

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Brad Watterson, et al.

Court of Appeals No. L-12-1012

Appellants

Trial Court No. CI0201106942

v.

Ronald Burnard, Successor Trustee  
of the Barthel J. Burnard Trust

**DECISION AND JUDGMENT**

Appellee

Decided: February 1, 2013

\* \* \* \* \*

Samuel G. Bolotin and Andrew J. Stough, for appellants.

Dominic J. Spinazze, for appellee.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, in which the trial court denied a motion for a preliminary injunction to prevent the disbursement of funds from the Barthel J. Burnard Trust pending the outcome of tort litigation by appellants, Brad and Jamie Watterson, against the trust's settlor, Barthel J.

Burnard, now deceased. On appeal, appellants set forth the following as their sole assignment of error:

I. Assignment of Error

The trial court erred in denying appellants' motion for preliminary injunction and holding that appellants could not reach the assets of the decedent's revocable trust to satisfy their judgment where appellants were prior creditors in that their causes of action accrued and suit was filed prior to decedents' death.

{¶ 2} The underlying facts in this case are undisputed. On February 6, 2008, appellant, Brad Watterson, was injured in an automobile accident caused by Barthel J. Burnard. On February 3, 2010, Watterson and his wife, Jamie ("appellants"), filed a personal injury lawsuit against Burnard in the Lucas County Court of Common Pleas. On November 2, 2011, while the lawsuit was pending, Burnard passed away. At the time of her death, there was in existence a revocable trust, the Barthel J. Burnard Trust, into which Burnard had transferred assets during her lifetime.

{¶ 3} Appellants initially filed a complaint and a request for a temporary restraining order in the trial court on November 7, 2011; however, that action was later dismissed. On December 9, 2011, appellants filed a second complaint for declaratory and injunctive relief, in which they asked the trial court to issue an order declaring that the Burnard trust's assets were available to satisfy any judgment appellants would obtain as a result of their personal injury lawsuit. Appellants also asked the trial court for an order

prohibiting any transfer of assets out of the trust by the successor trustee, Ronald J. Burnard. That same day, appellants filed a motion for a temporary restraining order and a preliminary injunction. In response, the trial court issued an order temporarily prohibiting Ronald Burnard “from disbursing the assets contained in the Barthel J. Burnard trust until further Order of the Court.”

{¶ 4} A hearing was held on appellants’ request for a preliminary injunction on December 22, 2011. At the hearing, testimony was presented by Brad Watterson and Ronald Burnard. Watterson testified at the hearing as to the basic facts surrounding the accident on February 6, 2008, after which the defense stipulated that Barthel Burnard was at fault in causing the accident that injured Watterson. The defense further stipulated that appellants are creditors of Barthel Burnard; however, they refused to stipulate that Watterson suffered irreparable harm as a result of the accident.

{¶ 5} Ronald Burnard testified at the hearing that he became the successor trustee of his mother’s trust on January 7, 2010. He further testified the lawsuit was filed before Barthel Burnard died.

{¶ 6} After the parties’ testimony was presented, arguments were made to the trial court by counsel. Thereafter, the trial court stated that, based on the evidence and its own interpretation of existing Ohio law, appellants lost the right to access the assets of the Barthel J. Burnard Trust when the settlor died. Accordingly, the trial court denied appellants’ request for a preliminary injunction on December 23, 2011. A timely notice

of appeal was filed in this court on January 12, 2012. A jury trial was held on February 6, 2012, after which Brad Watterson was awarded a judgment of \$398,000.<sup>1</sup>

{¶ 7} On appeal, appellants assert that the trial court's denial of their request for a preliminary injunction was based on an erroneous interpretation of Ohio law. In support, appellants argue that, pursuant to *Sowers v. Luginbill*, 175 Ohio App.3d 745, 2008-Ohio-1486, 889 N.E.2d 172 (3d Dist.), and R.C. 5805.06, the assets of the Barthel J. Burnard Trust should be available to satisfy the judgment obtained by Brad Watterson because his claim arose, and the lawsuit was filed, before Burnard's death on November 2, 2011. Appellee responds that, pursuant to *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 21 N.E.2d 119 (1939), Watterson's ability to compel revocation of the trust to satisfy his tort claim ended with the settlor's death.

{¶ 8} Generally, the trial court's decision to grant or deny a preliminary injunction will not be overturned on appeal absent a finding that the trial court abused its discretion. *Garono v. State*, 37 Ohio St.3d 171, 173, 524 N.E.2d 496 (1998). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). However, in this case, the trial court denied the request for a preliminary injunction after finding that, as a matter of law, appellants were not entitled to the assets of the Barthel J. Burnard Trust because Barthel Burnard died before their legal claim was reduced to a judgment. Accordingly,

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<sup>1</sup> The limit of Barthel J. Burnard's insurance policy was \$100,000.

our standard of review in this case is de novo. *State v. Calderon*, 9th Dist. No. 09CA0088-M, 2010-Ohio-2807, ¶ 6, citing *State v. Campbell*, 9th Dist. No. 24919, 2010-Ohio-128, ¶ 5. (Additional citations omitted.)

{¶ 9} In *Schofield v. Cleveland Trust Co.*, *supra*, the Ohio Supreme Court considered a case in which G.A. Ehret, a Cleveland physician, entered into a trust agreement with the Cleveland Trust Company in 1925. Ehret's trust was originally funded by the conveyance of a parcel of real estate. In 1932, Ehret cancelled the original trust and created a second trust, also funded with a transfer of real estate, that provided for distribution of the trust's assets by the trustee upon Ehret's death. Under the terms of the 1932 trust, Ehret had the right to receive the net income from the trust, and to occupy the real estate. Ehret also had the right to revoke the trust at any time during his lifetime. The trustee was instructed to distribute the trust property equally between Ehret's wife and daughter after Ehret's death.

{¶ 10} Ehret died in 1936. After Ehret's death, Douglas F. Schofield brought an action to revoke the trust and use its assets to pay Ehret's outstanding debts. One of the debts was for \$628.25, which Schofield claimed was owed to him as unpaid rent for an office space Ehret occupied in a building owned by Schofield. The court of common pleas, in which Schofield's complaint was filed, ordered the trust property sold and used to pay Ehret's debts before distributing the remainder of the trust assets to Ehret's surviving wife and daughter. On appeal, the trial court's decision was reversed, and the trust was upheld. Schofield then filed an appeal to the Ohio Supreme Court.

{¶ 11} The Ohio Supreme Court first found that the trust was not fraudulent and, therefore, it was created by a valid trust agreement. *Id.* at 332. Next, the court turned its attention to the issue of whether the trust was valid “as against a subsequent creditor of the settlor.” *Id.* First, the *Schofield* court noted that, in Ohio, “a transfer of property by one who is solvent will not be set aside as to subsequent creditors unless there is proof of actual intent to defraud such creditors \* \* \*.” *Id.* However, the court recognized that, through then-Section 8617, General Code, later designated R.C. 1335.01(A)<sup>2</sup>, the Ohio legislature provided an exception to the rule, which states that a proper trust is valid against all persons,

except that any beneficial interest reserved to such creator shall be subject to be reached by the creditors of such creator, and except that where the creator of such trust reserves to himself for his own benefit a power of revocation, a court of equity, at the suit of any creditor or creditors of the creator, may compel the exercise of such power of revocation so reserved, to the same extent and under the same conditions that such creator could have exercised the same. *Id.*

{¶ 12} The Ohio Supreme Court interpreted the above-quoted statutory provision to mean that the right of a creditor to reach the beneficial interest of the creator of a valid, revocable trust, forcing the revocation of the trust and subjecting its assets to the creditor’s

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<sup>2</sup> R.C. 1335.01 has since been repealed and replaced by R.C. 5805.06, which will be discussed elsewhere in this decision.

claim, “exists only during the lifetime of the settlor.” *Id.* at 133. This conclusion was based on the premise that the power to revoke a trust, “being personal, would terminate with [the settlor’s] death.” *Id.* at 334. Therefore, if the Ohio legislature had intended for all creditors to reach the assets of a revocable trust both “before and after the settlor’s demise, the statute would have contained language to that effect.” *Id.* However, the *Schofield* court further qualified its conclusion by stating that “[i]n our opinion the statute is inapplicable to creditors who do not act while the settlor is still alive.” *Id.* This opinion was based on the facts that: (1) Ehret had not paid Schofield rent over the course of two years prior to May 1, 1936; (2) Ehret did not incur any additional debt for the three months before his death; (3) the trust document was on record for more than 10 years before Ehret’s death; and (4) Schofield waited until after Ehret’s death before attempting to collect the debt. *Id.*

{¶ 13} Many years after the decision in *Schofield*, in *Sowers v. Luginbill*, 175 Ohio App.3d 745, 2008-Ohio-1486, 889 N.E.2d 172 (3d Dist.), Ohio’s Third District Court of Appeals considered a case in which a motorist, Melanie Luginbill, was injured in an accident caused by Gordon E. Sowers. On April 2, 2006, Luginbill filed a complaint seeking damages for injuries she sustained in the accident. On January 11, 2007, before Luginbill’s claim could be adjudicated, Sowers died. It was undisputed that, at the time of Sowers’ death, a revocable trust existed into which Sowers transferred some assets in 1997, and again in 2001. The bulk of the assets remaining in Sowers’ estate were to be transferred into the trust upon his death through a pour-over provision in his will.

{¶ 14} On March 16, 2007, John Sowers, the successor trustee, filed a motion for declaratory judgment in which he asked the trial court to find that Luginbill was Sowers' subsequent creditor because her claim was not fully adjudicated until after Sowers died. The trustee argued that, as a subsequent creditor, Luginbill could not seek to access the trust assets to satisfy any judgment that she might obtain in the personal injury action. Luginbill argued in opposition that she was not a subsequent creditor because she filed her personal injury claim before assets were transferred into Sowers' trust via his pour-over will.

{¶ 15} The trial court ruled in favor of Luginbill, after concluding that: "[Luginbill] filed a claim against the deceased prior to his death and before any transfer to the trust by operation of his will. Therefore, [she] is not a subsequent creditor of the deceased." John Sowers appealed.

{¶ 16} On appeal, the Third District Court of Appeals conducted a lengthy analysis of existing Ohio case law, including *Schofield, supra*. As a major part of that analysis, the court of appeals took on the task of interpreting the meaning of the phrase "subsequent creditor."

{¶ 17} Initially, the *Sowers* court noted that a "subsequent creditor" is legally defined as "[o]ne whose claim comes into existence after a given fact or transaction, such as the recording of a deed or the execution of a voluntary conveyance." *Id.* at ¶ 13, quoting Black's Law Dictionary 376 (7th Ed.Rev.1999). Thereafter, the appellate court concluded that, for purposes of reaching the assets of a revocable trust, the determinative



“fact or transaction” which determines whether or not a claimant is a “subsequent creditor” is the date of the settlor’s death. *Id.* at ¶ 21-22, citing *Schofield, supra*, at 328, 331, 333-335, 21 N.E.2d 119.

{¶ 18} Stated policy considerations in support of the use of the settlor’s date of death as the determining factor included the following: (1) it establishes a “date certain”; (2) it is “expedient” in that it “promotes the vesting of property rights” and encourages the “prompt filing of creditor claims”; and (3) it “promotes judicial economy \* \* \* [by providing] a definitive point in time upon which the court can render a determination” as to what assets are included in the trust. *Id.* at ¶ 24-26. The appellate court rejected the creditor’s argument that the definitive date should be the date of the trust’s creation, saying that it was “both underinclusive and overinclusive” depending on when assets were actually transferred into the trust. *Id.* at ¶ 27. Ultimately, the appellate court held that “the trial court did not err in finding that Luginbill was not a subsequent creditor \* \* \*.” *Id.* at ¶ 34.

{¶ 19} In addition to analyzing the meaning of the term “subsequent creditor,” the *Sowers* court also considered the general question of whether a tort claimant is entitled to reach the assets of a trust after the settlor’s death to satisfy her tort claim. In so doing, the court relied on the language of R.C. 5805.06(A)(1) and (2), and the official comments to those statutory provisions, as well as the Restatement of the Law 3d, Trusts, Section 25, Comment e (2003).

{¶ 20} R.C. 5805.06 states, in relevant part, that;

(A) Whether or not the terms of a trust contain a spendthrift provision, all of the following apply:

(1) During the lifetime of the settlor, the property of the revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit \* \* \*.

{¶ 21} The Official Comment to R.C. 5805.06(A)(1) states the "well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living." *Sowers*, 775 Ohio App.3d 745, 2008-Ohio-7486, 889 N.E.2d 172, at ¶ 41.

{¶ 22} Restatement of the Law 3d, Trusts, Section 25, Comment e (2003) states, in relevant part:

*Rights of creditor and other matters.* Although a revocable trust is nontestamentary and is therefore not subject to the Wills Act or to the usual procedures of estate administration, property held in the trust is subject to the claims of creditors of the settlor or of the deceased settlor's estate if the same property belonging to the settlor or the estate would be subject to the claims of the creditors \* \* \*.

{¶ 23} The Official Comment to R.C. 5805.06(A)(2) states that the statute was intended to prevent a settlor who is also a trust beneficiary from using the trust as a “shield” against his or her creditors. *Sowers*, 175 Ohio App.3d 745, 2008-Ohio-7486, 889 N.E.2d 172, at ¶ 42.

{¶ 24} After reviewing all of the above provisions, the *Sowers* court concluded that “the overall intent of the legislature to protect the settlor’s creditors becomes clear.” *Id.* at ¶ 43. Accordingly, the appellate court upheld the trial court’s decision to allow Luginbill to reach the trust’s assets, even though *Sowers* died before the tort litigation could be concluded. *Id.*

{¶ 25} Before deciding the ultimate issue, i.e., whether Brad Watterson is entitled to reach the assets of the Burnard trust to satisfy his tort claim, we are compelled for the following reasons to disagree with the *Sowers* court’s conclusion that “the death of the settlor is the relevant date for determining a creditor’s status when he/she is attempting to subject revocable trust assets to his/her claim.” *See id.* at ¶ 29. It is well-established law in Ohio that “[a] tort claimant becomes a creditor within the meaning of R.C. 1336.01(C) at the moment in which the cause of action accrues.” *Id.* at ¶ 31, quoting *Stein v. Brown*, 18 Ohio St.3d 305, 308, 480 N.E.2d 1121 (1985). *See also Harshbarger v. Moody*, 3d Dist. No. 8-09-13, 2010-Ohio-103, ¶ 14. R.C. 1336.01(D), Ohio’s Uniform Fraudulent Transfer Act, defines a “creditor” as “a person who has a claim.” A “claim” is statutorily defined as “a right to payment, whether or not the right is reduced to judgment,

liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” R.C. 1336.01(C).

{¶ 26} It is also important to note that the term “subsequent creditor” was not defined in the *Schofield* decision. Rather, the term was used in the context of explaining that creditors seeking to set aside a voluntary conveyance or declaration of a trust, made before their claim arose and while the debtor was solvent, cannot reach the trust’s assets without a showing of “actual intent to defraud such creditors.” *Schofield*, 135 Ohio St. 328, 21 N.E.2d 119, at paragraph two of the syllabus. This reference to a “subsequent creditor” does not even come close to suggesting that the date of the settlor’s death should be determinative of whether or not an individual claimant is or is not a “subsequent creditor.”

{¶ 27} On consideration of the foregoing, we find that the issue of whether a tort claimant is a “subsequent creditor” is better determined by whether the claim arose before or after the date the trust was created and funded,<sup>3</sup> and not by the arbitrary circumstance of whether or not the settlor dies during the course of tort litigation that commenced before the settlor’s death. The assets potentially subjected to such a claim

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<sup>3</sup> Although not directly stated as an additional basis for the appellate court’s interpretation of the term “subsequent creditor,” the trust at issue in *Sowers*, unlike the one in this case, was funded through a pour-over will at the time of the settlor’s death.

are those assets that were transferred into the trust before the date that the tort claim arose.<sup>4</sup>

{¶ 28} It is undisputed in this case that the Barthel J. Burnard trust was both established and funded before the accident that gave rise to Brad Watterson’s personal injury claim occurred. Accordingly, Brad Watterson qualifies as a “subsequent creditor.” However this finding, standing alone, is not determinative of the outcome of this appeal.

{¶ 29} As set forth above, *Schofield, supra*, was a case involving a claim for unpaid rent made by the successor trustee, Schofield, who was also the landlord of the deceased settlor, Ehret. Schofield’s claim was not filed until after Ehret’s death. Before deciding Schofield was not entitled to reach the Ehret’s trust assets to satisfy his claim, the Ohio Supreme Court considered Section 8617, General Code, later re-codified as former R.C. 1335.01(A), which allowed creditors of the creator of a revocable trust to compel the revocation of the trust and to reach its assets “to the same extent and under the same conditions that such creator could have exercised the same.” *Schofield*, 135 Ohio St. 328 at 333, 21 N.E.2d 119. The Ohio Supreme Court further interpreted former R.C. 1335.01(A) to mean that because such creditors may compel the exercise of that power which the settlor “could have exercised” during the settlor’s lifetime, the statute is “inapplicable to creditors who do not act while the settlor is still alive.” In support of its decision, the *Schofield* court distinguished its conclusion from those of courts in other

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<sup>4</sup> We disagree with the *Sowers* court’s statement that such an approach to determining the amount of trust assets that are subject to a potential claim would be “overly complicated.” *Sowers*, 175 Ohio App.3d 745, 2008-Ohio-1486, 889 N.E.2d 172, at ¶ 27.

jurisdictions where, by statute, the bringing of an action by creditors after the settlor's death is specifically allowed. *Id.* at 334, citing *Alford v. Alford*, 96 Ala. 384, 11 So. 316; *Schreyer v. Schreyer*, 101 App.Div. 456, 91 N.Y.S. 1065. (Other citations omitted.)

{¶ 30} Upon consideration, we believe that the *Schofield* court's distinction between claims brought against a revocable trust before and after the settlor's death is significant in light of the circumstances of this appeal. Unlike the creditor in *Schofield*, Brad Watterson is a tort claimant whose claim "arose" the moment that he was injured due to the undisputed negligence of Barthel J. Burnard. At some time before Watterson's claim arose, the Barthel J. Burnard Trust was established and funded. Watterson brought his claim against Burnard during her lifetime.

{¶ 31} Similarly, although we disagree with the *Sowers* court as to whether Watterson is a "subsequent creditor," we agree with that court's analysis of the purpose and policy behind the enactment of R.C. 5805.06 and the comments thereto. Clearly, the Ohio legislature intended to allow even subsequent creditors of the settlor of a revocable trust to access the trusts' assets. After further analyzing the decisions in both *Sowers* and *Schofield*, we see no reason that an arbitrary event such as the death of the settlor while a tort claim is pending should prevent a tort claimant from satisfying a judgment out of the assets of a revocable trust, provided that the now-deceased settlor could have accessed

the trusts' assets during his or her lifetime.<sup>5</sup> Accordingly, we find that the trial court erred as a matter of law when it found that appellant could not reach the assets of the Barthel J. Burnard revocable trust to satisfy a judgment where the lawsuit was filed, but was not concluded, prior to the trust settlor's death. Appellants' assignment of error is, therefore, well-taken.

{¶ 32} The judgment of the Lucas County Court of Common Pleas is hereby reversed, and this case is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

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<sup>5</sup> In making this decision, we are not attempting to resolve the issue of whether a tort claimant must file his or her claim during the settlor's lifetime in order to reach the trust's assets to satisfy a judgment.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.  
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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