

COURT OF APPEALS  
EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO

ARTHUR P. DUECK, et. al. )  
 )  
 ) Plaintiffs/Appellants, )  
 )  
 vs. ) Civil Appeal from Cuyahoga County  
 ) Court of Common Pleas, Probate Division  
 ) Case No. 2012 ADV 179424  
 )  
 ) THE CLIFTON CLUB CO., et al. )  
 )  
 ) Defendants/Appellees. )

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**REPLY BRIEF OF APPELLANT DENNIS F. BUTLER**

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## INTRODUCTION

The Trustees'<sup>1</sup> continued illogical arguments<sup>2</sup> and false claims do not support affirming the Trial Court. As more fully set forth below, the Trustees misrepresentation of the Plaintiffs' lawsuit as an attempt to completely exclude the Club Members as Beach users is simply false. In fact, the Plaintiffs are defending the Trust and opposing the Trustees' reckless abandonment of the foundational principles guiding a century of successful Trust management as they support the Club's new claims of universal beneficial rights for all Club Members. The Trustees' arguments to reinterpret the Trust to include a right to use Trust Property for all Club Members defy logic and common sense and are unsupportable under the Trust's plain language. If that revision of the Trust beneficiary definition prevails, the Clifton Park community's benefit under the Trust would become a liability which the lot owners would unfortunately be forced to try to terminate. Additionally, the unspun facts show that the Trustees breached their duty of impartiality and duty to furnish information to the beneficiaries of the Trust before and during this litigation. For these reasons, the Court should reverse the Trial Court's grant of summary judgment and denial of the Plaintiffs' Motion to Remove the Trustees and Motion for Attorney's Fees.

## ARGUMENT

### **I. This Case Is Not About Prohibiting Club Members Use of the Beach; the Plaintiffs Brought This Case to Protect the Trust and Rights of All Lot Owners.**

The Trustees have repeatedly made the false statement that Plaintiffs filed this lawsuit to prevent the Club Members from using the Beach, with the disparaging implication that the Plaintiffs selfishly want the Beach all to themselves. That demeaning falsehood illustrates the Trustees' violation of their duty of impartiality, and duty to faithfully and honestly represent the Trust rather than zealously advocate for the Club's business interests. This created an irreconcilable conflict between their fiduciary duties and their partisan advocacy. Contrary to the Trustees' false claims, the Plaintiffs initiated this lawsuit **to protect** a foundational (and

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<sup>1</sup> All capitalized terms have the same meaning as used in the Appellants' Opening Brief unless noted otherwise herein.

<sup>2</sup> Because the Club's Brief incorporates the arguments of the Trustees, any reference herein to the "Trustees' arguments" is a combined response to the Club and the Trustees.

indispensable) principle of the Trust that only sub-lot owners within Clifton Park and members of their households are beneficiaries with a right to use Trust Property. That original interpretation permeates the entire available seventy-plus year recorded history of Trust administration, summarized in the Trial Court record.<sup>3</sup> This principle is demonstrated by a 1940s agreement, ratified by the Club and the lot owner beneficiaries, that allowed Club Members permissive access to the Beach provided that the Club paid an annual user fee. [10/15/2015 McElfresh Aff. Ex. 9 at CliftonClub 1841-42, Ex. 13 at 1883, Ex. 14 at CPT 12265, Ex. 18, at 2.] Both parties retained the right to end that agreement unilaterally at any time.

In 2011, the Trustees abandoned the principle that Club Members had no beneficial rights. When several lot owners questioned the Trustees in December 2011 regarding Club Member's rights, they answered that Club Members had full rights to use the Beach **under** the Trust and stated they did not know if they could limit them. [10/31/2014 Mot. to Remove Ex. 2 at ¶ 6.] The Trustees previously had considered changes that would have limited the Club Members' use, as they were required to do since they hold Trust Property for the benefit of lot owners not Club Members. But based on their claimed recent "discovery" of the Club Lease, they shifted their position and stated that every Club Member had the full right to use the Beach equal to any lot owner. [10/15/2015 McElfresh Aff. Ex. 50] Later discovery revealed that on or around December 1, 2011, the Club responded to previously proposed rule changes by claiming that such changes disparately impacted the Club Members, and would damage the Club financially. The Club wrote that the Trustees "breached their fiduciary responsibility to represent all Beach members fairly and without discrimination." (10/31/2014 Mot. to Remove, Ex. 3.) The Trustees' current claim that the Club did not make accusations of breaches of fiduciary duty is false and further shows that the Trustees are unfit to continue as trustees.

Given the Trustees' claimed confusion, several lot owners, including some of the Plaintiffs, requested that the Trustees join them in petitioning the Trial Court to provide a

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<sup>3</sup> Plaintiffs summarized thousands of pages of history obtained from both the Trustees and the Club as the "History of Clifton Park, Clifton Beach and its use by the Clifton Club" in which neither the Trustees or Club identified specific errors. [12/24/2014 Reply in Support Ex. 11.]

definitive interpretation of the Trust regarding the Club Members' rights. [10/31/2014 Mot. to Remove Ex. 2 at ¶ 7; 11/09/2015 Pls. Notice of Filing, Hall Dep. at 90:3-91:22] The Trustees declined and instead, created their own memo summarizing the "History of Beach use of the Beach by the Clifton Club", which claimed "the 1902 lease, the March 1912 Trust Deed and the Club's July 1912 deed suggests [sic] that the [CPLIC] intended that Club members, including non-residents of Clifton Park enjoy Beach privileges." [10/15/2015 McElfresh Aff. Ex. 50, at CPT 12082-83.] Trustees then sought assistance from four different law firms to support the conclusion that they had already reached by reviewing the Trust, Club Deed and Club Lease and ignoring the available history of the Trust's administration, that past trustees and Club leadership all agreed that the lot owners were beneficiaries and the Club Members only enjoyed permissive use. They ultimately obtained a legal memorandum from Ulmer & Berne LLP which was only based on the Trust, the Club Deed, and the Club Lease.<sup>4</sup> [10/31/2014 Mot. to Remove Ex. 2 at ¶ 8; 11/06/2015 Notice of Filing, Pyke Dep. at 97:21-99-12.]

The Plaintiffs were thus forced to bring this lawsuit to protect against the Trustees' attempt to rewrite the Trust, which will add hundreds of additional beneficiaries and eliminate the underlying agreement needed to control the number of Club Members with Beach access and require the Club or Club Members to pay fees previously charged for such use. Such unrestrictable usage would severely diminish the lot owners' use and enjoyment of Trust Property and convert the Trust into an onerous liability for lot owners. The Plaintiffs never asked that the Trial Court declare that the Club Members have no right to use the Beach under any circumstances, **only that they are not beneficiaries and that they have no legal right of use under the terms of the Trust or the Club Deed**, thus allowing Trust administration to continue as it had for the past century, in accordance with its original intent.

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<sup>4</sup> That early Ulmer memorandum concluded that all Club Members have the right to use the Beach also **erroneously claimed that all prior Trustees held that same belief**. As, according to Trustee Pyke, Ulmer only reviewed the three documents, the only basis for a statement to that effect would have been false statements by these Trustees.

## **II. The Trustees' Re-interpretation of the Trust Is Wrong and Contrary to the History of Creation of Clifton Park and the Trust.**

There is no dispute that the parent deed creating Clifton Park restricted its future development to **exclusively residential use** except for certain non-business facilities (including a Club) **for the residents**. [10/15/2015 McElfresh Aff. Exs. 1, 2.] All businesses were expressly forbidden. All lot owners in this exclusively residential suburb were to have a common right to use the land set aside for park purposes, *i.e.* land which ultimately became the Trust Property. A social club for the lot owners was created for the residents (notwithstanding that non-residents could gain admission as part of its role in attracting buyers to Clifton Park and to help encourage lot sales). [*Id.*]

The land set aside for common Park use was placed in the Trust, which contains detailed language specifying that the lot owners of this exclusively residential suburb (expanded to expressly include “their households”) are the beneficiaries. It also contains language limiting the assessment that the Trustees may levy to cover the Trust expenses, only allowing the Trustees to assess lot owners (including the Club) according to the value of their lot. The Trust contains no provision to alter this formula based on the number of users emanating from a particular lot owner. The same formula must be used **equally for all lot owners** with no provision to allow or alter the Club’s assessment to reflect any use by its countless outside members (non-Clifton Park residents).

Purchasers of those original lots accepted the obligation to be bound to pay their mandatory assessed portion of the expenses of Trust Property maintenance while being openly promised the benefits of a Beach and beach house **exclusively reserved for them**. The deed language is consistent with CPLIC’s public promise of a Beach exclusively reserved for residents. [*Id.*; see also 10/15/2015 McElfresh Aff. Ex. 3]

The historical records show that in the 1940s, the interest of the Club Members, who did not or no longer owned lots in Clifton Park, in using the Beach was accommodated by the Trustees of that era. They asked the lot owners for permission to allow those Club Members to use the Beach, under an agreement requiring the Club to pay a yearly fee to cover the Club

Members' Beach use. The Trustees needed the lot owners' permission for that agreement as the Trust does not empower the Trustees to give that permission nor does it authorize the Trustees to charge a lot owner more or less than the lot value derived assessment. The lot owners approved that permissive use, and the Trustees established a process for assessing the Club the yearly fee. [10/15/2015 McElfresh Aff. Ex. 9 at CliftonClub 1841-42, Ex. 13 at 1883, Ex. 14 at CPT 12265, Ex. 18, at 2.]

Later, some new Club leaders tried to gain full use of the Beach for all Club Members for only the cost of the lot assessment formula established in the Trust. The prior Trustees relied on the fact that the Trust did not give rights to use the Beach to all Club Members and successfully defended the Trust and the interests of **lot owner beneficiaries** from those claims. [*E.g.*, 10/15/2015 McElfresh Aff. Ex. 26.]

**that is exactly what the Plaintiffs attempted to do in this case: preserve the integrity of the Trust against the attempt by the Club (and Trustees) to redefine the beneficial terms of the Trust.** These efforts were supported by their community,<sup>5</sup>

Further, as shown in the Plaintiffs' Briefs, the Trustees' arguments are unsupportable under a plain reading of the Trust, despite the misrepresentations of the Club and Trustees.

**A. CPLIC Could Not and Did Not Grant Rights to the Club Members.**

The 1899 deed creating the Clifton Park Allotment bound CPLIC to create a community exclusively for "private residential purposes," allowing only certain non-residential facilities "for use of the owners of lots in said allotment." That deed also bound CPLIC to follow prior commitments made within the preceding deeds originating from the Clifton Park Association to devote the "...beach or park places..." to "...use in common with other owners of land in said [private residential] allotment." [10/15/2015 McElfresh Aff. Ex. 3.] CPLIC carried out these commitments by including the universally required language in deeds it wrote. CPLIC, whose leaders created and managed the early Club, also placed a restriction in the Club Lease that the

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<sup>5</sup> The Plaintiffs' efforts to remove the Trustees were supported by 130 lot owners. [12/12/2104 Secondary Parties' Mot. to Have Current Clifton Park Trustees Removed.]

reserved land was for “persons owning land in said allotment” and offered the Club use of **alternate** land.<sup>6</sup>

Contrary to the Club’s and Trustees’ argument, the inclusion of the universal language that grants each lot owner an equivalent right to “use in common with the owners of land in said allotment” all park spaces in the Club Deed cannot be taken to grant all of the Club Members’ rights to use the Beach as the inclusion of that language was merely required by CPLIC’s prior deed commitment. Rather, it only follows logic that if CPLIC had intended to add all members of the Club as beneficiaries—contrary to its prior deed obligation—it would have (1) added language to the Trust and the Club Deed to that effect, (just as it added language to the Trust to clearly define that the lot owners’ rights included their households) and (2) given the Trustees the authority to assess those additional users a portion of the maintenance fee. None of this was done, nor were Club Members even mentioned in the Trust or Club Deed at a time when it was well known that some Club Members were not lot owners. Accordingly, CPLIC did not grant nor intend to grant any rights to Club Members to use the Beach.

Further, reliance on the absence of the term “resident” to limit beneficiaries when the Trust limits Trusteeship to residents does not salvage the Trustees’ arguments. The terms used in the Trust limiting beneficiaries to “**lot owners in the Clifton Park allotment** and their successors in title, **and members of their household**” are specific, well-chosen and fully restrictive to those people owning lots in Clifton Park and only that family or other occupants of that house. This carefully chosen term “household” fully restricts the users of Trust Property to the “residents” of the Park as it **excludes family and persons not living in a Clifton Park household**. With such careful and precise definition of beneficiaries, the Trial Court erroneously

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<sup>6</sup> The Club Lease included that the “land reserved for park purposes” was for “persons owning land.” This was placed in the restrictive covenants paragraph, separate from the promise made to the Club to give it the option to potentially further lease certain **other strips of land** for bathing, building a boat house and a stable found in the promises paragraph. This option was never exercised by the Club. The separation from and specific use of different terms leaves no doubt that the Club was not promised use of the already identified land dedicated to the common use by lot owners.

ignored that CPLIC did not mention Club Members in the Trust or Club Deed, which demonstrates that they were neither given nor intended to have a right to use Trust Property.

**B. The Club's Status as a Lot Owner Does Not Confer "Add-on" Rights for Club Members.**

The fact that the Club is a lot owner and as such is a beneficiary like any other lot owner was not disputed. No deed in the Park could have been written otherwise and the Club's deeded obligation to pay an assessment is also identical to any other individual lot owner. Considering that limited and equivalent assessment obligation and absent any written intent of the CPLIC to expand Club's usage rights beyond that of any other lot owner, the Club can logically only claim Beach use rights for one family and household at any given time.<sup>7</sup> That position was relied on by prior trustees to oppose the Club's past attempts to gain universal use for all Club Members for only its single lot assessment. Such ordinary use of the Beach would not substantially disturb the Trust function or the community. But that is not what the Trustees have argued and the Trial Court found. They incorrectly claim that the Club should have an entirely different right, the uniquely expanded right of unrestricted universal Beach use for **all** Club Members each being equivalent to a lot owner. The number of potentially added Beach users from the Club is at present 350 families but the actual future number is only determined by the Club, not the Trustees. In contrast, there are approximately only 205 residential lot owners in Clifton Park who are historic, undisputed Trust beneficiaries. The Trustees' interpretation transforms the Club into a gargantuan super user obligated to pay only a lot owner assessment. Such a reading of the Trust is plainly incorrect and must be reversed.

**III. The Trustees' Breached Their Duty of Impartiality by Taking Sides and Falsely Characterizing the Plaintiffs' Claim.**

The Trustees did not know who their beneficiaries were when questioned prior to this lawsuit. They then claimed all Club Members were beneficiaries, found legal support for that view, and entered the lawsuit **on the side of the Club**, which had only recently claimed the

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<sup>7</sup> Although the Club sits on four original lots, its property value is similar to others in equivalent prime locations, some of which also occupy more than one original lot.

same, eventually assuming the role of lead proponent. During the lawsuit, the Trustees have morphed their position to state illogically that they actually meant that the Club Members have use rights but are not beneficiaries. This directly contradicts the terms of the Trust. They now hide behind the pretense they are defending the Trust by conjuring a complex mirage to conceal facts, misrepresenting both what the Plaintiffs are seeking and the actual basis on which this Trust has functioned in the past. Their continued breach of their duty of impartiality<sup>8</sup> is thwarting the Plaintiffs' efforts to preserve the Trust.

The Trustees' obfuscation and mirage includes the false claims that: (1) the Plaintiffs are trying to prevent the Club Members from using the Beach, (2) the Trustees have allowed all Club Members to use the Beach for a century according to their authority to make regulations for users of Trust Property, (3) the Plaintiffs are attacking the Trustees' rule making authority, (4) the Plaintiffs' claims are time barred as the Trustees have openly allowed all Club Members to use the Beach since 1912 without objection, (5) the production of over 12,000 randomly presented pages of Trust documents satisfied their duties to inform their beneficiaries and (6) the Plaintiffs (who they denigrate as dissidents) are challenging the long established provisions of the Trust.

To the contrary, the long established principle was always that Club Members were not beneficiaries and did not have any rights under the Trust. It is the Trustees, not the Plaintiffs, who abandoned the century old reading of the Trust's terms. The Trustees' rule making authority has never been a basis for allowing Club Members to use the Beach as it does not give the Trustees discretion to create new Trust beneficiaries. Further, the Club Members have not had unfettered rights to use the Beach since 1912. Their use was permissive and fee-based. And the claims by the Trustees are belied by the fact that this case arose from the Trustees' initial inability in 2011 to explain who the beneficiaries of the Trust were and what beneficial rights Club Members had. Importantly, after first professing their lack of clarity as to the rights of Club

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<sup>8</sup> The Club, in its Brief, has adopted the Trustees' mirage and claim that the Plaintiffs' claims are time barred. Ironically, when properly applied to the facts, the past Club leadership's acceptance that the Club Members had no rights under the Trust (following the Club's own legal review in 1943) actually bars the Club from now claiming that Club Members have such rights.

Members, the Trustees injected themselves into this case, ardently defending the Club's new and severely damaging claims of universal rights for Club Members.

This rewrite of key Trust provisions will have devastating consequences on the Trust and the community it was established to benefit. Specifically, it defeats the purpose for which the Trust Property was created. Instead of the lot owners having a benefit under the Trust, they will now be subject to the substantial liability of deeds requiring they pay an assessment for maintenance and operation of the Beach used primarily by the Club Members who will have no obligation to pay a proportionate share of the expenses, but can freely use the Beach without any restriction or concern for the rights of resident lot owners.

The severity of the consequences of the Trustees' breach of their duty of impartiality is enormous, and for the reasons set forth above, the Trial Court should have removed them.

**IV. The Trustees' False Claim That They Freely Complied With Their Obligation to Furnish All Information to the Beneficiaries Further Justifies Their Removal.**

The Trustees' attempts to falsely portray the Plaintiffs' as wishing to remove them for withholding privileged information, is meant to distract from the facts. Before the Plaintiffs filed this lawsuit, some beneficiaries formally requested Trust documents to protect their rights as beneficiaries. The Trustees denied that access, forcing the Plaintiffs to seek in discovery, information which the Trustees were obligated to freely and fully provide. In response to Plaintiffs' discovery requests, these Trustees then frustrated discovery by furnishing 12,000 disorganized pages, omitting countless relevant documents which they only reluctantly supplied after Plaintiffs were able to ascertain their existence. They further claimed legal privilege over documents pertinent to the issues in this litigation. These included prior inter-trustee communications. In their Brief, the Trustees justify their conduct as simply the normal tactics of a litigant adversary. But such conduct is contrary to their primary duty of loyalty and their obligation to provide their beneficiaries with **all** information needed to protect their interests, especially where the Plaintiffs as beneficiaries are attempting to determine who the Trust beneficiaries are. The Trustees' failures to produce information related to the Trust violated their

fiduciary duties, greatly contributed to the Plaintiffs need to seek legal redress, led to unneeded expense, and warranted their removal.

### **CONCLUSION**

For the foregoing reasons and the reasons set forth in Appellants' Opening Brief, Appellant Dennis F. Butler requests that the Court reverse the trial court's grant of summary judgment in favor of the Trustees and find that (1) the prior Clifton Park Trustees interpretation of the Trust's terms was correct based on the plain reading of the Trust, (2) that the Club Deed and Club Lease cannot change the plain language of the Trust, and (3) that the prior Clifton Park Trustees acted correctly to seek the lot owners' approval for the authority to grant permission for the Club Members' use and the authority to regulate that use. Appellant Butler further requests that the Court remand this case for further proceedings consistent with those findings. Finally Appellant Butler requests that the Trial Court's August 24, 2015 Judgment Entries denying Plaintiffs' Motion to Remove the Trustees and Plaintiffs' Motion for Attorneys' Fees against the Trustees be reversed and remanded with directions to enter judgment on those Motions in favor of the Plaintiffs.

Respectfully submitted,

/s/ Dennis F. Butler

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**CERTIFICATE OF SERVICE**

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