

IN THE SUPREME COURT OF OHIO

MICHAEL K. CUNDALL, et al.

Plaintiffs

v.

U.S. BANK, TRUSTEE, et al.

Defendants

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Case No. 08-0314

On Appeal from the Hamilton County
Court of Appeals, First Appellate District

**REPLY BRIEF OF APPELLANTS DEBORAH KOONS GARCIA, JOHN F. KOONS
IV, JAMES B. KOONS, CAROLINE M. KOONS, KATHLEEN M. KOONS, MAURA
L. KOONS, JEREMY B. KOONS AND MORGAN N. KOONS**

Peter L. Cassady (0005562) (COUNSEL OF RECORD)

Brian G. Dershaw (0072589)

Beckman Weil Shepardson LLC

300 Pike Street, Suite 400

Cincinnati, Ohio 45202

Telephone: 513-621-2100

Facsimile: 513-621-0106

petercassady@beckman-weil.com

bdershaw@beckman-weil.com

Attorneys for Appellants Deborah Koons Garcia, John F. Koons IV, James B. Koons, Caroline
M. Koons, Kathleen M. Koons, Maura L. Koons, Jeremy B. Koons and Morgan N. Koons

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SUPREME COURT OF OHIO

Donald J. Mooney, Jr. (0014292) (COUNSEL OF RECORD)
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, OH 45202
Attorneys for Appellants Christina N. Koons, Nicholas Koons Baker, and Carson Nye Koons Baker

James B. Helmer, Jr. (0002878) (COUNSEL OF RECORD)
Julie W. Popham (0059371)
Robert M. Rice (0061803)
Erin M. Campbell (0079083)
Helmer, Martins, Rice & Popham, Co. L.P.A.
600 Vine Street, Suite 2704
Cincinnati, OH 45202
Attorneys for Appellants Richard W. Caudill; Executor; Keven E. Shell, Ancillary Administrator; Richard W. Caudill, Successor Trustee; Keven E. Shell, Successor Trustee; William P. Martin II, Successor Trustee; D. Scott Elliott, Successor Trustee; G. Jack Donson, Jr., Successor Trustee; and Michael Caudill, Successor Trustee

Wijdan Jreisat
Katz Teller Brant & Hild
255 E. Fifth Street, Suite 2400
Cincinnati, OH 45202
Attorney for Appellees Peter B. Cundall, Peter B. Cundall, Jr., Katie Mikula, Sara C. Kersting, Kyle Kersting, Alex Kersting and Jeffrey Kersting

Susan Grogan Faller (0017777) (COUNSEL OF RECORD)
Frost Brown Todd LLC
2200 PNC Centre
201 E. Fifth Street
Cincinnati, OH 45202
Attorney for Appellee U.S. Bank, Predecessor Trustee

Richard G. Ward (0037613) (COUNSEL OF RECORD)
Drew & Ward Co., L.P.A.
One W. Fourth Street, Suite 2400
Cincinnati, OH 45202
Attorney for Appellees Michael K. Cundall, Individually and as Successor Trustee

William H. Blessing (0006848) (COUNSEL OF RECORD)
Law Offices of William H. Blessing
119 E. Court Street, Suite 500
Cincinnati, OH 45202
Attorney for Appellees Michael K. Cundall, Jr., Courtney Fletcher Cundall, and Hillary Cundall

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I. REPLY TO APPELLEES' STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Court of Appeals did a great disservice to this case and Ohio jurisprudence in issuing an opinion that not only addressed matters well beyond the Motion to Dismiss, but waxing poetic—with unsubstantiated and inaccurate conclusions—about irrelevant subjects. While those matters and factual determinations would be appropriate if the appeal was based on a motion for summary judgment or a trial verdict, here, the underlying motion is for dismissal.

The Cundalls' approach in their briefs is to use self-affirming logic. "We're right because the court of appeals said we were right." For the most part, they offer no additional discussion or analysis beyond the First District's Opinion that is being challenged.¹ Instead, they spend nearly 24 pages citing merely to this poorly-reasoned decision.

The decisions that the appellate court did make on the issues presented on appeal were incorrect as neither the law nor the facts supports its result.² The problem with the appellate court's lack of focus is that the Plaintiff/Appellee Michael Cundall and his children, the Cross-Claimants/Appellees ("Plaintiff Cundall" and "Cross-Claimant Cundalls," respectively) have latched onto the extraneous parts of the appellate court's opinion as vindication of their position on underlying merits, which again, are not the subject of this appeal.

For example, Cross-Claimant Cundalls' Proposition of Law No. 1 essentially asks the Supreme Court to rule that the actions of John F. Koons, III ("JFK") were presumptively invalid because he purportedly bought back the Cundalls' CIC shares without any express authority in

¹ The exception to this statement is with respect to the tender argument, in which Plaintiff Cundall and the Cross Claimant Cundalls swing the other direction by abandoning the First District's reasoning and raising new arguments.

² Appx. 7, *Cundall v. U.S. Bank* (1 Dist.), 174 Ohio App.3d 421, 882 N.E.2d 481, 2007-Ohio-7067.

the trust instrument.³ In making this Proposition of Law, the Cross-Claimant Cundalls quote the First Districts' dicta on the merits.⁴ It is premature for this Court to decide, or even consider, such issues.

Going further, Plaintiff Cundall and the Cross-Claimant Cundalls also inartfully attempt to use the appellate court's dicta about the merits of the case to support their position on the procedural-type issues that are being appealed. For example, Plaintiff Cundall and the Cross-Claimant Cundalls make much of the alleged wrongs of JFK and the tenor of their briefs seem to suggest that because the things JFK did were so bad, their case should be allowed past the "pesky" issues of tender, personal jurisdiction and statute of limitations.⁵ This reasoning is clearly flawed.

The First District's dicta, to the extent that it related to the substantive issues and not the issues on appeal, was directed to the trial court on remand and was not intended to create issues to be taken up by this Court. This is an appeal of a motion to dismiss under Ohio Civil Rule 12(B)(1), (2), and (6).⁶ The substantive matters raised by the Cundalls are inappropriate for appeal and should not have been addressed by the court of appeals because no decision has ever been made by a trial court on these issues.⁷ The Cundalls are attempting to compensate for unfavorable jurisprudence by muddling the issues before this Court.

Despite the baseless assumptions made by the appellate court and manipulated by the Cundalls, the simple facts remain that in 1984 the Cundalls sold their shares back to CIC in

³ Cross-Claimant Cundall Merit Brief, p. 4.

⁴ Id. at p. 5.

⁵ Plaintiff Cundall Merit Brief, p.p. 1-4 (i.e. the Preliminary Statement).

⁶ Appx. 17, *Cundall v. U.S. Bank* (1 Dist.), 174 Ohio App.3d 421, 431, 882 N.E.2d 481, 488, 2007-Ohio-7067 ¶.

⁷ Appx. 29.

exchange for millions of dollars.⁸ They signed releases which their personal attorney drafted.⁹ They negotiated the price they received—in fact, they initially rejected a lower sale price—and were represented by their own counsel in doing so.¹⁰ It was not until 22 years later that they raised their hands claiming that the transaction was unfair. And the only thing that changed between 1984 and 2006 was that the Cundalls learned how much the shares were sold for in 2005.

This is a case of sellers' remorse. But the problem with waiting 22 years to do anything about it is that the court is powerless to address the Cundalls' outrageous claims because it lacks jurisdiction over the targets of the remorse and the applicable statutes of limitations have run. Accordingly, this Court must reverse the appellate court's decision and dismiss this case against the Appellants.

II. ARGUMENT

In addition to the reply arguments offered by the other Defendant/Appellants in this case, these Defendant/Appellants (the "Koons Beneficiaries") offer the following replies in support of their Propositions of Law.

PROPOSITION OF LAW NO. I.

Out of state beneficiaries of an Ohio Trust who passively receive distributions from a trust are not subject to personal jurisdiction under the Ohio Trust Code ("OTC") or Pre-OTC law.

⁸ Supp. of Defendants-Petitioners 85-87.

⁹ Id. at 87 ("Richard R. Cundall, Jr. had his own attorney, Arthur Weber, prepare the Release.").

¹⁰ Id. at 86-87.

The Koons Beneficiaries thoroughly discussed the jurisdiction issues in their Merit Brief.¹¹ The responses that the Cundalls attempt to make in their respective merit briefs are unconvincing and do not change the outcome of the Koons Beneficiaries' analysis.

III. INTERPRETING THIS CASE UNDER PRE-OTC LAW

The Cundalls lack personal jurisdiction in this case against the Koons Beneficiaries because not one Koons defendant is an Ohio resident, Ohio's long-arm statute and Civil Rule 4.3(A) do not confer jurisdiction, and there are insufficient minimum contacts to constitutionally confer jurisdiction upon the Koons Beneficiaries.

The Cundalls tout the First District's incorrect conclusion that there is jurisdiction in this case even if the pre-OTC law is applied.¹² They cite little case law beyond the First District's opinion in support of their position. In a Motion to Dismiss, jurisdiction must be decided on the face of the pleadings.¹³ Plaintiff Cundall inappropriately cites to alleged contacts of the Koons Beneficiaries that are not contained in his complaint or amended complaint.¹⁴ Alternatively, Plaintiff Cundall cites to alleged contacts of the Koons Beneficiaries that are contained in yet another amended complaint that has never been filed in this case and, thus, is not part of the record.¹⁵ For example, Plaintiff Cundall attempts to find minimum contacts based on the receipt of dividend income, location of accountants and financial institutions, and quantity of distributions without any citation to the record or his complaints.¹⁶ There is no citation to the

¹¹ Koons Beneficiaries Merit Brief ("Merit Brief"), p.p. 12-33.

¹² Appx. 25-27, *Cundall v. U.S. Bank* (1 Dist.), 174 Ohio App.3d 421, 441-445, 882 N.E.2d 481, 496-498, 2007-Ohio-7067 ¶¶ 70-82.

¹³ Appx. 31-32 (Citing *Coors v. Fifth Third Bank* (1 Dist.) 2006 WL 2520322, 2006-Ohio-4505).

¹⁴ Plaintiff Cundall Merit Brief, p. 35-36.

¹⁵ *Id.*, p. 38.

¹⁶ *Id.*, p. 35-36.

record because these facts are not contained in the record. Plaintiff Cundall must not be permitted to supplement his argument with additional facts that are not before this Court.

Plaintiff Cundall also, once again, improperly attempts to bridge the gap in his personal jurisdiction argument with in rem jurisdiction.¹⁷ He states: “The court, having *in rem* jurisdiction over the trust, has jurisdiction over the parties to the trust.”¹⁸ This conclusion is woefully incorrect. In rem jurisdiction only extends to property that is within the state, it does not extend to people.¹⁹ There is a distinction in these types of jurisdiction for a reason and Plaintiff Cundall ignores this basic tenet of law.

Plaintiff Cundall’s attempt to distinguish *Norton v. Bridges*²⁰ and the Cross-Claimant Cundalls’ attempt to distinguish *Hoover v. Society Bank of Eastern Ohio N.A.*²¹ are both flawed for the same reason. In both of those cases the court was determining jurisdiction over a trustee, not a beneficiary. By accepting appointment and carrying forth his obligations under the trust, a trustee engages in deliberate and affirmative conduct related to the trust. Beneficiaries, on the other hand, do not. Their role is much more passive; they do not necessarily even control whether or not they are named as beneficiaries.

¹⁷ Plaintiff Cundall Merit Brief, p. 37.

¹⁸ Id.

¹⁹ *In re Guardianship of Thomas* (7 Dist.), Slip Copy, 2008 WL 2081274, ¶ 35 (citing *Moss v. Std. Drug Co.* (1953), 159 Ohio St. 464, 470, 112 N.E.2d 542 for the proposition that “[a]ctions in rem are proceedings against property rather than persons, or primarily directed against things in themselves”); *Rokakis v. Estate of Thomas* (8 Dist.), Slip Copy, 2008 WL 4447702, 2008-Ohio-5147, ¶ 7 (citing *Patton v. Diemer* (1988), 35 Ohio St.3d 68 for the proposition that “Ohio law provides that a judgment rendered without personal jurisdiction over a defendant is void rather than voidable.”).

²⁰ *Norton v. Bridges* (7 Cir. 1983), 712 F.2d 1156.

²¹ *Hoover v. Society Bank of Eastern Ohio N.A.* (N.D. Ohio Apr.12, 1991), Case No. 5:90 CV 1245, 1991 U.S. Dist. LEXIS 19073.

The better comparison lies in looking at cases that determine whether jurisdiction is appropriate for other types of beneficiaries. For example, in *Mueller v. Mueller*,²² a court declined to extend jurisdiction to a non-resident beneficiary of a life insurance policy because, as with the instant case, that resident lacked sufficient minimum contacts with the state and purposeful availing of the state's rights and privileges.²³ Being a beneficiary and passively receiving distributions are simply not jurisdiction submitting acts.

The Cross-Claimant Cundalls do not have standing, and thus jurisdiction, to bring their claims because they were contingent beneficiaries of the trust whose contingent status lapsed when JFK died.

The Grandparents Trust explicitly provides that upon the later death of JFK or Betty Lou Cundall, Share B would be distributed per stirpes to the then living descendants of Betty Lou.²⁴ Since JFK was the last to die, Plaintiff Cundall took all of his proportionate share of trust and the Cross-Claimant Cundalls' contingent beneficiary status lapsed and so they took nothing.²⁵ Since the Cross-Claimant Cundalls lost any interest in the Grandparents' Trust at the moment of JFK's death, they have no standing in this case.²⁶

The Cross-Claimant Cundalls attempt to thwart this result by emphasizing their claim of intentional interference with the expectancy of an inheritance.²⁷ They correctly cite the elements of this tort and observe that any person who can prove such elements have standing,²⁸ but they

²² Merit Brief, p. 14. *Mueller ex rel. Mueller v. Mueller* (N.D. Ill. March 4, 2002), No. 02-C-488, 2002 WL 338874.

²³ *Id.*

²⁴ Supp. 40, Article II(C)(2) of the Grandparents Trust, p.6.

²⁵ Merit Brief, p. 22.

²⁶ *Id.*

²⁷ Cross-Claimant Cundall Merit Brief, p.p.12-13.

²⁸ *Id.* (citing *Firestone v. Galbreath* (1993), 67 Ohio St.3d 87, 88, N.E.2d 202. The elements of the tort of intentional interference with the expectancy of an inheritance are as follows: (1) an

incorrectly conclude that they can meet all of the elements.²⁹ Specifically, the Cross-Claimant Cundalls cannot meet the fourth prong of the test because there is no reasonable certainty that the inheritance would have been realized by the Cross-Claimant Cundalls but for the alleged actions of JFK. Their father would have had to predecease JFK for that to be possible.

The Twelfth District Court of Appeals addressed this issue in *Treadway v. Free Pentecostal Pater Ave. Church of God, Inc.*³⁰ In that case, the grandchildren of a decedent, Dorothy Treadway, filed suit against the church and its pastor's daughter alleging, among other things, intentional interference with the expectancy of an inheritance.³¹ The grandchildren claimed that the defendants had influenced Dorothy to revise her will and leave her entire estate to the pastor's daughter.³²

Dorothy's previous will named her husband as the sole beneficiary of her estate.³³ In the event that her husband predeceased her, everything went to her son (plaintiffs' father) and if her son predeceased her, everything went to her son's wife and the plaintiffs.³⁴ Dorothy's husband predeceased her, but her son did not.³⁵ The trial court held that the plaintiffs (her grandchildren)

existence of an expectancy of inheritance in the plaintiff; (2) an intentional interference by a defendant with that expectancy of inheritance; (3) conduct by the defendant involving the interference which is tortuous, such as fraud, duress or undue influence, in nature; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and (5) damage resulting from the interference.)

²⁹ See also Reply Brief of Executor/Trustees, p. 13-14 (explaining that this claim is also barred by the statute of limitations).

³⁰ *Treadway v. Free Pentecostal Pater Ave. Church of God, Inc.* (Ohio App. 12 Dist), slip copy, 2008 WL 921606, 2008-Ohio-1663.

³¹ *Id.* at ¶ 1.

³² *Id.* at ¶¶ 3-5.

³³ *Id.* at ¶ 1.

³⁴ *Id.*

³⁵ *Id.* at ¶ 24.

lacked standing to maintain their intentional interference claim and the court of appeals affirmed.³⁶

The court of appeals in *Treadway* held that the grandchildren-plaintiffs could not meet the fourth prong of the test for intentional interference with the expectancy of an inheritance.³⁷ The rationale was that plaintiffs were only contingent beneficiaries of Dorothy's prior will and, as such, could not show to a reasonable certainty that they would have realized their expectancy to inherit from their grandmother, but for the alleged influence.³⁸

In so holding, the court of appeals observed:

The facts of the case make it clear that [plaintiffs] would not have been beneficiaries of Dorothy's estate..., even if the purported tortious interference had not occurred. In light of these facts, it is impossible for [plaintiffs] to prove the fourth element of the tort. As such, applying a de novo standard of review, we find that the trial court did not err when it determined that appellants lacked standing to assert this claim.³⁹

Like the plaintiffs in *Treadway*, the Cross-Claimant Cundalls were contingent trust beneficiaries whose rights expired upon JFK's death and, therefore, they cannot meet the fourth prong of the *Firestone* test. The Cross-Claimant Cundalls would not have realized any benefit of the trust even if JFK's alleged wrongdoing had not occurred.

Because the Cross-Claimant Cundalls cannot meet this fourth prong, they attempt to sidetrack the Court by likening the tort of intentional interference with an inheritance with the tort of wrongful interference with an expectation of a future business relationship.⁴⁰ This is a drawn-out tangent that leads nowhere. It is irrelevant to the facts and the analysis at hand. The

³⁶ Id. at ¶ 20.

³⁷ Id. at ¶ 24.

³⁸ Id. at ¶ 23.

³⁹ Id. at ¶ 24.

⁴⁰ Cross-Claimant Cundall Merit Brief, pp. 14-16.

Cross-Claimant Cundalls, like the plaintiffs in *Treadway*, lack standing and must have their claims dismissed.

IV. INTERPRETING THIS CASE UNDER THE NEW OTC

The Koons Beneficiaries' Merit Brief emphasizes that even if the First District found that retroactive application of the OTC was proper, the OTC's other provisions would still result in a pre-trial judgment in favor of the Koons Beneficiaries.⁴¹ If the OTC is applied retroactively, it contains numerous provisions that are unfavorable to the Cundalls. First, the OTC § 5810.09 states that a trustee is not liable to a beneficiary who consented to conduct and released the trustee from liability.⁴² The OTC § 5801.10 even endorses private settlement agreements, like the releases signed by Plaintiff Cundall, and specifically provides that the trustee represents his/her own individual interests in negotiating these releases, and not those of the beneficiaries.⁴³ Finally, the new OTC § 5803.03 also states that a parent may represent and bind his/her minor child⁴⁴ and that "[a]ny [private settlement agreement] shall be final and binding on the trustee...all beneficiaries, and their heirs, successors and assigns."⁴⁵

The Cross-Claimant Cundalls' footnote 76 offers a response to these provisions but their response tries to complicate the clear language of the OTC. Footnote 76 seems to be a classic case of unclear writing reflecting unclear thinking.

⁴¹ Merit Brief, p. 24.

⁴² Appx. 50, O.R.C. § 5810.09.; see also Uniform Trust Code § 1009 and comments.

⁴³ Appx. 43, O.R.C. § 5801.10, O.R.C. § 5801.10(E), (F).

⁴⁴ Appx. 47, O.R.C. § 5803.03(F); Uniform Trust Code § 303 and comments; see also Appx. 48. O.R.C. § 5803.04, Uniform Trust Code § 304 and comments (stating that any person may bind a minor who has substantially identical interests to the representative).

⁴⁵ Appx. 43, O.R.C. § 5801.10(E).

This footnote attempts to urge the Court that JFK's actions as trustee were not covered by O.R.C. § 5801.10, which allows parties to a trust to enter into agreements⁴⁶ O.R.C. § 5801.10, however, allows agreements covering a very broad range of conduct and, even then, is not intended to be all-inclusive. Therefore, JFK's conduct when he was approached by the Cundalls and asked to purchase their shares was permissible. The Cross-Claimant Cundalls attempt to negate this section by citing O.R.C. § 5810.09 and its corresponding Uniform Trust Code comments.⁴⁷ This section, however, is equally unhelpful to them because, in making their argument, they ignore the releases and assume that a breach of trust occurred.

Further, the Cross-Claimant Cundalls cite to § 5801.10(F), and apparently suggest that the 1984 releases were improper because JFK in some way acted on behalf of the beneficiaries. The new OTC is clear that a trustee represents only him or herself when entering into a private settlement agreement⁴⁸ and that the parties may essentially enter into any type of agreement that they want, which agreement will be binding on all beneficiaries, their heirs, successors, and assigns.⁴⁹ In this case, the beneficiaries were represented by counsel,⁵⁰ they signed releases that their counsel drafted,⁵¹ and they negotiated the terms of the sale to their satisfaction.⁵² The entire transaction was fair and reasonable, and JFK, as trustee, did not attempt to or actually represent any of the beneficiaries in any way. The Cundalls were paid millions in the sale of their stock

⁴⁶ Cross-Claimant Cundall Brief at 19, fn 76.

⁴⁷ Uniform Trust Code § 1009 and comments.

⁴⁸ O.R.C. § 5801.10(F) (“[A] trustee serving under the terms of the trust shall only represent its own individual...interests in negotiating or entering into an agreement subject to this section. No trustee serving under the terms of the trust shall be considered to represent any...beneficiary...in negotiating or entering into an agreement subject to this section”)

⁴⁹ O.R.C. § 5801.10(E) (“Any agreement entered into under this section...shall be final and binding on the trustee...all beneficiaries...and their heirs, successors, and assigns.”).

⁵⁰ Supp. of Defendants-Petitioners 85-87.

⁵¹ Id.

⁵² Id.

and a release was executed.⁵³ If the OTC is applied to this case, its provisions validate those releases and this case is again dismissed.

This same issue comes up in Plaintiff Cundall's brief. Plaintiff Cundall knows that valid releases would result in a dismissal of his claims. So to get around the issue, he argues that the releases are void.⁵⁴ Though he wants the OTC to apply so that he can have jurisdiction to bring his case, he notably fails to acknowledge that OTC § 5810.09 and the other OTC provisions would also apply. If the OTC is applied to this case, it will apply to all of this case and where the Cundalls signed releases and received a negotiated amount for their stock, all the while represented by counsel, the releases will be upheld and the Cundalls' case will be dismissed.

PROPOSITION OF LAW II:

Using the new OTC jurisdiction provision to retroactively find jurisdiction over out-of-state trust beneficiaries who were previously dismissed for lack of jurisdiction substantially interferes with those judicial proceedings.

PROPOSITION OF LAW III:

Using the new OTC jurisdiction provision to retroactively find jurisdiction over out-of-state trust beneficiaries who were previously dismissed for lack of jurisdiction prejudices the rights of those beneficiaries.

PROPOSITION OF LAW IV:

Using the new OTC jurisdiction provision to retroactively find jurisdiction over out-of-state trust beneficiaries who were previously dismissed for lack of jurisdiction "affects an act done before the effective date of (the OTC)."

The court of appeals erred when it did not analyze any of the exceptions to the retroactive jurisdiction section of the OTC (i.e. substantially interfering, prejudicing the rights, affecting an act done before the effective date).⁵⁵ The Cundalls do not devote any serious discussion in their

⁵³ Id.

⁵⁴ Cundall Merit Brief, p. 21-23

⁵⁵ Merit Brief, p.p. 25-28.

respective merit briefs to these exceptions either, except, curiously, when they want to apply the “affect an act done” exception to make things more favorable to their case.⁵⁶

The analysis of these exceptions is different than the constitutional retroactive analysis discussed in Proposition of Law V, *infra*. Even if it is constitutional to apply the jurisdiction section of the OTC retroactively, that provision, by its own terms, is not applied if it would substantially interfere with judicial proceedings, if it would affect an act already done or if its application would prejudice the rights of the beneficiaries. These exceptions deserve serious consideration by this court because retroactive application in this case would trigger each the exceptions.⁵⁷

PROPOSITION OF LAW NO. V:

Retroactive application of the OTC to create jurisdiction where none existed before is unconstitutional.

In interpreting this case under the new OTC, Plaintiff Cundall cites to the appellate court’s misguided assertion that no court has found the retroactivity provision, or any other Uniform Trust Code provision to be unconstitutional.⁵⁸ The court of appeals ignored, and now Cross-Claimant Cundalls ignore, that there must be a separate analysis of whether a retroactive statute is unconstitutional as applied.⁵⁹

The analysis is not whether the OTC itself is per se unconstitutional because it has retroactive provisions. In fact, retroactive statutes can be constitutional. But the analysis must

⁵⁶ Cross-Claimant Cundalls cite the “affect an act done” exception for their own advantage in footnote 46 of their Merit Brief, see also O.R.C. § 5811.03(A)(5).

⁵⁷ *Id.*

⁵⁸ Appx. 27, *Cundall v. U.S. Bank* (1 Dist.), 174 Ohio App.3d 421, 444, 882 N.E.2d 481, 498, 2007-Ohio-7067 ¶ 81.

⁵⁹ Merit Brief, p. 29-33.

be whether it is unconstitutional, *as applied*.⁶⁰ The First District did not go through the proper analysis here because it did not even consider the adverse constitutional implications of retroactively applying the OTC in this case. If the court of appeals had conducted this analysis, it should have found, as the Koons Beneficiaries concluded in their Merit Brief, that the retroactive application of the OTC as applied to the facts of this case produces an unconstitutional result.⁶¹

It must be noted that the Cross-Claimant Cundalls attempt to support their position on unconstitutionality with a portion of the appellate court's decision that deals with the *exceptions* to retroactive applicability of the OTC (substantially interferes, prejudices the rights, affects an act done).⁶² The issue of unconstitutionality, however, is a separate inquiry that comes before one even looks at these enumerated statutory exceptions. Conversely, to suggest that a particular exception does not apply because the retroactive application complies with due process and is therefore constitutional, results in that exception having no independent effect. This result is negated by the basic principle that a statute should not be construed in such a way that it has no independent meaning.⁶³

The holding that the Koons Beneficiaries urge is for one similar to that in *McCabe v. Duran*.⁶⁴ In that case the court declined to retroactively enforce a provision of the Uniform Trust Code because "doing so would constitute the taking of property without due process" given the

⁶⁰ Id.

⁶¹ Id.

⁶² Cross-Claimant Cundall Merit Brief, p.p. 18-19.

⁶³ *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections* (Ohio 1993), 67 Ohio St.3d 597, 599, 622 N.E.2d 329, 330-31 ("It is the duty of any court, when construing a statute, to give effect to all of the pronouncements of the statute and to render the statute compatible (to harmonize) with other and related enactments whenever and wherever possible.").

⁶⁴ *McCabe v. Duran* (2008), 180 P.3d 1098.

facts of that particular case.⁶⁵ The Koons Beneficiaries will be similarly deprived if the OTC is applied to this case.

PROPOSITION OF LAW VI:

The applicable statute of limitations for unjust enrichment is six years, which begins to run on the date that the money or property was allegedly wrongfully obtained from the original transferee. Any remedy for constructive trust that flows from unjust enrichment is unavailable when the underlying statute of limitations for unjust enrichment runs.

The Cundalls, as they do throughout their Merit Briefs, are trying to play fast and loose with the law. They are attempting to apply a perceptively more favorable statute of limitations for their breach of fiduciary duty claims against JFK, to their unjust enrichment and constructive trust claims against the Koons Beneficiaries.⁶⁶ Further, they argue to apply the pre-OTC version of the Ohio Revised Code to their statute of limitations argument even though they argue for the application of the OTC elsewhere in their brief.⁶⁷ Both of these argument are flawed for the reasons discussed below.

First, the Cundalls' claims against the Koons Beneficiaries are for unjust enrichment and constructive trust.⁶⁸ Their breach of trust claim is solely against the Estate of JFK. However, because they perceive it to be more beneficial to them, the Cundalls urge the court to apply the statute of limitations for breach of trust and the accompanying "continuing and subsisting trust" exception thereto to their claims against the Koons Beneficiaries.⁶⁹

Plaintiff Cundall demonstrates the improper intermingling of the respective statutes of limitations for his claims, and is just plain wrong, when he states: "To the extent that a 6 year

⁶⁵ Id. at 1100.

⁶⁶ Cundall Merit Brief, p.p. 33-35, Cross-Claimant Cundall Merit Brief, p.p. 20-22.

⁶⁷ Cross-Claimant Cundall Merit Brief, p.p. 22-23.

⁶⁸ Merit Brief, p.p. 33-35.

⁶⁹ Cundall Merit Brief, p.p. 33-35, Cross-Claimant Cundall Merit Brief, p.p. 20-22.

statute of limitation for unjust enrichment is applicable to the plaintiff's claims, it would not have started running until sometime in 2005 at the earliest and therefore is not effective to bar the action commenced on March 3, 2006.”⁷⁰

The “continuing and subsisting trust” exception⁷¹ that Plaintiff Cundall alludes to and the Cross-Claimant Cundalls cite does not apply to support this interpretation because the exception does not apply to claims against beneficiaries of a trust and, more specifically, claims for constructive trust. *Peterson v. Teodosio*,⁷² which the court of appeals cited, and the Cundalls cling to, clearly supports this holding by stating, in no uncertain terms: “constructive trusts, by their very nature, are not technical direct trusts cognizable solely in equity, and, therefore, are not continuing and subsisting trusts exempted from the statutes of limitation.”⁷³ Therefore, the statute of limitations is not tolled against the Koons Beneficiaries and, in fact, has long lapsed.

In an attempt to support their “continuing and subsisting trust” argument, the Cross-Claimant Cundalls cite *Brate v. Hurt*⁷⁴ for the proposition that the statute of limitations does not begin to run until the trustee disavows the trust.⁷⁵ *Brate*, however, dealt with a purchase-money resulting trust, not an express trust or resulting trust and the holding of the case is limited to such.⁷⁶ Furthermore, while the Cross-Claimant Cundalls cite it as a case that applies O.R.C. §

⁷⁰ Cundall Merit-Brief, p. 34.

⁷¹ Former O.R.C. 2305.22 (The current version of O.R.C. § 2305.22 was effective January 1, 2007, and was enacted with the new Ohio Trust Code).

⁷² *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 297 N.E.2d 113.

⁷³ *Id.* at 169, 297 N.E.2d at 119.

⁷⁴ *Brate v. Hurt* (12. Dist.) 174 Ohio App.3d 101, 2007-Ohio-6571.

⁷⁵ Cross-Claimant Cundall Brief, p. 22.

⁷⁶ *Brate* at ¶ 40 (“The statute of limitations will not run in favor of the trustee of a resulting trust until the trustee disavows the trust or asserts some inconsistent right to the property or until the defendant expressly repudiated the trust.”).

2305.22, the case does not mention the statute anywhere in its opinion.⁷⁷ The *Estate of Southard v. United States*⁷⁸ case that is cited by the Cross-Claimant Cundalls dealt with a suit by an express trustee against the estate of a beneficiary. The other cases that are cited by the Cross-Claimant Cundalls involve suits against express trustees by beneficiaries. Accordingly, they do not apply here.⁷⁹

The Cundalls' also spend a great deal of time in their respective briefs championing the "conclusion" of the First District that their request for constructive trust should be treated as a remedy instead of a claim and that the appropriate statute of limitations to apply to this case is for that of the underlying breach of trust claim. This "conclusion," however, has no bearing with respect to the claims against the Koons Beneficiaries. The underlying claim against the Koons Beneficiaries would be for unjust enrichment, which overwhelming Ohio authority holds, has a six-year statute of limitations that begins to run on the date that the money or property was originally wrongfully obtained from the original transferee.⁸⁰ Since the statute of limitations for the underlying claim of unjust enrichment has lapsed against the Koons Beneficiaries, a constructive trust would be unavailable even as a remedy.

⁷⁷ Id. Likewise, the *Bergholtz Coal Holding Co. v. Dunning* (11 Dist), 2006 WL 1816290, 2006-Ohio-3401, and the *Barthelmas v. Barthelmas* (4 Dist. Jan. 7, 1999), Case No. 97 CA 48, 1999 WL 22610, 68, cases cited by Cross-Claimant Cundalls also fail to mention O.R.C. § 2305.22 and, further, were decided prior to the enactment of the new version of § 2305.22.

⁷⁸ *Southard v. United States* (S.D. Ohio 2007), unreported, 2007 WL 2407046.

⁷⁹ Ironically, both Plaintiff Cundall and Cross-Claimant Cundall cite to *In re Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, as authority for their constructive trust arguments. This case more importantly, however, describes the level of precision that a plaintiff must go to in tracing the assets that are subject to a constructive trust. It will be impossible for the Cundalls to adequately trace any property that might subject to a constructive trust in this case to the level of certainty and particularity that is articulated in *Cowling*.

⁸⁰ Merit Brief at 33-35; *LeCrone v. LeCrone* (10 Dist.), unreported, 2004 WL 2806387, 2004-Ohio-6526, ¶ 20.

Finally, the new OTC section on the statute of limitations for breach of trust, O.R.C. § 5810.05, strictly and purposely limits the amount of time that a beneficiary can bring a claim against a trustee for breach of trust. It provides:

[A] judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within four years after the first of the following to occur:

- (1) The removal, resignation, or death of the trustee;
- (2) The termination of the beneficiary's interest in the trust;
- (3) The termination of the trust;
- (4) The time at which the beneficiary knew or should have known of the breach of trust.⁸¹

The fourth prong applies in this case, because the Cundalls have had knowledge of this transaction since 1984 and the extent of the Cundalls' knowledge of the transaction has not changed between 1984 and 2006, except that the amount of money that the shares were worth increased during that time.

If the OTC is retroactively applied in this case, the new statute of limitations should apply as well. It is worth mentioning that the Uniform Trust Code section that this statute is modeled after does not include this fourth prong,⁸² which means that the Ohio legislature must have included this additional option to ensure the prompt adjudication of breach of trust claims. In refusing to dismiss this case on the basis of statute of limitations, the court of appeals ignored this revised statute and its clear intent to prevent the bringing of the exact type of case as the one at hand, wherein a beneficiary who possessed full knowledge of the transaction in which he now complains is allowed to wait and observe for decades to see how his decision played out in time.

The statutes of limitations on the claims against the Koons Beneficiaries have lapsed for numerous reasons and the Cundalls should be barred from proceeding.

A. Replies to inaccurate representations.

⁸¹ Appx. 49. O.R.C. § 5810.05. (Emphasis added.)

⁸² Uniform Trust Code § 1005.

While the purpose of this brief is to reply to the issues that are being appealed to this Court, the appellees' briefs address many substantive issues that are too provocative or too inaccurate to leave unaddressed. For purposes of giving this Court a more accurate picture of the record, those issues are now addressed.

B. O.R.C. § 2111.18 misconstrued.

The Cross-Claimant Cundalls' persistence that the releases executed by the beneficiaries in 1984 did not cover—and should not have covered—them is inaccurate. First, they summarily state the “Appellants’ reliance on the ‘pre-injury’ exception to the general rule prohibiting parents from signing a release binding their children is misplaced,” but they fail to explain or even suggest why this is so.⁸³ Instead, they go on to say that “absent compliance with R.C. 2111.18, [the Cross-Claimants] claims and interests in the Trusts could not be released.”⁸⁴ The problem with that argument is that § 2111.18 has no relevance to the 1984 transaction and the Cross-Claimants’ conclusion about this not being a pre-injury situation is inaccurate. Section 2111.18 of the Ohio Revised Code *only* applies when a ward is entitled to maintain an action for damages or other relief based on any claim for personal injury, damage to property, or damage that was caused to a ward by a wrongful act, neglect or default as a result of personal injury or damage to property.⁸⁵

In 1984, the Cundalls were not entering into releases in settlement of some claim. They signed releases to confirm the agreed-upon terms of the sale of their stock for which they were paid millions.⁸⁶ The releases were not created in order to settle a claim. This statute

⁸³ Cross-Claimant Cundall Brief, p. 11 (internal citations omitted).

⁸⁴ Cross-Claimant Cundall Brief, p. 12.

⁸⁵ O.R.C. § 2111.18.

⁸⁶ Supp. of Defendants-Petitioners 85-87.

applies to releases that are executed for purposes of settling a minor's claim.⁸⁷ And if § 2111.18 did apply the way the Cross-Claimants argue it does, it would conflict with the new OTC, which allows parents and/or similarly-situated beneficiaries to execute releases on behalf of minors without court approval.⁸⁸

C. Plaintiff inaccurately extrapolates a “material purpose” of the Trust to show that the 1984 transaction was an improper modification of the Trust.

Plaintiff Cundall states that the Grandparents Trust “provides that the closely-held family stock be held in trust until the last to die of JFK and his sister, Betty Lou Cundall.”⁸⁹ This conclusion is based on a convoluted and conveniently presumptive reading of the Trust. The Grandparents Trust contains no language stating or implying that holding the CIC shares is a “material purpose.” But even taking those presumptions as true, this is still an inconceivable interpretation of the Grandparents Trust language. The Grandparents put the closely-held shares in the Trust, knowing JFK would be acting both as Trustee and as President of the closely-held family company.

The Grandparents Trust was established to give the Trustee (among other things), “full power and authority in his discretion and without being required to apply to any court for authority and without being subject to the laws of the state or nation in respect to the investment of trust funds or the management of trust property: ...3. To sell or exchange, publicly or privately, any assets, real or personal, and any right appurtenant thereto, for cash or on credit, with or without security, and to grant options to purchase.”⁹⁰ Plaintiff Cundall's argument that

⁸⁷ See nearly every case in the annotations of § 2111.18.

⁸⁸ Cf. § 2111.18 and § 5801.10.

⁸⁹ Plaintiff Cundall Brief, p. 21.

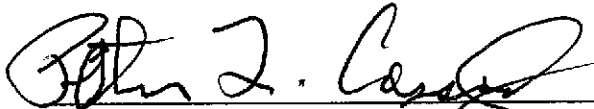
⁹⁰ Supp.40, Grandparents Trust at 8-9. The Grandparents Trust specifically allows the trustee to sell any part of the trust funds (Article II), to distribute principal (Article III(b)), to sell or barter

the entire 1984 transaction was improper because the sale modified the material purpose of the trust stated above is both attenuated and disingenuous.

V. CONCLUSION

For the reasons discussed above, the Court of Appeals' decision is fundamentally wrong in its reasoning and in its dangerous implications upon these Koons Beneficiaries and similarly-situated beneficiaries. The Court of Appeals' decision undermines the basic principals of jurisprudence, due process, limitations of action and the right to only get one bite of the apple in any given case. The decision below must be reversed to promote the most fundamental notions of state and federal law.

Respectfully submitted,



Peter L. Cassady (#0005562) (COUNSEL OF RECORD)

Brian G. Dershaw (#0072589)

Beckman Weil Shepardson LLC

300 Pike Street, Suite 400

Cincinnati, Ohio 45202

Telephone: 513-621-2100

Facsimile: 513-621-0106

petercassady@beckman-weil.com

bdershaw@beckman-weil.com

Attorneys for Appellants Deborah Koons Garcia, John F.

Koons IV, James B. Koons, Caroline M. Koons, Kathleen

M. Koons, Maura L. Koons, Jeremy B. Koons and Morgan

N. Koons

CIC shares (Article III(a), to sell any assets of the trust (Article IV(3)), and to transfer CIC shares (Article IV(4) and (7)).

CERTIFICATE OF SERVICE

A copy hereof has been served upon all counsel and parties of record, by ordinary U. S. Mail, this 13th day of October, 2008, as follows:

Richard G. Ward, Esq.
Drew & Ward Co., LPA
One West Fourth Street, Suite 2400
Cincinnati, Ohio 45202
Attorney for Appellee Michael K.
Cundall, Individually and as
Successor Trustee

Susan Grogan Faller, Esq.
Frost Brown Todd LLC
2200 PNC Centre
201 East Fifth Street
Cincinnati, Ohio 45202
Attorney for Appellee U.S. Bank

Donald J. Mooney, Jr., Esq.
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202
Attorney for Appellant
Christina Koons, Nicholas Koons Baker and
Carson Nye Koons Baker

Wijdan Jreisat, Esq.
Katz, Teller, Brant & Hild
255 East Fifth Street, Suite 2400
Cincinnati, OH 45202
Attorney for Appellees Peter B. Cundall, Sara
C. Kersting, Caitlin Mikula, Peter Cundall, Jr.,
Kyle Kersting, Alex Kersting and Jeffrey
Kersting

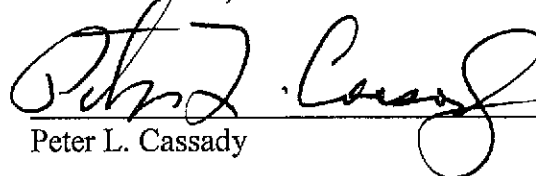
James B. Helmer, Jr., Esq.
Julie W. Popham, Esq.
Robert M. Rice, Esq.
Erin M. Campbell, Esq.
Helmer, Martins, Rice & Popham
600 Vine Street, Suite 2704
Cincinnati, Ohio 45202
Attorneys for Personal Representative and
Successor Trustee Appellants

G. Jack Donson, Esq.
Jeanne M. Cors, Esq.
Taft, Stettinius & Hollister, LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
Of Counsel for Personal Representative and
Successor Trustee Appellants

William H. Blessing, Esq.
119 East Court Street, Suite 500
Cincinnati, OH 45202
Attorney for Appellees Michael K.
Cundall, Jr., Courtney Fletcher
Cundall, and Hillary Cundall

Justin M. Cundall, Infant
1418 South Church Street
Jonesboro, AR 72401

Jackson A. Cundall, Infant
1418 South Church Street
Jonesboro, AR 72401


Peter L. Cassady