

[Cite as *Holdren v. Garrett*, 2010-Ohio-6295.]

[Please see 2011-Ohio-1095.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles A. Holdren, Trustee of the Cecil W. Garrett Trust,	:	
	:	
Plaintiff-Appellee,	:	No. 09AP-1153
	:	(Prob. No. 523179A)
v.	:	
	:	
Wesley L. Garrett, Individually and as Former Trustee of Cecil W. Garrett Trust,	:	(REGULAR CALENDAR)
	:	
Defendant/Third-Party Plaintiff-Appellant,	:	
	:	
v.	:	
	:	
Patricia Westfall et al.,	:	
	:	
Third-Party Defendants- Appellees.	:	
	:	

D E C I S I O N

Rendered on December 21, 2010

*Snider, Barrett, Easterday, Cunningham & Eselgroth LLP, Jeffrey A. Easterday and Troy A. Callicoa*t, for plaintiff-appellee.

Stebelton, Aranda & Snider, and *Daniel J. Fruth*, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas,
Probate Division.

McGRATH, J.

{¶1} Defendant-appellant, Wesley L. Garrett ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, Probate Division, entering judgment in favor of plaintiff-appellee, Charles A. Holdren, Trustee of the Cecil W. Garrett Trust and third-party defendants, Patricia Westfall ("Patricia"), Virginia Westfall ("Virginia"), and Cecilia Garrett ("Cecilia").

{¶2} This action arises out of a revocable inter vivos trust ("the trust"), established by Cecil W. Garrett ("Cecil"), on September 17, 1980. The trust was funded with real property, consisting primarily of a family farm. Cecil's wife, Alice A. Garrett ("Alice"), was the income beneficiary of the trust during her life, and appellant, Patricia, Cecilia, and Virginia were the persons designated as beneficiaries of the trust upon the death of Alice. When created, the trust named The Huntington National Bank as trustee. The trust was amended on January 21, 1985, and William Owens was designated as trustee. Cecil died on February 28, 1986, and on October 26, 1989, with Alice's consent, appellant was appointed trustee.

{¶3} On February 28, 2000, Virginia was appointed as the temporary conservator of the estate and person of Alice by the Superior Court of California, County of Riverside. Virginia was made the permanent conservator on May 10, 2001. On December 1, 2004, Alice passed away. On or about December 5, 2006, after serving for over 20 years, appellant was removed as trustee, and Patricia's husband, Ralph Westfall ("Ralph"), was appointed successor trustee. During this litigation, Ralph was removed as

trustee and Patricia and Ralph's son, Charles Holdren ("Charles"), was named as successor trustee.

{¶4} On June 20, 2007, prior to his removal and in his capacity as trustee, Ralph filed a complaint requesting a trust accounting, alleging breach of trust and/or fiduciary duty, breach of loyalty and/or good faith, and conversion/concealment of assets. Appellant filed an answer, counterclaim, and third-party complaint naming Patricia, Virginia, and Cecilia as third-party defendants.

{¶5} A trial was held before a magistrate of the probate court on August 15, 18, and 19, 2008, and the magistrate rendered a decision on June 30, 2009. The magistrate did not find that the evidence demonstrated a concealment of assets but, instead, that the evidence demonstrated gross neglect of fiduciary responsibility. Therefore, the magistrate concluded that during his time as trustee, appellant violated the trust provisions and breached his fiduciary responsibilities.

{¶6} Appellant filed objections to the magistrate's decision. On October 19, 2009, the trial court rendered a decision that essentially upheld the magistrate's decision in all respects except for the magistrate's conclusion that appellant was liable for \$61,044 as the trust's share of the cost to clear the family farms. Therefore, the trial court overruled in part and sustained in part appellant's objections to the magistrate's decision and adopted the magistrate's decision as modified. In conclusion, the court entered judgment in the total amount of \$719,824.41, plus interest in the amount of \$275,452.13 as of October 31, 2009, attorney fees in the amount of \$94,731.67, and litigation costs in the amount of \$3,881.78.

{¶7} This appeal followed and appellant brings the following three assignments of error for our review:

Appellant's First Assignment of Error:

The Trial Court erred to the prejudice of Appellant, Wesley Garrett, individually and as Trustee of the Cecil W. Garrett Trust, as a matter of law, in denying Appellant's Motion for Summary Judgment as the applicable statute of limitations bars the Plaintiff's claims herein.

Appellant's Second Assignment of Error:

The Trial Court erred to the prejudice of Appellant, Wesley Garrett, individually and as Trustee of the Cecil W. Garrett Trust, in its award and calculation of damages.

Appellant's Third Assignment of Error:

The Trial Court erred to the prejudice of Appellant, Wesley Garrett, individually and as Trustee of the Cecil W. Garrett Trust, by not ruling upon and/or implicitly denying Appellant's Motion for Summary Judgment on his claim for declaratory relief.

{¶8} In his first assignment of error, appellant contends his motion for summary judgment should have been granted because appellee's claims against him are barred by the applicable statute of limitations. On July 11, 2008, appellant filed a motion for summary judgment asserting several grounds for why he was entitled to judgment as a matter of law. Our only concern at this juncture, however, is appellant's arguments related to the statute of limitations. Appellant contends that, pursuant to *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, and R.C. 5810.05, the statute of limitations began to run when the beneficiaries either knew or should have known of the breach of trust. According to appellant, this occurred well before four years prior to suit being filed.

It is appellant's position that at the very least there is an issue of unresolved fact regarding whether the beneficiaries should have known about the transactions at issue herein, and, therefore, this matter should be remanded to the trial court to make such factual determination. We agree.

{¶9} As is relevant here, R.C. 5810.05(C) provides that a beneficiary must commence an action against a trustee for breach of trust within four years after the first of the following to occur:

(1) The removal, resignation, or death of the trustee;

* * *

(4) The time at which the beneficiary knew or should have known of the breach of trust.

{¶10} In *Cundall*, the Supreme Court of Ohio reviewed the importance of statutes of limitations where a successor trustee sued a former trustee for fraud, self-dealing, and breach of fiduciary duty. In *Cundall*, the court applied, not R.C. 5810.05, but instead the four-year statute of limitations contained in R.C. 2305.09. The *Cundall* court rejected the appellate court's holding that for a trustee, the statute of limitations will not begin to run until the fiduciary relationship has ended.

{¶11} Quoting *The Law of Trusts and Trustees*, the court stated: "If the trustee violates one or more of his obligations to the beneficiary * * * there obviously is a cause of action in favor of the beneficiary and *any relevant Statute of Limitations will apply from the date when the beneficiary knew of the breach or repudiation*, or by the exercise of reasonable skill and diligence could have learned of it." (Emphasis sic.) Id. at ¶28, quoting George Gleason Bogert, *The Law of Trusts and Trustees* (2d Ed.Rev.1995) 630-34,

Section 951. Additionally, "[w]hen determining whether the exercise of reasonable diligence should have discovered a case of fraud, the relevant inquiry is whether the facts known 'would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry[.]' " *Id.* at ¶29, quoting *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 181, quoting *Schofield v. Cleveland Trust Co.* (1949), 149 Ohio St. 133, 142. This, as recognized by *Cundall*, does not require the victim to possess concrete knowledge of the alleged fraud but, rather, requires only "facts sufficient to alert a reasonable person of the *possibility* of fraud." (Emphasis sic.) *Id.* at ¶30, quoting *Palm Beach Co. v. Dun & Bradstreet.* (1995), 106 Ohio App.3d 167, 171. Constructive knowledge of the facts, rather than actual knowledge of their legal significance, is enough to start the statute of limitations running. *Id.*

{¶12} In his motion for summary judgment, appellant argued that, pursuant to *Cundall* and R.C. 5810.05, the statute of limitations expired long before this litigation was filed. Appellant's motion, however, was not ruled upon prior to trial, and the magistrate's decision makes no reference to either appellant's motion or the statute of limitations. In his objections to the magistrate's decision, appellant argued that *Cundall* required judgment to be entered in his favor and that the magistrate erred in failing to render his bench decision without first deciding the statute of limitations issue raised in his summary judgment motion.

{¶13} The trial court stated that, in effect, the motion had been overruled and cited the well-established principle that any pending motions that the trial court does not expressly rule on when it renders a final judgment in a case will be deemed to have been implicitly overruled. *Am. Business Mtge. Servs., Inc. v. Barclay*, 10th Dist. No. 04AP-68,

2004-Ohio-6725. However, the trial court went on to state that appellees' claims were not time-barred and summarily concluded that the statute of limitations began to run in December 2006, when appellant was removed as trustee. That date, according to the trial court, is when the beneficiaries had knowledge of the alleged breaches of duty. The predicament this presents, however, is that there is no factual determination made by the trial court, either on its own or by the magistrate, regarding when the beneficiaries *should have known* of the alleged breach. Granted, it may not have been until December 2006 that the beneficiaries had actual knowledge, but the test for when the statute of limitations begins to run contemplates not only actual knowledge, but also constructive knowledge of facts sufficient to alert a reasonable person of the possibility of fraud. *Cundall* at ¶30. The magistrate's finding, relied upon by the trial court, that the beneficiaries received no information relating to appellant's actions as trustee until after the lawsuit was initiated again goes to actual knowledge, which is only part of the test regarding when the statute of limitations begins to run.

{¶14} While the trial court summarily states there is "nothing in the record" to demonstrate the beneficiaries knew or should have known of the alleged breaches of trust, such statement is not supported by the evidence in the record. For example, Virginia was appointed permanent conservator of Alice's person and estate on May 10, 2001. Appellees' own exhibit 55 is dated January 18, 2001, and explains that Virginia, as conservator, hired legal counsel to inquire about the trust. Virginia's own testimony indicates they met with an attorney after her father's funeral because "we did have concerns. Wes had done some things that were scary. Even now, I realize I didn't know *all* the things he had done." (Emphasis added.) (Tr. 396.) Virginia did testify that she was

not aware of any breach until she got the paperwork for this court case; yet, when asked if her mother ever spoke about the deeds that transferred property from Alice to appellant, Virginia responded, "To my knowledge, Mom never remembered seeing them, signing them, or what they were." (Tr. 409.) Thus, it appears from her own testimony that Virginia was aware, from conversations with Alice, that appellant allegedly transferred property to himself without Alice's knowledge. Given that Alice passed away on December 1, 2004, Virginia's conversations with Alice about the property transfer obviously occurred prior to appellant's removal as trustee and prior to the initiation of this litigation.

{¶15} Additionally, when asked if Alice ever expressed concerns regarding the trust during appellant's tenure as trustee, Virginia said, "yes," and described the following encounter that occurred in 1995:

[T]he way [Alice] presented it to me, it was like the bank was siphoning off money. And I didn't see evidence of that. I did see evidence that [appellant] had written a lot of checks on her account that I didn't know what they went to[.]

(Tr. 416.)

{¶16} Also, in the application for conservatorship, Virginia stated that appellant admitted to stealing monies from Alice but that he would not repay any of the monies despite taking over a "large estate," resulting in Virginia filing a police report of the incident. We reiterate that, while the time of appellant's removal as trustee may be the date when the beneficiaries had actual knowledge of alleged breaches, we must review when they should have known based on the facts of which they were aware.

{¶17} "Statutes of limitations foster important public policies: ensuring fairness to the defendant, encouraging prompt prosecution of causes of action, suppressing stale and fraudulent claims, and avoiding the inconvenience engendered by delay and by the difficulty of proving older cases." *Cundall* at ¶22, citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88. The statute of limitations in the case before us began to run *either* when the beneficiaries knew *or* should have known of the alleged breaches of trust.

{¶18} We do not have a factual determination regarding when the beneficiaries should have known about various breaches despite the fact the record appears to contain evidence demonstrating this would have occurred prior to appellant's removal as trustee. Because we have no factual determinations made but, instead, are presented with a finding made without consideration of the evidence discussed above, we hesitate to simply enter judgment in favor of appellant but, rather, find the better approach is to allow the trial court to determine when the beneficiaries should have known of the alleged breaches of trust so as to begin the running of the statute of limitations and to, if needed, take additional evidence on this limited issue to make such determination. *Strawser v. Vulic* (June 22, 1993), 10th Dist. No. 92AP-1640 (case remanded for the trial court to make factual determinations); *Knowles v. Mercurio Custom Homes, Inc.*, 1st Dist. No. C-040025, 2005-Ohio-33 (remand for trial court to make factual determination); *Dilello v. Dilello* (Mar. 22, 1979), 8th Dist. No. 37790.

{¶19} Accordingly, we sustain appellant's first assignment of error to the extent that a factual determination needs to be made regarding when the beneficiary should have known of the alleged breaches of trust so as to begin the running of the statute of

limitations. The disposition of appellant's first assignment of error renders moot appellant's remaining assignments of error.

{¶20} For the foregoing reasons, appellant's first assignment of error is sustained in limited part, and appellant's remaining two assignments of error are moot. The judgment of the Franklin County Court of Common Pleas, Probate Division, is reversed, and this matter is remanded to that court for further proceedings in accordance with law and this decision.

Judgment reversed; cause remanded.

FRENCH and CONNOR, JJ., concur.
