

NORTH CAROLINA COURT OF APPEALS

HARRIETT HURST TURNER and)
JOHN HENRY HURST,)

Plaintiffs-Appellees,)

vs.)

FROM WAKE COUNTY

No. 06 CVS 18173

THE HAMMOCKS BEACH)
CORPORATION,)

Defendant-Appellant.)

_____)

PLAINTIFFS-APPELLEES' BRIEF

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STATEMENT OF THE CASE

On 15 December 2006, Plaintiffs-Appellees filed the above-captioned suit in Wake County Superior Court. The Complaint seeks termination of a trust for which Plaintiffs-Appellees Harriett Hurst Turner and John Henry Hurst are contingent beneficiaries, an accounting from Appellant, The Hammocks Beach Corporation, the trustee of the trust, and monetary damages from Appellant for breach of its fiduciary duties. Rather than answering the Complaint, on 12 January 2007, Appellant filed a Motion to Dismiss pursuant to Rule 12(b)(1) and 12(b)(3), asserting the Superior Court's lack of subject matter jurisdiction and improper venue. That Motion came on for hearing during the 16 April 2007 Term of the Superior Court of Wake County before the Honorable Paul G. Gessner. In an Order entered on 15 June 2007, the Superior Court denied Appellant's first Motion to Dismiss. At the same time, the Court also denied Appellant's Motion for Protective Order and granted Appellees' Motion to Compel, ordering Appellant to respond to discovery requests that had been served six months prior with the Summons and Complaint. Appellant did not appeal denial of its first Motion to Dismiss, denial of its Motion for Protective Order or the Order compelling discovery entered 15 June 2007.

On 5 July 2007, Appellant filed Defendant Hammocks Beach Corporation's Further Motion to Dismiss and for a Protective Order. (R. at 21). Defendant Hammocks Beach Corporation's Further Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure sought dismissal of Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. At the same time Appellant once again sought a protective order excusing it from responding to the discovery requests served by Appellees along with the Summons and Complaint in December. In other words, despite having been ordered by the Superior Court in the Order entered 15 June 2007, to serve full, accurate and complete responses to Plaintiffs' First Set of Interrogatories and Request for Production of Documents to Defendant The Hammocks Beach Corporation, Appellant defied the Superior Court Order Compelling Discovery and instead sought the sanction of another Superior Court Judge for its untimely, incomplete and non-responsive responses to the Appellees' outstanding discovery requests. Given Appellant's defiance of the 15 June 2007 Order compelling discovery, Appellees filed a Motion for Sanctions on 27 July 2007. Thus, when Defendant Hammocks Beach Corporation's Further Motion to Dismiss and Motion for Protective Order (R. at 21) came on for hearing on 21 August 2007, it was combined for hearing with Appellees' Motion for Sanctions and the Motion to

Dismiss filed by the North Carolina State Board of Education and Roy A. Cooper, III, in his capacity as Attorney General of the State of North Carolina. (R. at 85).

Following the hearing on 21 August 2007, the Superior Court, R. Allen Baddour, Jr. presiding, entered an Order denying the Appellant's Motion to Dismiss (R. at 83). At the same time, the Superior Court also entered an Order granting Plaintiffs' Motion for Sanctions and denying Defendant's Motion for Protective Order. Without objection from either Appellant or Appellees, the Superior Court also entered an Order dismissing the State Board of Education and Roy A. Cooper, III, as defendants. (R. at 90.)

On 5 September 2007, Appellant filed Notice of Appeal by Defendant The Hammocks Beach Corporation of the 23 August 2007 Order denying its Further Motion to Dismiss. The appeal filed by The Hammocks Beach Corporation is an interlocutory appeal. On 10 September 2007, Appellant filed in the Superior Court a Motion to Stay Pending Appeal and Supporting Legal Authorities. Although Appellant filed its Motion to Stay Pending Appeal and Supporting Legal Authorities on 10 September 2007, it failed to schedule that motion for hearing in the Superior Court. In fact, Appellant never sought a hearing at any time in the trial court upon the Motion to Stay Pending Appeal. On 24 September 2007, Appellees filed Plaintiffs' Motion to Activate Sanctions Against Defendant The Hammocks Beach Corporation. On 5 October 2007, Appellees served Notice of

Hearing upon the Plaintiffs' Motion to Activate Sanctions for a hearing to be held on 5 November 2007 before the Honorable R. Allen Baddour, Jr. in the Wake County Superior Court. On the last business day prior to that hearing, and without seeking a hearing or any action by the Superior Court on its previously filed Motion to Stay Pending Appeal, Appellant filed an Emergency Petition for Temporary Stay and Writ of Supersedeas Pending Appeal.

In an Order dated 2 November 2007, the Clerk of Court of the North Carolina Court of Appeals entered the Temporary Stay and provided that Appellees respond to the Emergency Petition for Temporary Stay and Writ of Supersedeas Pending Appeal on or before 13 November 2007. On 16 November 2007, this Court allowed the Petition for Writ of Supersedeas.

On 14 November 2007, Appellees filed a Motion to Dismiss this appeal on the basis that it is interlocutory and does not affect a substantial right and for violations of the Rules of Appellate Procedure. That Motion is currently pending before this Court.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

As explained in Plaintiffs-Appellees' Motion to Dismiss Appeal, there is no basis for this Court's exercise of appellate jurisdiction in this case. The Hammocks Beach Corporation is pursuing an interlocutory appeal from the denial of its motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of

Civil Procedure. *See McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404 (1998) (noting that, generally, the denial of a party's motion to dismiss is interlocutory, and thus is not immediately appealable). This Court has repeatedly held that a denial of a dispositive motion is an interlocutory order from which an appeal will not lie. *See Pineville Forest Homeowners Assoc. v. Portrait Homes Constr., Co.*, 175 N.C. App. 380, 383, 623 S.E.2d 620, 623 (2006); *McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404 (1998) (noting that, generally, the denial of a party's motion to dismiss is interlocutory, and thus is not immediately appealable).

Since Appellant's appeal is interlocutory and Appellant did not seek certification of immediate appealability from the trial court pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, The Hammocks Beach Corporation can only obtain appellate review at this stage of the proceedings if it establishes that the challenged Order affects a substantial right that would be lost without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 261 (2001). It is not only well established that an appeal from a denial of a motion to dismiss is interlocutory but also that such denial generally does not affect a substantial right. *See e.g., Grant v. Miller*, 170 N.C. App. 184, 188, 611 S.E.2d 477, 480 (2005) (dismissing appeal and noting that denial of motion to

dismiss “does not affect a substantial right which will be lost absent immediate appellate review”).

“When a trial court enters an order rejecting the affirmative defenses of *res judicata* and collateral estoppel, the order ‘*can* affect a substantial right and *may* be immediately appealed,’” but the mere “[i]ncantation of the two doctrines does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting these two defenses.” *Foster v. Crandell*, 638 S.E.2d 526, 532 (N.C. Ct. App. 2007) (emphasis added). It is clear that a defendant must have a valid basis for asserting the defense in order for this exception to the bar on interlocutory appeals to apply. *See also Adams v. Samuels*, 134 N.C. App. 372, 517 S.E.2d 418 (1999) (concluding that although the same parties were involved in the present suit as were involved in the prior arbitration litigation, the claims in the present suit were different and thus the case did not involve an issue of claim preclusion; dismissing defendant’s appeal as interlocutory); *Community Bank v. Whitley*, 116 N.C. App. 731, 449 S.E.2d 226 (1994) (acknowledging that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right but concluding that the facts of the case did not “present a compelling case for premature review” and dismissing plaintiff’s appeal as interlocutory). On the record presented, The Hammocks Beach Corporation does not have a valid basis to assert the defenses of *res judicata*, issue preclusion or

collateral estoppel. In this case, Appellant raised the defense of issue preclusion in its Further Motion to Dismiss, but the trial court correctly rejected this defense as inapplicable to the situation presented here.

The defenses of *res judicata*, issue preclusion and collateral estoppel are not applicable in this case, and the denial of Defendant's Further Motion to Dismiss does not affect a substantial right. Because Defendant's appeal is interlocutory and does not involve a substantial right, there is no basis for appellate jurisdiction at this stage of the case. Therefore, this appeal should be dismissed.

STATEMENT OF THE FACTS

A detailed statement of the facts helpful in understanding the issues presented on this appeal is set forth in the Complaint. (R. at 5). However, for the purpose of responding to the Defendant-Appellant's Brief, the critical facts are as follows:

This is an action to enforce the terms of a trust. Appellant, The Hammocks Beach Corporation, is the trustee of a trust created by Dr. William Sharpe and Josephine W. Sharpe in 1950. The trust was created by an Agreement (R. at 55-57) and Deed (R. at 57-59) which transferred Onslow County property as the trust res and placed numerous conditions and restrictions on the trust property. As heirs and descendants of John and Gertrude Hurst, Appellees Harriett Hurst Turner and John Henry Hurst are contingent beneficiaries of the trust.

In the Agreement and Deed, the settlor made specific provisions for disposition of the trust property should fulfillment of the purposes of the trust terms one day become impossible or impracticable. The settlor directed that in such event, The Hammocks Beach Corporation should convey the property to the North Carolina State Board of Education as trustee “for the purpose of continuing the Trust,” and for the purposes for which the trust was established and further directed that if the Board refused to accept such a conveyance for that purpose, the property would instead be conveyed to Dr. Sharpe and to John and Gertrude Hurst and their “heirs and descendents.” Specifically, the Deed provides that “if at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified . . . the 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 The Hammocks Beach Corporation, Inc., to Dr. William Sharpe, his heirs and descendants and to John and Gertrude Hurst, their heirs and descendants; the Hurst family shall have the main land property and the Sharpe family shall have the beach property.” (R. at 58). As the grandchildren of John Hurst and Gertrude Hurst, Plaintiffs are Hurst heirs and descendants (R. at 5) and therefore contingent

beneficiaries of the trust pursuant to the aforementioned terms in the trust documents.

The Agreement and Deed reserved numerous rights of present use and enjoyment by the Sharpe and Hurst families including the right of ingress and egress; rights to commercially fish, crab and oyster in adjacent waters; and the right to reside and operate a general store on the trust property; rights to farm and quarry the land; and rights to hunt, graze livestock and recreate on the land composing the trust res. (R. at 55-59). In a 1987 Consent Judgment entered by the Onslow County Superior Court, Appellees relinquished these rights of present use as well as making other significant concessions and providing other significant consideration in settlement of a 1986 lawsuit filed by The Hammocks Beach Corporation. However, contrary to the contentions of Appellant in this case, the 1987 Consent Judgment did not affect Appellees' reversionary rights as contingent beneficiaries. Indeed, the Consent Judgment continued the trust subject to all the provisions in the 1950 Agreement and Deed except as specifically altered by the Consent Judgment. (R. at 61-82).

The Record makes clear that the State has voluntarily relinquished any right, interest or entitlement to serve as the successor trustee (R. at 90-91) as reflected in the presentation of the Attorney General to the Superior Court on 21 August 2007. The State refused appointment as successor trustee because the law would not

permit the State to serve as a trustee for the purposes envisioned by the settlor in 1950 (a racially segregated recreational facility) and because the 1950 trust is not subject to the doctrine of *cy pres* since the settlor indicated a clear alternative disposition in the event of the impossibility or impracticability of the trust purposes in subsequent years. The Attorney General articulated the State's view that the trust was not subject to the doctrine of *cy pres* at the outset of the hearing before Judge Baddour on 21 August 2007. Rule 11(c) Supplement, Exhibit 3, p. 5-7 of Transcript.

In Defendant-Appellant's Brief, Appellant inaccurately represents to this Court that the State was dismissed because the Hursts conceded that the 1987 Consent Judgment expunged any interest those parties had in the trust (R. at 85-92). See p. 11 of Defendant-Appellant's Brief. The foregoing contention by the Appellant misrepresents the position taken by Plaintiffs in response to the State's Motion to Dismiss and is without support in the very pages in the Record cited to by the Appellant. In drafting the Complaint, Plaintiffs joined the North Carolina State Board of Education as a party defendant based on the language in the trust documents appointing it as successor trustee. Once the State disavowed any interest in serving as the successor trustee, Plaintiffs did not oppose their dismissal as a party defendant. Appellees' support of the Motion to Dismiss of the State Board of Education rested solely on having joined the State Board of Education as

a defendant in taking the steps necessary to obtain a judgment effective as to the State and on the State's position disavowing any interest in serving as a successor trustee.

More importantly, the Superior Court's Corrected Order dismissing all claims against the North Carolina State Board of Education and Attorney General Roy A. Cooper, III with prejudice did not turn on the terms of the 1987 Consent Judgment. Appellant advances this argument presumably in order to build to the false parallel that it then attempts to draw between the position of the State and the Plaintiffs as contingent beneficiaries. However, as with its reading of the 1987 Consent Judgment, Appellant finds terms in the Corrected Order that simply cannot be located within the four corners of the document.

In addition, there is no dispute regarding and Appellant has not contested the impossibility and impracticability of achieving the purposes of the trust. (See Defendant-Appellant's Brief, p. 8.) Finally, there is no dispute that, although Appellant may have filed the case of *Hammocks Beach Corporation v. The Fresh Air Fund*, Onslow County 86 CVS 1466, in 1986 in order to obtain title to the trust res in fee simple, the 1987 Consent Judgment did not vest title in The Hammocks Beach Corporation in fee simple. Rather, the Consent Judgment vested title to a portion of the trust property to Appellant as trustee "subject to the trust terms set forth in the aforesaid deed dated August 10, 1950 recorded in the Onslow County

Registry at Book 221, Page 636 and in Agreement dated September 6, 1950 and recorded in the Onslow County Registry at Book 221, Page 634.” (R. at 72-73). There is no language in the Consent Judgment that extinguishes the remainder interest of the Plaintiffs-Appellees. In fact, Defendant-Appellant has expressly contemplated and discussed that the trust and Plaintiffs’ interest therein as contingent beneficiaries continued after the entry of 1987 Consent Judgment. Rule 11(c) Supplement, Exhibit 3, p. 35-36 of Transcript.

In this action, Appellees seek an order terminating the charitable trust because developments over the years, including the 20 years since the entry of the Consent Judgment, make it abundantly clear that it is impossible and impracticable for the trust property to be used as mandated by the settlor. In agreeing to the terms in the Consent Judgment, Plaintiffs and other members of their family that The Hammocks Beach Corporation sued in 1986 made significant concessions and provided significant consideration to The Hammocks Beach Corporation in relinquishing many rights of present use. Appellees relinquished their rights of ingress and egress; rights to commercially fish, crab and oyster in adjacent waters; rights to reside on the land; rights to farm and quarry the land; and rights to hunt, graze livestock and recreate on the land composing the trust res. (R. at 55-59). In addition, the Appellees agreed to abolish the prohibition on the mortgage or sale of the property under Court supervision. (R. at 73). All of these concessions were

made to The Hammocks Beach Corporation in order to promote and enhance its ability to manage the trust property as mandated by the settlor. Just as significantly, Plaintiffs provided The Hammocks Beach Corporation additional time -- in this instance almost two decades -- in order to manage the trust property more effectively and in a manner consistent with what was envisioned by Dr. Sharpe and by their grandparents.

The record in this case has not yet been fully developed with respect to Appellant's management and stewardship of the property. Thus far, The Hammocks Beach Corporation has objected to almost all discovery requests served by the Plaintiffs, repeatedly sought protective orders from the Superior Court excusing it from participating in discovery and defied court orders compelling discovery. Thus, the record at this time is incomplete with respect to details of Appellant's management of the property, particularly in the last 20 years. However, as set forth in the Complaint (R. at 5-16), Plaintiffs believe that the evidence yet to be developed will demonstrate that The Hammocks Beach Corporation has mismanaged the trust property, failed to comply with the purposes mandated by the settlor, and, in so doing, has once again demonstrated the impossibility and impracticability of achieving the purposes set forth in the 1950 trust documents which continued to govern after entry of the 1987 Consent Judgment.

Therefore, pursuant to the settlor's original intent in the Deed and Agreement, the Appellees seek an order terminating the trust and vesting the trust res in the designated contingent beneficiaries. In addition, the Appellees assert claims for an accounting and monetary damages based on Appellant's breach of its fiduciary duties as trustee.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS, SINCE PLAINTIFFS-APPELLEES' CLAIMS ARE NOT BARRED BY THE 1987 CONSENT JUDGMENT.

Despite Appellant's arguments to the contrary, Plaintiffs are entitled to pursue the claims asserted in the Complaint and have properly stated claims upon which relief can be granted. Accordingly, the trial court correctly denied Defendant's Further Motion to Dismiss, and this Court should affirm this decision.

A. Standard of Review.

The thrust of Defendant's Further Motion to Dismiss was that Plaintiffs lack standing to pursue their claims. "The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court." *Street v. Smart Corp.*, 157 N.C. App. 303, 305-06, 578 S.E.2d 695, 698 (2003) (quoting *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980)). A lack of

standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted. *See, e.g., Krauss v. Wayne County DSS*, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997).

When reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, this Court must decide “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]” *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citing *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979)). Rule 12(b)(6) “ ‘generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.’ ” *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (quoting *American Dairy Queen Corp. v. Augustyn*, 278 F. Supp. 717, 721 (N.D. Ill.1967)). On appeal of a Rule 12(b)(6) motion to dismiss, this Court “conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.” *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation omitted); *see also McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005).

B. Plaintiffs Have Standing to Pursue Their Claims Against Defendant.

Appellant does not contend that Plaintiffs have failed to state a claim upon which relief can be granted, essentially conceding that, if Plaintiffs have standing, they have stated claims which would entitle them to relief. Despite Defendant's arguments to the contrary, Plaintiffs do have standing to pursue their claims, and this standing was not impacted by the 1987 Consent Judgment.

The face of Plaintiffs' Complaint identifies them as the heirs and descendants of the late Gertrude Hurst and the late John Hurst and thus as contingent remainder beneficiaries of the trust. (R. at 5, 9, 13-15; Complaint, par. 2, 19, 29, 38, 40.) The trust documents provided that, if at any time in the future it becomes impossible or impractical to use trust property as specified in the trust documents, the property should be conveyed to the North Carolina State Board of Education as successor trustee "for the purpose of continuing the trust." The trust document further directed that if the North Carolina State Board of Education refused to accept such a conveyance for that purpose, the property would instead be conveyed to Dr. Sharpe (with respect to the beach property) and to John and Gertrude Hurst and "their heirs and descendants" with respect to the mainland property. (R. at 58). Plaintiffs have a substantial interest at stake in this litigation and there is a justiciable controversy present here regarding the continued vitality

and practicability of the trust, the appropriateness of Defendant's conduct as trustee, and Plaintiff's right to receive the property as contingent beneficiaries. Accordingly, Plaintiffs have standing to pursue the claims asserted in this action.

Contrary to Appellant's argument, the Consent Judgment entered in 1987 did not terminate Appellees' rights as contingent beneficiaries. Although The Hammocks Beach Corporation sought termination of the trust and conversion of its estate to a fee simple interest in 1986, there is no doubt that the trust continued in existence following entry of the 1987 Consent Judgment. The Court explained that the Consent Judgment was intended to avoid a trial which would involve "a substantial risk that the counterclaim of defendants Sharpe and Hurst would prevail with *resulting termination of the trust* and a conveyance of the real property to the Sharpe and Hurst families." (R. at 71; Consent Judgment, p. 11) (emphasis added). The Consent Judgment further provided that "Hammocks Beach Corporation, *trustee*, holds title to said property *subject to the trust terms* set forth in aforesaid deed dated August 10, 1950." (R. at 73; Consent Judgment, p. 13) (emphasis added). The Consent Judgment, by providing that the trust continued, also necessarily provided that the Plaintiffs continued as contingent beneficiaries under the trust.¹

¹ In fact, the Court did not have authority in 1987 to terminate the trust and remove Plaintiffs as contingent beneficiaries. The cy pres doctrine, which was at issue in the 1987 litigation, is codified in N.C. Gen. Stat. 36C-4-413, provides that the doctrine and statute are "not applicable if the settlor has provided, either directly or indirectly, for an alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to

Appellant relies on language in the Consent Judgment stating that they take the trust property “free of any claims of the Sharpes and Hursts and with broader administrative powers,” (R. at 72; Consent Judgment, p. 12), and that the “real property so vested in Hammocks Beach Corporation as trustee shall be free and clear of any rights of the heirs of Dr. William Sharpe or of Gertrude Hurst or of the heirs of John and Gertrude Hurst, (R. at 74; Consent Judgment, p. 14). However, Appellant reads this language much too broadly and misinterprets its effect and true intent. Appellant ignores the fact that, in the very passages quoted above, the Consent Judgment also provides that Defendant will be taking the property - “as trustee,” “subject to the trust terms,” and “with broader administrative powers” - all language which makes it clear that the trust continued and Defendant did not take fee simple title to the property as it, for all intents and purposes, now claims. Appellant’s interpretation of the “free and clear” language, contending that Appellees relinquished their status as contingent beneficiaries, conveniently ignores that the Consent Judgment explicitly provides that the trust continues and that Defendant holds the property as trustee, subject to the terms of the trust. As the Deed makes clear, the alternative plan for disposition to the Hurst heirs in the

achieve, or wasteful.” N.C. Gen. Stat. 36C-4-413(d). In the present case, the settlor, Dr. Sharpe, provided directly for an alternate plan in the event the trust became impracticable or impossible to achieve and that plan included Plaintiffs as contingent beneficiaries. Accordingly, the Court did not have authority to alter Dr. Sharpe’s plan and remove the remainder beneficiaries. The State of North Carolina and Attorney General have agreed that the cy pres doctrine is inapplicable here, since the settlor provided for an alternative disposition to the contingent beneficiaries, the Plaintiffs. Rule 11(c) Supplement, Exhibit 3, p. 5-7 of Transcript.

event of impossibility or impracticability was an integral part of the trust terms and not affected by the 1987 Consent Judgment.

This Court should reject Defendant's strained interpretation of this "free and clear" language and instead interpret it consistently with the language continuing the trust and Defendant's obligations as trustee. The most logical way to reconcile these two positions is to interpret this "free and clear" language as divesting the Sharpe and Hurst families of their 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. By divesting the Sharpe and Hurst families of their rights of immediate use, while also granting Defendant additional powers of administration such as the right to sell and mortgage the property with Court approval, the parties' intention in entering the Consent Judgment was to allow The Hammocks Beach Corporation to continue as trustee under conditions optimizing its chances for success and fulfilling the settlor's purposes in establishing the trust. It does not follow that the Sharpe and Hurst families intended to waive all of their rights as contingent beneficiaries which might spring into being in the future in the event that The Hammocks Beach Corporation ultimately was not successful in accomplishing the trust's goals or if the trustee breached its fiduciary duties.

If the Consent Judgment had intended to divest the Hurst and Sharpe heirs of their contingent remainder interest, it would have obviously done so in clear and unequivocal language. Appellant relies heavily upon the typical boiler-plate language in the Consent Judgment providing that the parties “fully intend[ed] to bind themselves, their heirs, assigns and successors,” but it points to no language actually stating that any of the parties intended that the Hurst and Sharpe heirs were relinquishing or waiving their rights as contingent beneficiaries. *See First Nat’l Bank of Portland v. Commissioner of the Internal Revenue*, 39 B.T.A. 828 (1939) (noting that, while a beneficial interest under a trust may be disclaimed, the disclaimer, whether in writing, oral or by conduct, must be unequivocal). The parties to the 1987 Consent Judgment were represented by distinguished and highly skilled counsel. If these lawyers and the parties represented, as well as the Court, had intended to so dramatically alter the wishes of Dr. Sharpe, the settlor of the trust, and to contravene the language of the trust itself, they would have made this obvious by using clear, unequivocal language (as they did in relinquishing their immediate use rights). The absence of such language, particularly coupled with language clearly intended to continue the trust and Defendant’s duties as trustee, indicates that the intent was for Plaintiffs to retain their interest as contingent beneficiaries in the event that, despite the concessions and assistance

agreed to and memorialized in the Consent Judgment, the trustee was ultimately unable to achieve the purposes mandated by the trust documents.²

While avoiding saying so directly, the clear implication of Appellant's argument is that it now holds the trust *res* "free and clear" of anyone else's claims, essentially in fee simple. Despite the fact that the Consent Judgment explicitly provides that the trust continues and that The Hammocks Beach Corporation holds the property subject to the terms of the trust, Appellant now apparently takes the position that there are no beneficiaries or other parties that can hold it accountable and ensure that the purposes of the trust are served. It is unreasonable to assume that the parties to the Consent Judgment intended to give Appellant this sort of "blank check" and effectively fee simple ownership of the property in contravention of the wishes of Dr. Sharpe, the settlor of the trust. Dr. Sharpe clearly contemplated that the trust could be terminated and, if so, that the *res*

² Also, as noted in footnote 1, the settlor, Dr. Sharpe, provided directly for an alternate plan in the event the trust became impracticable or impossible to achieve and that plan included Plaintiffs as contingent remainder beneficiaries. Accordingly, the Court did not have authority in 1987 to alter Dr. Sharpe's plan and remove the contingent beneficiaries. Even assuming such a change could be made with the approval of all the contingent beneficiaries, this approval would have to take the form of a knowing and unequivocal waiver of these rights. Such a waiver is definitely not explicitly present in the Consent Judgment and should not be implied. *See e.g., Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989) (noting that, in the pension benefit context, a number of courts have held that the spouse's rights as a beneficiary are extinguished only by terms specifically divesting the spouse's rights as a beneficiary under the policy or plan; concluding that the former spouse was entitled to benefits as the primary beneficiary, because the former spouse's alleged waiver of benefits in the divorce decree was not *knowing and voluntary*, and therefore without effect); *Sharkey v. Ultramar Energy Ltd.*, 70 F.3d 226, 231 (2d Cir.1995) (explaining that in the ERISA context, to determine if a beneficiary has released his claims, the court must consider whether, in the totality of the circumstances, the individual's waiver of his right can be characterized as knowing and voluntary).

should pass to the Sharpe and Hurst heirs and descendants as contingent beneficiaries of the trust.³

In effect, The Hammocks Beach Corporation now urges an interpretation of the Consent Judgment not set forth in the four corners of the document. By this expansive and unsubstantiated analysis of the Consent Judgment, Appellant attempts to, in result and effect, now secure prerogatives of fee simple title sought but not obtained in its 1986 lawsuit.

If the parties and Court had intended to divest Plaintiffs of their status as contingent beneficiaries of rights that might (or might not) one day spring into being, the termination would have been clearly articulated in the Consent Judgment.⁴ It should not now be inferred as Appellants contend. The Superior

³ Plaintiffs have established that the clear meaning and intent of the 1987 Consent Judgment was to release their present rights to the use and enjoyment of the property to allow the trustee to better manage and administer the property to achieve the trust's purposes, not to waive their rights as contingent remainder beneficiaries. See e.g., *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 564, 478 S.E.2d 518, 528 (1996) (explaining that, where the provisions of a consent judgment were unambiguous, the trial court was limited to an interpretation in keeping with the express language of the document and without considering parol evidence and "cannot under the guise of interpretation rewrite the contract for the parties"); *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970) (noting, in the insurance policy context, that in the absence of any ambiguity in the language used in a policy, the court must apply the plain meaning thereof and enforce the policies as written; further explaining that no ambiguity exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to differing interpretations by the parties). However, if this Court believes there is some doubt about the meaning of the Consent Judgment, then this matter will hinge on the interpretation of the document and will require additional discovery and development of evidence. See *Bicket*, 124 N.C. App. at 564, 478 S.E.2d 518 at 527-28 (explaining that, where the provisions of a consent judgment are ambiguous, the trial court is required to interpret the provisions in question, considering parol evidence if necessary, consistent with the intention of the original parties to the final consent judgment; further explaining that the "[t]he courts' province is to construe, not make contracts for parties"). In that case, Defendants' Further Motion to Dismiss was properly denied, and this case should proceed through discovery and ultimately a hearing on all issues raised.

⁴ There are numerous reasons why Plaintiffs would not have agreed to divest their contingent rights in the trust, chief among them that the trust was not subject to *cy pres*. In addition, as already explained, the parties contemplated that the consideration for the Consent Judgment and the beneficiaries' receipt of some property was Plaintiffs' release of their rights of present use and not a release of all future rights.

Court properly denied Defendant Hammocks Beach Corporation's Further Motion to Dismiss.

C. Plaintiffs' Claims Are Not Barred By The Doctrines of Issue Preclusion or Res Judicata.

Contrary to Defendant's argument, this case does not implicate the principle of issue preclusion or *res judicata*. Plaintiffs are not seeking to relitigate the claims or issues involved in the 1987 Consent Judgment. The litigation that culminated in the 1987 Consent Judgment was premised on conditions of impossibility and impracticability and conduct by The Hammocks Beach Corporation's that existed at that time and in fact pre-dated 1987. By contrast, this litigation involves the time frame from 1987 to the present. Plaintiffs' claims for an accounting, for termination of the trust and reversion to contingent beneficiaries and for breach of fiduciary duty are all premised on facts and conditions that developed since entry of the Consent Judgment in 1987. Accordingly, it cannot be said that this action is an attempt to relitigate previous claims or that issue preclusion is applicable.

Defendant essentially contended in the trial court and now again in this Court that, because the 1987 Consent Judgment dealt with issues related to the continuation of the trust, the continuation of its role as trustee, and the rights of the trust's beneficiaries, all subsequent litigation related to the trust is precluded by the doctrine of issue preclusion. However, the doctrines of *res judicata* and issue

preclusion/collateral estoppel only apply where the parties would be relitigating previously decided matters. *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 591, 599 S.E.2d 422, 427 (2004) (noting that where the second action between the same parties is upon a different claim, the prior judgment serves as a bar only as to issues actually litigated and determined in the original action). See also *Community Bank v. Whitley*, 116 N.C. App. at 733, 449 S.E.2d at 227 (noting that, while “a substantial right is likely to be affected [by the denial of a motion to dismiss based on *res judicata*] where a possibility of inconsistent verdicts exists if the case proceeds to trial,” the facts of that case would not lead to that outcome and dismissal of the appeal as interlocutory was warranted); *Country Club of Johnston County, Inc. v. United States Fidelity and Guaranty Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999) (dismissing an appeal as interlocutory where, despite the defense of *res judicata*, there was no possibility of inconsistent verdicts; noting that the order appealed from was the denial of a motion to dismiss, rather than the denial of a motion for summary judgment, and that “withholding of appeal of summary relief at early stages of trial court litigation is generally favored”).

In denying Defendant’s Further Motion to Dismiss, the trial court correctly recognized that this case does not involve the relitigation of the same issues litigated in the 1987 case and Consent Judgment. Admittedly, the issues involved in this case are similar to those addressed in 1987 but they are not the same given

the passage of time and change of circumstances in the interim. After the 1987 Consent Judgment, the trust at issue continued to exist and Appellant continued as trustee.⁵ In essence, the trust and Defendant were given a “second chance” to comply with and fulfill the terms and goals of the trust. In the almost 20 years between the 1987 Consent Judgment and the filing of this action on 15 December 2006, Defendant has utterly failed to fulfill the purposes of the trust.

Despite Appellant’s protests to the contrary, the doctrine of *res judicata* or claim preclusion did not bar the trial court from determining - now, in the present – whether accomplishment of the trust’s purpose is impossible or impracticable and whether The Hammocks Beach Corporation has fulfilled its obligations as trustee over the past 20 years. To accept Defendant’s assertion to the contrary would be to accept the argument that Defendant has made implicitly throughout this case that the trust did not continue in 1987 and that Defendant, in effect, took fee simple ownership in the trust property. However, it is clear that the trust did continue here and Defendant continued as trustee. Because of the ongoing nature of the trust and Defendant’s responsibilities, the issues presented here are not the same as those

⁵ In certain circumstances, a consent judgment could constitute a final judgment which precludes litigation of the same issues. For instance, if a consent judgment establishes that the purchaser under a sales contract owed the seller \$10,000, the purchaser could not later try to relitigate the same issue and argue that she actually owed the seller \$5,000. Unlike this example sales contract, a trust like the one here is a continuing entity with an ongoing purpose and a trustee with ongoing responsibilities. The trust’s purpose and the trustee’s fulfillment of its responsibilities are continuing in nature and are subject to review and perhaps litigation throughout the trust’s existence.

considered in 1987.⁶ Further, because the facts and issues presented here are not exactly the same as those considered in 1987, there is no risk of inconsistent verdicts or results if this case proceeds to trial.

Furthermore, Defendant's argument that Plaintiffs' claims are barred by the doctrines of issue preclusion and *res judicata* are circular in nature and therefore unconvincing. In order to accept its collateral estoppel arguments, this Court must necessarily accept Appellant's contention that the Consent Judgment terminated Plaintiffs' status as contingent remainder beneficiaries. However, that issue – the effect of the 1987 Consent Judgment on Plaintiffs' status as contingent beneficiaries – is the central issue remaining to be determined in this case. It is only by accepting Appellant's circular, strained and unconvincing analysis of the effect of the Consent Judgment on Plaintiffs' status as contingent beneficiaries that the Court can then reach the conclusion that Plaintiffs' claims are barred by the doctrines of issue preclusion or *res judicata*.

⁶ Even if the focus is placed solely on the question raised by Defendant – whether the 1987 Consent Judgment extinguished all rights Plaintiffs had as beneficiaries under the trust - the legal issue raised by Defendant's argument is the intent of the parties in entering the Consent Judgment. While Plaintiffs believe that the trial court could conclude as a matter of law that the trust continues in effect and that the Consent Judgment did not extinguish their rights as beneficiaries, the trial court could have denied Defendant's Motion to Dismiss under Rule 12(b)(6) because it believed that it was necessary to examine evidence of the parties' intent in entering the Consent Judgment to determine its meaning and impact on the beneficiaries' rights in the trust. Such evidence is not available at the early stages of the litigation prior to discovery, illustrating the premature nature of this appeal. See *Country Club of Johnston County, Inc. v. United States Fidelity and Guaranty Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999) (dismissing an appeal as interlocutory where, despite the defense of *res judicata*, there was no possibility of inconsistent verdicts; noting that the order appealed from was the denial of a motion to dismiss, rather than the denial of a motion for summary judgment, and that "withholding of appeal of summary relief at early stages of trial court litigation is generally favored").

As demonstrated here above, Appellant's contentions in this regard are incorrect. Even if the Court concludes that the Consent Judgment is ambiguous with respect to its effect upon Plaintiffs' status as contingent beneficiaries (and Plaintiffs contend that it clearly did not affect that status), then an evidentiary record would need to be developed in discovery on this issue. In that event, the Superior Court properly denied Defendant Hammocks Beach Corporation's Further Motion to Dismiss.

As explained, Plaintiffs are contingent beneficiaries of the trust at issue here and have standing to pursue their claims against Defendant. The trial court correctly denied Defendant's Further Motion to Dismiss, and this Court should affirm this decision and remand this action for further proceedings in the trial court.

D. The Complaint Asserts Claims Upon Which Relief Can Be Granted.

As explained above, beyond attacking Plaintiffs' standing to assert such claims as beneficiaries under the trust, Appellant does not argue that the actual claims asserted by Plaintiffs are deficient or fail to state a claim upon which relief can be granted. A Rule 12(b)(6) motion to dismiss presents the question "whether, as a matter of law, the allegations of the complaint, . . . are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling on the motion to dismiss, the allegations of

the complaint must be treated as true. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). In ruling upon a Rule 12(b)(6) motion, the complaint is to be liberally construed, and should not be dismissed “unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” *Davis v. Messer*, 119 N.C. App. 44, 51, 457 S.E.2d 902, 906-07 (1995).

It is clear that Plaintiffs have properly asserted a claim for an accounting as provided in N.C. Gen. Stat. 36C-4-405.1. Likewise, they have stated a claim for termination of the trust based on impossibility or impracticability of fulfilling the trust terms, pursuant to N.C. Gen. Stat. 36C-4-410. Finally, Plaintiffs have properly alleged the elements of a claim for breach of fiduciary duty. Taking all of the allegations of the Complaint as true and construing them liberally, it is clear that Plaintiffs have stated claims upon which relief can be granted. Defendant has not argued otherwise and, thus, this Court should affirm the trial court’s decision denying Defendant’s Further Motion to Dismiss.

In its Order Denying Defendant’s Further Motion to Dismiss, the trial court correctly rejected Appellant’s contentions that Plaintiffs are precluded as a matter of law by the 1987 Consent Judgment from asserting their claims. The trial court also properly determined that Plaintiffs have stated claims upon which relief can be granted. Plaintiffs should be allowed to develop the record in support of their

claims in discovery and move forward at the trial court level. This Court should affirm the trial court's order denying Defendant's Further Motion to Dismiss.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS, AND THE DENIAL OF THIS MOTION DID NOT CONTRAVENE A PRIOR ORDER ENTERED BY ANOTHER SUPERIOR COURT JUDGE.

The principle that Defendant advances here – that one superior court judge may not overrule another – is unremarkable and irrelevant to the present case. The trial court's order denying Defendant's Further Motion to Dismiss did not overrule any other orders entered in this matter. This ground for appeal should be rejected, and this Court should affirm the trial court's order.⁷

III. THE TRIAL COURT PROPERLY DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS, AND THIS RULING WAS NOT INCONSISTENT WITH OR CONTRADICTORY TO ITS DECISION TO ALLOW THE STATE OF NORTH CAROLINA'S MOTION TO DISMISS.

The fact that the trial court granted the State's Motion to Dismiss did not require that the court also grant The Hammock Beach Corporation's Further Motion to Dismiss. Plaintiffs and the State were not united in interest in the 1986 action, their positions with respect to the trust and trust property were much different, and the impact of the 1987 Consent Judgment on their respective

⁷ Assuming that Plaintiffs' action is eventually successful and the trial court enters an order in its favor, there is no reason to believe that this order will overrule an earlier trial court order, including the 1987 Consent Judgment. As already explained, the facts and issues of this case are distinct from those raised in the earlier action, and the 1987 Consent Judgment is not controlling on the outcome here. In any event, Defendant's argument, which is premised

interests was very different. The State Board of Education and Attorney General took the position in 1987 that it could not legally assume control of the trust property and “disavowed any interest the State Board of Education [had in] becoming contingent trustee to this trust.” Rule 11(c) Supplement, Exhibit 3, p. 5-7 of Transcript. Accordingly, the State agreed in 1987 that the Consent Judgment would dispose of its interest in this matter. Rule 11(c) Supplement, Exhibit 3, p. 5-7 of Transcript. Having agreed to relinquish all of its rights in 1987 and affirming that it “has no present intention of maintaining any action to enforce the Trust,” (R. at 87), the Attorney General sought and the trial court allowed its Motion to Dismiss.

The State refused appointment as successor trustee because the law would not permit the State to serve as a trustee for the purposes envisioned by the settlor in 1950 (a racially segregated recreational facility) and because the 1950 trust is not subject to the doctrine of *cy pres* since the settlor indicated a clear alternative disposition in the event of the impossibility or impracticability of the trust purposes in subsequent years. The Attorney General articulated the State’s view that the trust was not subject to the doctrine of *cy pres* at the outset of the hearing before Judge Baddour on 21 August 2007. Rule 11(c) Supplement, Exhibit 3, p. 5-7 of Transcript.

on what the trial court’s order in this action *may* provide, is premature and further illustrates why this interlocutory

Appellees' support of the Motion to Dismiss of the State Board of Education rested solely on having joined the State Board of Education as a defendant in taking the steps necessary to obtain a judgment effective as to the State and on the State's position disavowing any interest in serving as a successor trustee. More importantly, the Superior Court's Corrected Order dismissing all claims against the North Carolina State Board of Education and Attorney General Roy A. Cooper, III with prejudice did not turn on the terms of the 1987 Consent Judgment. In dismissing the North Carolina State Board of Education and Attorney General Roy A. Cooper, III as defendants, without opposition from Appellant or Appellees, the Superior Court did not rely upon the 1987 Consent Judgment as argued by Appellant. Rather, the trial court simply recognized that the State and the Appellees stand in entirely distinct positions by reason of the terms of the original trust documents which still govern and that these factually and legally distinct positions were not blurred or altered in this respect by the 1987 Consent Judgment. As a practical matter, the trial court likely also took note that neither Plaintiffs nor The Hammocks Beach Corporation opposed dismissal of the North Carolina State Board of Education or the Attorney General.

Plaintiffs did not relinquish their rights as contingent beneficiaries in 1987 and instead only relinquished their rights to the present use and enjoyment of the

appeal is also premature and should be dismissed.

property. In addition, Plaintiffs and the State are clearly in different positions in relation to the trust, this litigation and the 1986 litigation, as the State would have been a potential successor trustee if the trust continues, while Harriett Hurst Turner and John Hurst are contingent beneficiaries. The State's relinquishment of its rights as successor trustee actually bolsters Plaintiffs' claim as contingent beneficiaries, as it is the impossibility of fulfilling the trust purposes, termination of the trust and the resulting extinguishment of Appellant's and the State's rights to hold and manage the property as trustees for this trust purpose, that causes Plaintiff's rights as contingent beneficiaries to spring into being and vests the ownership of the trust property in Plaintiffs.

The trial court properly distinguished the positions of the State and Plaintiffs and correctly ruled on these motions. Accordingly, this Court should affirm the trial court's denial of Defendant Hammock Beach Corporation's Further Motion to Dismiss and remand this matter to the trial court for further proceedings.

CONCLUSION

Based upon the foregoing, Plaintiffs-Appellees respectfully urge this Court to affirm the Superior Court's order denying Defendant Hammocks Beach Corporation's Further Motion to Dismiss Plaintiff's Complaint and remand this case to the trial court for further proceedings.

Respectfully submitted this the 29 day of January, 2008.

THE FRANCIS LAW FIRM, PLLC

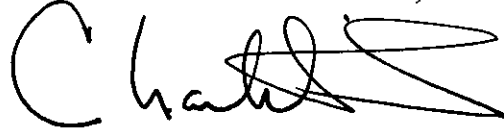
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Charles T. Francis
North Carolina State Bar No.: 16348
Attorneys for Plaintiffs-Appellees
Post Office Box 164
Raleigh, North Carolina 27602
Telephone: (919) 828-0801
Email: cfrancis@thefrancislawfirm.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Plaintiffs-Appellees certify that the foregoing brief, which was prepared using a proportional font, is less than 8,750 words as reported by the word-processing software.

THE FRANCIS LAW FIRM, PLLC



Charles T. Francis
North Carolina State Bar No.: 16348
Attorneys for Plaintiffs
Post Office Box 164
Raleigh, North Carolina 27602
Telephone: (919) 828-0801
Email: cfrancis@thefrancislawfirm.com

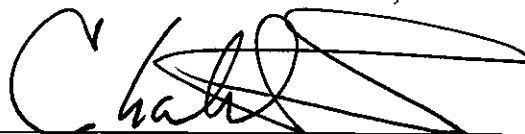
CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs hereby certifies that on this day the foregoing **PLAINTIFFS-APPELLEES' BRIEF** was served upon Defendants in this action, through counsel, by depositing a copy of same in the United States Mail, postage prepaid, and addressed as follows:

Frank E. Emory, Jr.
Hunton & Williams
Bank of America Plaza
101 South Tryon Street, Suite 3500
Charlotte, North Carolina 28280

This the 29 day of January, 2008.

THE FRANCIS LAW FIRM, PLLC



Charles T. Francis
North Carolina State Bar No.: 16348
Attorneys for Plaintiffs-Appellees
Post Office Box 164
Raleigh, North Carolina 27602
Telephone: (919) 828-0801
Email: cfrancis@thefrancislawfirm.com