### NORTH CAROLINA SUPREME COURT

Harriet Hurst Turner, and John Henry Hurst,

Plaintiffs-Appellants,

v.

From Wake County 06 CVS 18173

The Hammocks Beach Corporation,

Defendant-Appellee.

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**DEFENDANT-APPELLEE'S NEW BRIEF** 

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No. 450A08 TENTH DISTRICT

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### **DEFENDANT-APPELLEE'S NEW BRIEF**

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### INTRODUCTION

This case arises out of the claim of Appellants Harriet Hurst Turner and John Henry Hurst ("Plaintiffs") that they are entitled to 290 acres of North Carolina property in Onslow County, despite a 1987 Consent Judgment providing such property to Appellee The Hammocks Beach Corporation ("Hammocks Beach") "free and clear of *any* rights" of Plaintiffs. The North Carolina Court of Appeals properly rejected the Plaintiffs' claim, holding that Plaintiffs did not retain any future interests in the property vested in Hammocks Beach following the 1987

Consent Judgment. The issue of ownership to this property was litigated and decided against Plaintiffs in the 1987 action, and they cannot now relitigate the issue. The decision of the North Carolina Court of Appeals should be affirmed and Plaintiffs' complaint dismissed with prejudice.

### **STATEMENT OF THE CASE**

### I. HISTORY OF THE HAMMOCKS BEACH PROPERTY.

Plaintiffs' claims arise out of the administration of a trust created by deed in 1950 ("the 1950 deed") by Dr. William Sharpe ("Dr. Sharpe"), who was a neurosurgeon from New York. (R pp. 7-8) In 1923, Dr. Sharpe purchased 810 acres on the mainland in Onslow County, North Carolina. (R p. 64) Subsequently, in 1930 and 1931, Dr. Sharpe purchased adjacent property consisting of approximately 9,000 acres of beach and marshland. (R p. 64) The high land on the mainland portion is known as "The Hammocks." (R p. 64)

Dr. Sharpe became friends with John and Gertrude Hurst, an Onslow County couple who served as caretakers for the property. (R p. 64) After many years of friendship, Dr. Sharpe told the Hursts that he wanted to devise The Hammocks to them. (R p. 64) Having served as a black teacher in a racially segregated school system, Ms. Hurst asked that Dr. Sharpe instead devise the property in a manner that black teachers and various youth organizations could enjoy The Hammocks. (R p. 64) Dr. Sharpe agreed to do so and deeded The Hammocks to a non-profit

corporation in 1950, which eventually became The Hammocks Beach Corporation. (R pp. 64-65)

Hammocks Beach was organized to administer the property "primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina ... and for such other groups as are hereinafter set forth." (R p. 65) The 1950 deed prohibited the mortgage or sale of the property and restricted its use to members of the "North Carolina Teachers Association, Inc., and such others are as are provided for in the Charter of the Hammocks Beach Corporation." (R p. 65) In the event that the purposes of the trust became impossible or impracticable to fulfill, the 1950 deed provided for distribution of the Hammocks property in the following manner:

[T]he property conveyed herein may be transferred to The North Carolina State Board of Education, to be held in trust for the purpose herein set forth, and if the North Carolina State Board of Education shall refuse to accept such property for the purpose of continuing the trust herein declared, all of the property herein conveyed shall be deeded by said Hammocks Beach Corporation, Inc. to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants; The Hurst family shall have the mainland property and the Sharpe family shall have the beach property[.]

(R p. 58)

#### II. THE 1987 CONSENT JUDGMENT.

The restrictions against the mortgage or sale of the property, the limited rights of the Hurst and Sharpe families, and the integration of the public schools

rendered the trust terms illegal, impossible and impracticable to fulfill. (R pp. 66-68) Accordingly, in 1986, Hammocks Beach filed a declaratory judgment action against Plaintiffs in Onslow County. (R p. 61) Hammocks Beach requested the court to: (1) quiet title to the Hammocks; or (2) order an alternative disposition of the Hammocks to fulfill as nearly as possible the general intentions of Dr. Sharpe. (R p. 61) As they do here, Plaintiffs alleged in response that:

[F]ulfillment of the trust terms had become impossible or impracticable, that The Hammocks Beach Corporation had acted capriciously and contrary to the intent of the settlor in not declaring its recognition of such, and that the court should declare the trust terminated and either mandate a conveyance of all of the property to the Sharpe and Hurst families or adjudicate title in their names.

(R pp. 61-62)

Before trial in the 1986 action, the parties reached a settlement, which was approved by the Onslow County trial court in the 1987 Consent Judgment. The Consent Judgment provided, among other things, that the:

settlement which resulted from negotiations of the parties, whereunder Hammocks Beach Corporation as trustee would hold title to an appropriate portion of The Hammocks *free of any claims of the Sharpes and Hursts* and with broader administration powers, with the remainder of said property being vested in the Sharpe and Hurst defendants, [was] fair, reasonable, and in the best interests of the present and prospective beneficiaries of the trust, as well as the public interest, and is accordingly approved.

(R pp. 71-72) (emphasis added). Consistent with this finding, the 1987 Consent Judgment allocated the Hammocks property among Hammocks Beach, William

Sharpe and Gertrude Hurst. Specifically, Hammocks Beach relinquished its rights to approximately 490 acres in exchange for the rights to retain approximately 320 acres "free and clear of any rights" of Plaintiffs. (R p. 74) (emphasis added). Unlike the 1950 trust, the Consent Judgment allowed Hammocks Beach to sell the property vested in it. (R p. 73) Today the property vested and titled to Hammocks Beach consists of approximately 290 acres of land.

### III. PLAINTIFFS' 2006 LAWSUIT.

Plaintiffs filed their complaint on December 15, 2006 against Hammocks Beach and several other defendants who are not parties to this appeal, including the State of North Carolina. (R p. 5) Plaintiffs cite portions of the 1950 deed, the 1950 agreement, and the 1987 Consent Judgment in their complaint. (R pp. 7-12) Plaintiffs also allege that "[a]s in 1987, fulfillment of the trust terms has become impossible or impracticable" and seek claims for: (1) an accounting; (2) "Termination of Trust and Reversion to Contingent Beneficiaries"; and (3) breach of fiduciary duty. (R pp. 12-15)

Pursuant to Rule 12(b)(6), Hammocks Beach and the State of North Carolina moved to dismiss Plaintiffs' complaint on grounds that the 1987 Consent Judgment precluded Plaintiffs' claims. The State of North Carolina asserted that "the consent judgment expunged any interest that the State Board of Education may have had" in the subject property. (R p. 87) Hammocks Beach asserted that "pursuant to the

consent judgment, Plaintiffs have no rights to the property that is subject of this lawsuit and therefore no further rights as beneficiaries of the trust to an accounting or a claim of breach of fiduciary duty." (R p. 22) The trial court *granted* the State of North Carolina's motion but *denied* Hammocks Beach's motion. (R. pp. 83, 90-91) Because the trial court's denial of its motion affected a substantial right, Hammocks Beach appealed the decision to the North Carolina Court of Appeals. (R p. 115)

The North Carolina Court of Appeals reversed the trial court's decision with instructions to dismiss Plaintiffs' complaint with prejudice. *Turner v. The Hammocks Beach Corp. et al.*, \_\_\_N.C.\_\_\_, 664 S.E.2d 634 (2008). In doing so, Judge Stephens and Judge McGee recognized the trial court's interlocutory ruling affected a substantial right, as well as the preclusive effect of the 1987 Consent Judgment. *Id.* at 637-42. With respect to the latter, the majority concluded as follows:

[W]e hold that Plaintiffs did not retain any interests in the property that vested in Defendant following the 1987 consent judgment. The issue was litigated and decided against Plaintiffs in the prior action, and Plaintiffs cannot now re-litigate the issue as a basis for the claims they assert in the present action. Therefore, we hold that Plaintiffs' claims are barred by collateral estoppel and that the trial court erred by denying [Hammocks Beach's] motion to dismiss.

Id. at 642. Judge Tyson dissented from the majority opinion on two grounds, stating that the court should have dismissed Hammocks Beach's appeal as

interlocutory and that Plaintiffs' complaint states a claim upon which relief can be granted. *Id.* at 642-47. Plaintiffs appeal. As the majority recognized, the "central issue" in this case "is whether Plaintiffs retained any interest in the real property that vested in [Hammocks Beach] based upon the 1987 consent judgment." *Id.* at 640. As demonstrated below, the majority of the Court of Appeals panel correctly concluded that Plaintiffs did not.

### <u>ARGUMENT</u>

## I. THE MAJORITY CORRECTLY CONCLUDED THAT THE TRIAL COURT'S RULING AFFECTS A SUBSTANTIAL RIGHT.

The trial court's ruling affects substantial rights of Hammocks Beach such that appellate review was proper pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1). As the majority noted, the North Carolina Court of Appeals has held that the denial of a dispositive motion based on the defense of collateral estoppel is immediately appealable because such denial may expose a successful defendant to repetitious and unnecessary lawsuits. *See, e.g., McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231, *disc. rev. denied*, 353 N.C. 452, 548 S.E.2d 527 (2001) (holding that denial of dispositive motion based on the defense of collateral estoppel may affect a substantial right). Specifically, denial of Hammocks Beach's motion to dismiss based on collateral estoppel raises the possibility that Hammocks Beach will twice have to defend against the same issue

by the same Plaintiffs in frustration of the underlying principles of collateral estoppel. In fact, the whole reason for the 1986 suit and subsequent 1987 Consent Judgment was to bring to an end, once and for all, a dispute over the property in question that even back in 1986 had already raged for more than a decade.

In the 1986 action, Hammocks Beach sought (1) to quiet title to the Hammocks Beach property; or (2) to obtain an order for alternative disposition of the Hammocks Beach property and administration of the trust to fulfill as nearly as possible the manifested general intention of Dr. Sharpe. (R p. 61) Plaintiffs, on the other hand, argued—just as they do here—that it was impossible or impracticable to fulfill the trust terms, that Hammocks Beach had acted capriciously, and that the court should terminate the trust and order the property conveyed to them. (R pp. 61-62) All these issues were presented, were in dispute, were litigated, and were resolved. The Consent Judgment was signed by these very Plaintiffs. (R p. 78) But now, despite the fact that the Consent Judgment contains no reservation of Plaintiffs' rights of reversion, despite the fact that it divests Plaintiffs of "any" interest in the trust res, and despite the fact that it states that Plaintiffs "relinquish[ed] their rights" to the trust res, these same Plaintiffs have come back to the Court to seek what they have already given up. (R pp. 71, 74) Accordingly, the majority correctly concluded that Hammocks Beach's

substantial right to be free from relitigation and the risk of inconsistent determinations would be impaired if immediate appeal is not allowed.<sup>1</sup>

Plaintiffs suggest Foster v. Crandell, 181 N.C. App. 152, 638 S.E.2d 526 (2007), compels a different result. Not so. As the majority noted, the order "appealed from in [Foster] did not affect a substantial right because the prior action on which the defendants relied upon in support of their defenses of res judicata and collateral estoppel did not result in a final determination on the merits 'by either a jury or a judge[.]" Hammocks Beach, 664 S.E.2d at 638 (quoting Foster, 181 N.C. App. at 162-64, 638 S.E.2d at 533-34)). In stark contrast, the prior action here "did result in a final adjudication on the merits" because "[a] consent judgment is a final judgment on the merits for purposes of res judicata and collateral estoppel." Id. at 639. Accordingly, because the prior action resulted in a final judgment on the merits, the majority correctly concluded that this action presents the possibility of a result inconsistent with the prior trial court's decision. Hammocks Beach has thus demonstrated that the trial court's order is immediately

<sup>&</sup>lt;sup>1</sup>The dissent and Plaintiffs agree that denial of a collateral estoppel defense can affect a substantial right but claim that this case should be treated differently in light of its procedural posture. *Hammocks Beach*, 664 S.E.2d at 643; Plaintiffs' Brief at 18-19. However, Hammocks Beach's substantial right to be free from duplicative litigation is no less affected because this appeal was taken in the earliest stages of litigation. To the contrary, an interlocutory appeal in the early stages of the case, *e.g.*, before engaging in substantial discovery, is precisely what best protects that right.

appealable because it affects a substantial right—it exposes Hammocks Beach to repetitious and unnecessary lawsuits.

# II. THE MAJORITY CORRECTLY CONCLUDED THAT THE DOCTRINE OF COLLATERAL ESTOPPEL BARS PLAINTIFFS' FROM RELITIGATING THE ISSUES IN THIS CASE.

In 1987, Plaintiffs asserted that the Hammocks Beach trust should be terminated because "fulfillment of the trust terms ha[d] become impossible or impracticable" and that "Hammocks Beach Corporation [] acted capriciously and contrary to the intent of the settlor." (R p. 69) Now, Plaintiffs assert that the terms of the trust are impracticable or impossible, that Hammocks Beach has breached its fiduciary duty, and seek an accounting. (Plaintiffs' Brief at 21).

Collateral estoppel "prevents [the] relitigation of issues actually litigated and necessary to the outcome of the prior action . . . between the parties or their privies." State ex. rel. Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128 (1996) (quoting Thomas M. McInnis & Assoc. v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986)) (emphasis added). Plaintiffs' claims hinge on a previously litigated issue—whether Plaintiffs have any interest in the property in question. Specifically, Plaintiffs seek an accounting pursuant to N.C. Gen. Stat. § 36C-4-405.1 based on their alleged status as "remainder beneficiaries and interested persons." (R p. 13) In asserting their breach of fiduciary duty claim, Plaintiffs contend that Hammocks Beach owes them a special duty because they

are alleged "remainder beneficiaries and interested persons." (R p. 15) Plaintiffs seek to terminate the trust pursuant to N.C. Gen. Stat. § 36C-4-410 as alleged "contingent beneficiaries." (R p. 14)

In the 1987 Consent Judgment, however, the trial court granted the property at issue to "[Hammocks Beach] as trustee, . . . free and clear of *any rights* of [the Hursts]." (R p. 74) (emphasis added). The unambiguous language of the Consent Judgment thus extinguished any rights, including any future interest, that Plaintiffs may have held in the property at issue. *Hammocks Beach*, 664 S.E.2d at 641-42. Significantly, both Plaintiffs were signatories to the 1987 Consent Judgment. (R p. 78). The 1987 Consent Judgment is a final judgment on the merits, which bars relitigation of the same issue or claims. *NationsBank of North Carolina, N.A. v. Am. Doubloon Corp.*, 125 N.C. App. 494, 501, 481 S.E.2d 387, 391 (1997); *accord Hammocks Beach*, 664 S.E.2d at 639.

Plaintiffs concede that the issues involved in this case "are similar to those addressed in 1987" but claim they are "not the same given the passage of time and change of circumstances in the interim." (Plaintiffs' Brief at 22). Plaintiffs are mistaken. The central issue in this case—whether Plaintiffs have any interest in the property at issue—was determined as a matter of law in the 1987 Consent Judgment. Such a determination is not subject to change over time. Indeed, taken to its logical extreme, Plaintiffs' argument would mean that the number of times

this matter could be subject to litigation would be limited only by the desires of Plaintiffs or their heirs to file future lawsuits. This scenario is not consistent with the plain language of the 1987 Consent Judgment, which sought to end a "dispute between plaintiff and defendants [that] ha[d] continued for over a decade," and runs directly counter to the purpose behind the doctrine of collateral estoppel. (R p. 63)

Indeed, when a judgment of the court vests title to property "free and clear of any right," courts hold that res judicata bars a party from relitigating its rights to that property. Kavouras v. Fernandez, No. 92-1291, 1993 WL 26781, at \*1 (7th Cir. Feb. 2, 1993) (noting that "res judicata" barred plaintiff from asserting rights in property because a prior court ruled that such property should be held "free and clear of any right" of plaintiff); LaBow v. Rubin, Case No. CV-030400970S, 2004 WL 615713, at \*13-15 (Conn. Super. Mar. 12, 2004) (holding prior summary judgment order, which stated that property of defendant was "free and clear of any claims" of plaintiff, "definitively resolved" the issue of whether plaintiff "can maintain a claim" for the same property and "the doctrine of collateral estoppel prevents" plaintiff "from litigating this action to quiet title"); Suprenant v. Suprenant, No. 3909, 1986 WL 2229, at \*1-2 (Ohio Ct. App. Feb 12, 1986) (finding that a divorce decree, which granted property to an ex-husband "free and clear of any right of claim" by the ex-husband's former wife, was "res judicata as

to ownership of all the couple's property"); State ex. rel v. Self-Realization Fellowship Church, 21 Ariz. App. 233, 236, 517 P.2d 1280, 1283 (1974) (holding that 1945 trial court judgment "determining that the [s]tate had no right, title or interest in the subject property is res judicata and the state may not relitigate the issue" of its entitlement to ownership in the property).

Plaintiffs' argument that their new lawsuit does not seek to relitigate matters but merely seeks an interpretation of the "meaning and effect" of the 1987 Consent Judgment misses the mark. Plaintiffs' Brief at 19-20. The collateral estoppel defense *requires* the interpretation of the meaning and effect of an earlier decision or judgment. Moreover, the substantial right that is adversely affected, and thus gives rise to interlocutory appellate jurisdiction, is the right to avoid repetitive and duplicative litigation. It is thus not sufficient protection that the trial court in the second lawsuit may avoid error by, after protracted litigation, ultimately interpreting the original judgment correctly and entering a final judgment consistent with the original one.

The 1987 Consent Judgment and this action involve the same parties. The central issue in this case and in the 1987 Consent Judgment are identical. And, as the North Carolina Court of Appeals held, "Plaintiffs' rights to the property that vested in Defendant by reason of the 1987 consent judgment, including any alleged future interests of Plaintiffs, were extinguished." *Hammocks Beach*, 664 S.E.2d at

641-42. The North Carolina Court of Appeals reversed the Superior Court's Order denying Hammocks Beach's motion to dismiss based on collateral estoppel. *Id.* at 642. But, the North Carolina Court of Appeals could have also reversed the Superior Court based on res judicata. Here, the same parties to the 1987 Consent Judgment, a final judgment on the merits, seek to relitigate identical claims—the impossibility of the trust and breach of fiduciary duty. See Green v. Dixon, 137 N.C. App. 305, 307, 528 S.E.2d 51, 53 (2000), aff'd, 352 N.C. 666, 535 S.E.2d 356 (2000). Res judicata bars relitigation of matters brought by the same parties that "were or should have been adjudicated in the prior action." Bockweg v. Anderson, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993). In short, there is no need to waste scarce judicial resources or to incur the risk of inconsistent verdicts to relitigate a matter that was decided over twenty years ago. The Court should affirm the North Carolina Court of Appeals decision to reverse the Superior Court's denial of Defendant The Hammocks Beach Corporation's N. C. R. Civ. P. 12(b)(6) Motion to Dismiss. *Hammocks Beach*, 664 S.E.2d at 642.

## III. THE MAJORITY CORRECTLY CONCLUDED THAT THE 1987 CONSENT JUDGMENT EXTINGUISHED PLAINTIFFS' PROPERTY RIGHTS.

A. THE 1987 CONSENT JUDGMENT UNAMBIGUOUSLY EXTINGUISHED ALL OF PLAINTIFFS' PRESENT AND FUTURE PROPERTY RIGHTS.

In 1987, the Superior Court concluded as a matter of law that the property at

issue "so vested in Hammocks Beach Corporation as trustee shall be *free and clear* of any rights of the heirs of . . . [the Hursts]." (R p. 74) (emphasis added). Nevertheless, Plaintiffs contend that the 1987 Consent Judgment only eliminated Plaintiffs' "present rights of immediate use of the trust property for cultivation, quarrying, raising livestock, fishing, residency, recreation and other activities, but not their future interests as contingent beneficiaries." Plaintiffs' Brief at 27. Plaintiffs thus assert an interpretation of the Consent Judgment that the plain language of the Consent Judgment does not support.

The 1987 Consent Judgment is a "court-approved contract subject to the rules of contract interpretation." *Walton v. City-of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). When a consent judgment is unambiguous, it must be interpreted consistent with its express terms as a matter of law. *See Bicket v. McLean Sec., Inc.*, 124 N.C. App. 548, 562, 478 S.E.2d 518, 526 (1996). Because the provision of the 1987 Consent Judgment, which vests title to the property at issue in Hammocks Beach free of "any rights" of Plaintiffs, is unambiguous, the judgment must be enforced as a matter of law. (R p. 74)

The parties' intent to extinguish Plaintiffs' present rights of use and enjoyment as well as their future interests in the property is clear by the Superior Court's use of the word "any" in the 1987 Consent Judgment. (R p. 74) The word "any" is unambiguous on its face because it is simply "not 'susceptible of two

different and reasonable interpretations." First Nationwide Bank v. United States, 48 Fed. Cl. 248, 261 (2000), aff'd, 431 F.3d 1342 (Fed. Cir. 2005) (noting that "[t]here are perhaps few words in the English language as unambiguous as the word 'any"); CBS, Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1223 (11th Cir. 2001) (quoting Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (noting that the Eleventh Circuit has repeatedly held that "the adjective 'any' is not ambiguous; it has a well-established meaning").

When interpreting a statute that utilized the word "any," the United States Supreme Court noted that "any has an expansive meaning, that is, one or some indiscriminately of whatever kind" and that in the absence of "any language limiting the breadth of that word," "any" means all. United States v. Gonzales, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035 (1997) (interpreting 18 U.S.C. § 924(c) to determine "whether the phrase 'any other term of imprisonment' means what it says, or whether it should be limited to some subset of prison sentences"); accord CBS, Inc., 245 F.3d at 1223 (noting that "any" means all when there is no language to limit the broad reach of the term). There is no language in the 1987 Consent Judgment that limits the broad reach of the word "any." (See R p. 74) If the parties intended for Plaintiffs to retain a future interest in the land at issue, they would not have used such an expansive term without expressly reserving Plaintiffs' future rights. (R p. 74)

Despite the plain language of the Consent Judgment, Plaintiffs argue that the Superior Court's use of the phrase "any rights" suggests that the parties only intended to extinguish Plaintiffs' "rights of present use and enjoyment of the property." Plaintiffs' Brief at 39. Specifically, Plaintiffs argue that the fact that the Superior Court granted the Hurst heirs land in fee simple and "free and clear of any claim of Hammocks Beach Corporation, trustee," suggests that the Court used "broader language" to establish when a party relinquished all present and future rights to land. Plaintiffs' Brief at 40; (R p. at 75) (emphasis added). Plaintiffs are again mistaken. The Superior Court did not grant Hammocks Beach fee simple title because it continues to hold the land at issue in trust for its beneficiarieseducators. And, in addition to vesting the land at issue in Hammocks Beach "free and clear of any rights of the heirs of . . . [the Hursts]," the Superior Court also concluded as a matter of law that Hammocks Beach "would hold title to an appropriate portion of [t]he Hammocks free of any claims of the . . . Hursts." (R pp. 71-72, 74) (emphasis added). Thus, the Court did in fact use language, which Plaintiffs expressly acknowledge, extinguished present and future property rights. Regardless, Plaintiffs cite no authority for their argument that the phrase "any claim" indicates a broader relinquishment of property interests than "any rights," and the Court should reject it. See Plaintiffs' Brief at 39-40.

Plaintiffs' argument that their rights can somehow "spring" into action later

is also inconsistent with the ability of Hammocks Beach to sell or mortgage the property following the 1987 Consent Judgment. Indeed, Plaintiffs would have no rights to "spring" if Hammocks Beach sold the property. Moreover, though Hammocks Beach would be required to sell or mortgage the property under court supervision, there is no similar provision that applies to Plaintiffs. Nor is there a requirement that Plaintiffs be allowed to object or even have a right of first refusal. As the majority concluded, the power of Hammocks Beach to sell and mortgage the property without Plaintiffs' approval is inconsistent with their claims of any rights in the property given to Hammocks Beach. *Hammocks Beach*, 664 S.E.2d at 642.

Lastly, Plaintiffs implicitly argue that they could not relinquish their contingent remainder because "a person who holds a contingent remainder has no immediate fixed right of future enjoyment." *Canoy v. Canoy*, 135 N.C. App. 326, 520 S.E.2d 128 (1999) (Plaintiffs' Brief at 39). North Carolina case law makes clear, however, that a party may transfer its future interest rights where the contingent remaindermen are ascertainable. *Rawls v. Early*, 94 N.C. App. 677, 681, 381 S.E.2d 166, 168 (1989). Therefore, Plaintiffs, who were ascertainable contingent remaindermen in 1986, disclaimed their future interests in the property given to Hammocks Beach by signing the Consent Judgment.

### B. THE CONSENT JUDGMENT IS VALID.

In the alternative, Plaintiffs argue that the Superior Court did not have authority "to terminate the trust and remove Plaintiffs as contingent beneficiaries" pursuant to N.C. Gen. Sat. § 36C-4-413. (Plantiffs' Brief at 30). Notwithstanding § 36C-4-413, the Superior Court had authority to modify the terms of the trust and to redistribute the land at issue because all interested parties, including Plaintiffs, consented to the terms of the judgment. (R pp. 78-80) Moreover, Plaintiffs undermine their own argument by acknowledging that the Superior Court had authority to vest Plaintiffs with fee simple title to land that the 1950 deed granted to Hammocks Beach in trust. (R p. 75) Plaintiffs cannot acknowledge the Superior Court's authority to vest them with title to land formerly held by Hammocks Beach in trust, while contesting the Court's use of the same authority with regard to a provision that they deem inconvenient to their present interests. If the Court had authority to vest Plaintiffs with fee simple title to property that Hammocks Beach held in trust, it also had authority to vest title to property in Hammocks Beach "free of any rights of the [Hursts]." (R p. 74) In any event, Plaintiffs have waived any right to seek relief from the Consent Judgment because they have failed to move for relief under Rule 60 of the North Carolina Rules of Civil Procured within a "reasonable time" and the time to appeal the Consent Judgment has long passed.

C. THERE IS NO INCONSISTENCY BETWEEN THE CONTINUATION OF THE MODIFIED TRUST AND THE EXTINGUISHMENT OF PLAINTIFFS' CONTINGENT REMAINDER.

Plaintiffs contend that they necessarily remained contingent beneficiaries because "[t]he Hammocks Beach Corporation holds the property as trustee, subject to the terms of the trust" and "the alternative plan for disposition to the Hurst heirs in the event of impossibility or impracticability was an integral part of the trust terms not affected by the 1987 Consent Judgment." (Plaintiffs' Brief at 32). The plain language of the 1987 Consent Judgment belies Plaintiffs' argument. The Superior Court held, as a matter of law, that the property at issue was "vested in Hammocks Beach Corporation as trustee shall be *free and clear of any rights* of the heirs of . . . [the Hursts]." (R p. 74) (emphasis added). Such language expressly modified the trust terms by extinguishing Plaintiffs' contingent remainder. *See infra* Section II.

Next, Plaintiffs contend that the "majority opinion strains mightily to reconcile the fact that the Consent Judgment explicitly provides that the trust continues and that [t]he Hammocks Beach Corporation holds the property subject to the terms of the trust with its acceptance of Defendant's argument that there are no beneficiaries or other parties that can hold [t]he Hammocks Beach Corporation accountable and ensure that the purposes of the trust are served." (Plaintiffs' Brief at 35). Contrary to Plaintiffs' argument, pursuant to N.C. Gen. Stat. § 36C-4-

405.1, the Attorney General, the District Attorney, or any interested party has standing to maintain a proceeding for breach of fiduciary duty or for an accounting of a trust. Thus, Hammocks Beach can be held accountable even in the absence of contingent remaindermen. Moreover, Plaintiffs appear to mistake their former status as contingent remaindermen, who have a right to the trust res in the event that the trust fails, with that of trust beneficiaries. Although a trust must necessarily have beneficiaries, a trust need not have contingent remaindermen.<sup>2</sup> Therefore, there is no inconsistency between the continuation of the modified trust and the extinguishment of Plaintiffs' contingent remainder.

### D. ENFORCEMENT OF THE PLAIN LANGUAGE OF THE CONSENT JUDGMENT DOES NOT LEAD TO ABSURD CONSEQUENCES.

Plaintiffs contend that the plain language of the Consent Judgment leads to absurd consequences because the removal of the settlor's alternate disposition frustrates the settlor's intent and without contingent remaindermen the trust res will escheat to the state in the event that the trust fails. Contrary to Plaintiffs' assertions, the modified trust effectuates the settlor's intent to benefit educators and it is highly unlikely that the trust res will escheat to the state under any circumstance.

<sup>&</sup>lt;sup>2</sup> The beneficiaries of the Hammocks Beach trust are educators. There is no evidence in the record that either Plaintiff is an educator.

### 1. The modified trust effectuates the settlor's intent.

The settlor's original intent was that the trust benefit black teachers and youth organizations. (R pp. 64-65) Indeed, the 1950 deed expressly stated that the purpose of the trust was "for the recreational and educational purpose to the use and benefit of the members of [t]he North Carolina Teachers Association, Inc. and such others as are provided for in the Charter of the Hammocks Beach Corporation." (R p. 65) The settlor's intent to benefit educators is further evidenced by the settlor's alternate disposition to the North Carolina Board of Education. (R p. 66) But "[t]he integration of the public schools and the virtual disintegration of the organizations for black people which were contemplated by [the settlor]" rendered the trust impossible or impracticable. (See R p. 68)) In full recognition of the settlor's intent and the practical factors that rendered the trust impossible or impracticable, the parties negotiated a settlement with the express purpose of "continuing the trust so as to carry out the original intentions of [the settlor]." (R p. 70) The modified trust effectuates the settlor's charitable intent to benefit educators. Although the settlor may not have originally intended that Hammocks Beach own the portion of land at issue exclusive of Plaintiffs' rights of present use and enjoyment or future interests, the settlor also did not intend that Plaintiffs would have fee simple title to a portion of land that Hammocks Beach formerly held in trust. (R p. 75) The Consent Judgment represents a negotiated

settlement among all interested parties to modify the trust with the settlor's express intent as a guiding principle. In continuing the trust with modified terms and granting Plaintiffs fee simple title to a portion of land formerly held by Hammocks Beach in trust, the 1987 Consent Judgment effectuates the settlor's intent to benefit educators and to grant Plaintiffs property rights.

### 2. The Property is highly unlikely to escheat to the state.

Plaintiffs contention that the trust res will escheat to the state or be applied in a manner that is inconsistent with the settlor's original intent is unrealistic. Plaintiffs contend that Hammocks Beach "cannot accomplish the purposes for which the trust was created" because the terms of the trust under the 1950 deed rendered the trust impossible or impracticable. See Plaintiffs' Brief at 46. Yet, Plaintiffs contention that the Superior Court, which expressly recognized that the terms of the trust under the 1950 deed rendered the trust impracticable, failed to remove the impossible or impracticable terms of the 1950 deed is nonsensical. Indeed, as the North Carolina Court of Appeals noted: "[h]ad the trial court intended for the impossibility and impracticability terms of the 1950 deed to remain in effect following the 1987 consent judgment, it would have so ordered." Hammocks Beach, 664 S.E.2d at 641. While it is undisputed that the terms of the trust as stated under the 1950 deed were impossible, there is no evidence that the modified terms of the trust are similarly impossible or impracticable.

Nevertheless, even if a court deemed the trust to be impracticable, N.C. Gen. Stat. § 36C-4-413 provides that if a trust becomes impracticable or impossible then a court "may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable intent." In Morris v. Morris Charitable Found., 161 N.C. App. 673, 589 S.E.2d 414 (2003) (quoting *Riverton Area Fire Prot. Dist. v.* Riverton Volunteer Fire Dept., 208 Ill. App. 3d 944, 950, 566 N.E.2d 1015, 1019 (1991)), the North Carolina Court of Appeals noted that under the cy pres doctrine, "if [a] failed gift was to or for a charitable institution which never existed, or has ceased to exist, or is too vaguely described to be identified, the court will . . . deliver the principal to another like institution." Here, the settlor's charitable purpose was to benefit educators. In the event that the trust fails, the trust res would likely be distributed to a charitable organization that benefits educators. Therefore, it is highly unlikely that the trust res would ever escheat to the State of North Carolina or that the trust res would be applied for purposes that are not consistent with the settlor's intent.

### 3. The practical consequences of Plaintiffs' interpretation are not logical.

While Plaintiffs proposed consequences of a plain reading of the Consent Judgment are exaggerated and highly unrealistic, Plaintiffs' interpretation has practical consequences that would lead to absurd results. Plaintiffs' seek to

reclaim property rights that they relinquished over twenty years ago by asserting an interpretation of the Consent Judgment that is not supported by its terms. Further, Plaintiffs contend that while the portion of the 1987 Consent Judgment that granted Hammocks Beach a portion of land free of "any rights" of Plaintiffs is invalid, the portion of the judgment granting them fee simple ownership free of "any claim" of Hammocks Beach is valid. (R pp. 74-75) Effectively, Plaintiffs seek to reclaim property that they relinquished in exchange for enhanced property rights. Such an outcome is not only inequitable, but it is also contrary to the plain language of the Consent Judgment. Consistent with the majority's decision, the Consent Judgment that the parties signed and agreed to and that the Onslow Superior Court approved over twenty years ago should not be undone.

### **CONCLUSION**

For the foregoing reasons, the Court should affirm the decision of the North Carolina Court of Appeals and order the trial court to dismiss Plaintiffs' complaint with prejudice.

### This 21st day of November, 2008.

### **HUNTON & WILLIAMS LLP**

Frank E. Emory, Jr.

N.C. Bar No. 10316

femory@hunton.com

Brent A. Rosser

N.C. Bar No. 28781

brosser@hunton.com

Counsel for Defendant-Appellee Hammocks Beach Corporation

Bank of America Plaza 101 South Tryon Street, Suite 3500 Charlotte, NC 28280 (704) 378-4700 (704) 378-4890 ~ Fax

### **CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing **DEFENDANT-APPELLEE'S NEW BRIEF** upon each of the parties in this lawsuit by placing a true and correct copy of same in the United States mail, first class and postage prepaid, by electronic transmission and by facsimile as follows:

Charles T. Francis, Esq.
THE FRANCIS LAW FIRM, PLLC
P. O. Box 164
Raleigh, North Carolina 27602
cfrancis@thefrancislawfirm.com

Facsimile: (919) 828-0801

This 21st day of November, 2008.

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