Appellants, at p. 36.) There were several flaws in this assertion.

First of all, as shown by Exhibit 9 attached to Plaintiffs' Motion to Remove and by the Probate Court's Journal Entry of August 24, 2015, the Trustees, in response to Plaintiffs' discovery requests, produced "more than 12,000 pages of material." However, the Plaintiffs then insisted that the Trustees produce, for inspection by Plaintiffs, the **originals** of those twelve thousand pages. When the Trustees insisted that this would be unduly burdensome, Plaintiffs filed a Motion to Compel. In addition, Plaintiffs sought to compel production of eight documents that the Trustees (and their attorneys) contended were privileged, being attorney-client communications. That Motion to Compel was still pending when Plaintiffs filed their Motion to Have the Current Trustees Removed. Ultimately, on August 24, 2015, the Probate Court held that only three of the eight documents needed to be produced. The Court also ruled that the originals of all documents should be produced for inspection, but only on condition that Plaintiffs "bear all costs associated with defendants' production of those originals"—and Plaintiffs elected not to do so.

Significantly, Plaintiffs have failed to cite a single case from any jurisdiction in which a court has removed a trustee because the trustee refused to produce, in the course of litigation, documents that constituted privileged communications between a trustee and the trustee's attorneys. Indeed, Plaintiffs have failed to cite a single case in which a court has ever removed a trustee because of failure to produce **unprivileged** documents.

Plaintiffs also assert that the defendant Trustees breached a duty to "keep the current beneficiaries of the trust reasonably informed about the administration of the trust" by failing to inform "the resident lot owners" of a letter that the Trustees received from the Clifton Club on or about December 1, 2011. According to Plaintiffs, that letter constituted a "threat

from the Club to claim a breach of fiduciary duty if the Trustees instituted Beach regulations that applied to Club Members only." (Br. of Appellants, at p. 37.) However, a reading of that letter—a copy of which was attached to Plaintiffs' Motion to Remove as Exhibit 3—demonstrates that it contained no threat of any kind. To the contrary, that letter from the Club stated that the Club was "ready, willing and able to work with [the Trustees] on a cooperative basis to deal with the underlying issues and [is] open to discussing all options, including a voluntary reduction of our membership." Hence, Plaintiffs' assertion that the Trustees failed to disclose to beneficiaries of the Trust a "threat" by the Club is patently fallacious.

III. THE PROBATE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFFS' MOTION FOR ATTORNEY FEES.

Plaintiffs' third (and final) assignment of error is that the Probate Court abused its discretion when, on August 24, 2015, it denied the Motion for Attorney Fees that Plaintiffs filed on June 25, 2015. The latter Motion, however, was contrary to law in a number of respects.

To begin with, Plaintiffs claimed that they were entitled to attorney fees under Ohio R.C. § 5810.04, which states that, in a "judicial proceeding involving the administration of a trust," the court, "as justice and equity may require," may award costs and reasonable attorney fees to any party "from the trust that is the subject of the controversy." However, at page 15 of the Brief that they filed in support of their Motion, Plaintiffs expressly acknowledged that a "key factor in determining whether the beneficiary is entitled to its attorney fees is whether the beneficiary is successful." As of the date of their Motion (June 25, 2015), Plaintiffs had **not** been successful. To the contrary, in the Journal Entry that the Probate Court filed on November 10, 2015, granting the Trustees' Motion for Summary Judgment and holding that "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," the

Court expressly found that the litigation filed by the Plaintiffs "**did not benefit the trust**," hence, "Plaintiffs should be responsible for paying their own attorney fees and Court costs." (Journal Entry, Nov. 10, 2015, at p. 10.) It is therefore manifest that the Probate Court did not err when, on August 24, 2015, it denied Plaintiffs' Motion for Attorney Fees.

As for Plaintiffs' assertion that an award of attorney fees was "warranted" because the Trustees "took sides in favor of one beneficiary against all other beneficiaries" (Br. of Appellants, at p. 37), this is the same fallacious argument that Plaintiffs made in support of their Motion to Remove. As pointed out above at pages 25-27, in opposing the position taken by Plaintiffs the Trustees were simply carrying out their statutory duty to defend and uphold provisions of the Trust.

CONCLUSION

For the reasons set forth above, all of Plaintiffs' assignments of error should be overruled and the judgment entered by the Probate Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellee Trustees of The Clifton Park Trust has been filed this 9th day of May, 2016, and served by the Court's electronic filing system upon all counsel of record, and by U.S. mail upon the following unrepresented interested-party defendants-appellees:

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