

NO. 450A08

TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

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HARRIETT HURST TURNER and )  
JOHN HENRY HURST, )

Plaintiffs-Appellants, )

vs. )

FROM WAKE COUNTY

THE HAMMOCKS BEACH )  
CORPORATION, )

Defendant-Appellee. )

\_\_\_\_\_ )

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OF NORTH CAROLINA

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PLAINTIFF APPELLANTS' NEW BRIEF

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## QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS MAJORITY OPINION ERRED IN DENYING PLAINTIFFS' MOTION TO DISMISS DEFENDANT'S APPEAL AS INTERLOCUTORY.
  
- II. WHETHER THE COURT OF APPEALS MAJORITY OPINION ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE AND HOLDING THAT THE DOCTRINE OF COLLATERAL ESTOPPEL BARRED PLAINTIFFS' CLAIMS AND COMPELLED THE TRIAL COURT TO GRANT DEFENDANT'S RULE 12(B)(6) MOTION TO DISMISS.
  
- III. WHETHER THE COURT OF APPEALS MAJORITY OPINION ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE AND HOLDING THAT THE 1987 CONSENT JUDGMENT SIGNED BY THE PARTIES CLEARLY AND UNAMBIGUOUSLY EXTINGUISHED ALL OF PLAINTIFFS' EXTENSIVE USE AND OCCUPANCY RIGHTS, AS WELL AS THEIR CONTINGENT REVERSIONARY INTEREST IN REAL PROPERTY VESTED IN AND SPECIFICALLY HELD BY DEFENDANT AS "TRUSTEE".
  
- IV. WHETHER THE COURT OF APPEALS MAJORITY OPINION ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE, AS THE ALLEGATIONS OF PLAINTIFFS' COMPLAINT, WHEN TAKEN AS TRUE AND VIEWED IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, ARE SUFFICIENT TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

## **STATEMENT OF THE CASE**

On 15 December 2006, Plaintiffs-Appellants filed the above-captioned suit in Wake County Superior Court. The Complaint seeks termination of a trust for which Plaintiffs-Appellants Harriett Hurst Turner and John Henry Hurst (hereinafter “Appellants” or “Plaintiffs”) are contingent beneficiaries, an accounting from Defendant-Appellee, The Hammocks Beach Corporation (hereinafter “The Hammocks Beach Corporation” or “Defendant”), the trustee of the trust, and monetary damages from The Hammocks Beach Corporation for breach of its fiduciary duties. Rather than answering the Complaint, on 12 January 2007, The Hammocks Beach Corporation 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 The Hammocks Beach Corporation’s first Motion to Dismiss. At the same time, the Court also denied its Motion for Protective Order and granted Appellants’ Motion to Compel, ordering The Hammocks Beach Corporation to respond to discovery requests that had been served six months prior with the Summons and Complaint. The Hammocks Beach Corporation 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, Defendant The Hammocks Beach Corporation filed its Further Motion to Dismiss and for a Protective Order. (R. at 21). This 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, the Hammocks Beach Corporation once again sought a protective order excusing it from responding to the discovery requests served by Plaintiffs 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, The Hammocks Beach Corporation 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 Plaintiffs' outstanding discovery requests. Given The Hammocks Beach Corporation's defiance of the 15 June 2007 Order compelling discovery, Plaintiffs filed a Motion for Sanctions on 27 July 2007. Thus, when The Hammocks Beach Corporation's Motion for Protective Order (R. at 21) came on for hearing on 21 August 2007, it was combined for hearing with Plaintiffs' 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 Hammocks Beach Corporation'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 The Hammocks Beach Corporation's Motion for Protective Order. Without objection from either Plaintiffs or The Hammocks Beach Corporation, 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, The Hammocks Beach Corporation filed Notice of Appeal to the North Carolina Court of Appeals of the 23 August 2007 Order denying its Further Motion to Dismiss. On 10 September 2007, it also filed in the Superior Court a Motion to Stay Pending Appeal and Supporting Legal Authorities. Although The Hammocks Beach Corporation 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, The Hammocks Beach Corporation never sought a hearing at any time in the trial court upon the Motion to Stay Pending Appeal. On 24 September 2007, Plaintiffs filed a Motion to Activate Sanctions Against Defendant The Hammocks Beach Corporation. On

5 October 2007, Plaintiffs 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, The Hammocks Beach Corporation 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 Plaintiffs respond to the Emergency Petition for Temporary Stay and Writ of Supersedeas Pending Appeal on or before 13 November 2007. On 16 November 2007, the Court of Appeals allowed the Petition for Writ of Supersedeas. On 14 November 2007, Plaintiffs filed a Motion to Dismiss the appeal on the basis that it was interlocutory and did not affect a substantial right and for violations of the Rules of Appellate Procedure.

In an opinion filed on 19 August 2008, the majority of the Court of Appeals denied Plaintiffs' Motion to Dismiss appeal and reversed the trial court's denial of Defendant The Hammocks Beach Corporation's Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Judge Tyson filed a dissent, concluding that Defendant The Hammocks

Beach Corporation's appeal should have been dismissed as interlocutory and that the trial court correctly concluded that Plaintiffs had stated claim upon which relief could be granted and thus were entitled to pursue their claims in the trial court.

Plaintiffs-Appellants filed their Notice of Appeal to this Court on 22 September 2008. This case is now before this Court on the basis of the issues raised by the dissent in the Court of Appeals.

### **STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

Plaintiffs-Appellants' appeal is taken as of right pursuant to N.C. Gen. Stat. § 7A-30(2), as Plaintiffs appeal from the judgment of the Court of Appeals entered on 19 August 2008, based on the dissent filed by Judge John M. Tyson. The dissent was based on the following issues:

- I. Whether the Court of Appeals majority opinion erred in denying Plaintiffs' motion to dismiss Defendant's appeal as interlocutory.
- II. Whether the Court of Appeals majority opinion erred in reversing the trial court's order denying Defendant's motion to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and holding that the doctrine of collateral estoppel barred Plaintiffs' claims and compelled the trial court to grant Defendant's Rule 12(b)(6) motion to dismiss.
- III. Whether the Court of Appeals majority opinion erred in reversing the trial court's order denying Defendant's motion to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and holding that the 1987 Consent Judgment signed by

the parties clearly and unambiguously extinguished all of Plaintiffs' extensive use and occupancy rights, as well as their contingent reversionary interest in real property vested in and specifically held by Defendant as "trustee".

- IV. Whether the Court of Appeals majority opinion erred in reversing the trial court's order denying Defendant's motion to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, as the allegations of Plaintiffs' Complaint, when taken as true and viewed in the light most favorable to Plaintiffs, are sufficient to state a claim upon which relief may be granted.

As explained in Plaintiffs-Appellant's Motion to Dismiss Appeal in the Court of Appeals, there was no basis for the Court of Appeals' 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. Furthermore, as recognized by the dissenting opinion, The Hammocks Beach Corporation's appeal was not certified for immediate appeal by the trial court and did not involve a substantial right. Accordingly, as Judge Tyson concluded, the Court of Appeals should have dismissed The Hammocks Beach Corporation's appeal as premature. As further explained in the Argument section below, this Court should also adopt the dissenting opinion's reasoning below and reverse the majority opinion's decision to deny Plaintiffs-Appellants' Motion to Dismiss the appeal filed by The Hammocks Beach Corporation.

## STATEMENT OF THE FACTS

This case was appealed by The Hammocks Beach Corporation on an interlocutory basis. The Hammocks Beach Corporation appealed the denial of its Further Motion to Dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). It is well established that 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). The Complaint sets forth the detailed statement of facts necessary and helpful in understanding the issues presented in this appeal. (R. at 5). However, for the purpose of highlighting the issues essential to this appeal, the critical facts are as follows:

Plaintiffs commenced the underlying action here to enforce the terms of a trust and to protect their contingent remainder interests therein. The Hammocks Beach Corporation is the trustee of this 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, Plaintiffs 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; 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, Plaintiffs 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 The Hammocks Beach Corporation in this case, the 1987 Consent Judgment did not affect Plaintiffs’ reversionary interests 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 its brief to the Court of Appeals, The Hammocks Beach Corporation inaccurately represented to that 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, Brief of The Hammocks Beach Corporation, Court of Appeals. This contention by The Hammocks Beach Corporation misrepresented 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 Hammocks Beach Corporation. 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. Plaintiffs' 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. The Hammocks Beach Corporation advanced 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, The Hammocks Beach Corporation finds terms in the Corrected Order that simply cannot be located within the four corners of the document.

The impossibility and impracticability of achieving the purposes of the trust is not contested in this case. (See p. 8, Defendant-Appellant's Brief, Court of Appeals.) In addition, 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 The Hammocks Beach Corporation 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.

The Rule 11 Supplement to the Record reveals that The Hammocks Beach Corporation has expressly contemplated and discussed that the trust and Plaintiffs’ interest therein as contingent beneficiaries continued after the entry of 1987 Consent Judgment. While its discovery responses were largely unresponsive and incomplete, The Hammocks Beach Corporation did produce handwritten Minutes from a meeting of the Board of Directors of The Hammocks Beach Corporation that took place after the entry of the 1987 Consent Judgment. In a revealing exchange discussing the possibility of developing the trust property, the Directors of the Hammocks Beach Corporation contemplated that, at a minimum, there was a question whether the interests of contingent beneficiaries such as Plaintiffs remained in effect after the 1987 Consent Judgment. Rule 11(c) Supplement, Exhibit 3, p. 35-36 of Transcript.

In this action, Plaintiffs seek an order terminating the 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. Plaintiffs 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 Plaintiffs 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. As noted by the dissenting opinion, viewing all evidence in the light most favorable to plaintiffs and giving them the benefit of

every reasonable inference to be drawn therefrom, the Consent Judgment could be construed as a tolling agreement to allow defendant, as trustee, to attempt to continue to "carry out the original intentions of Dr. Sharpe," in which case Plaintiffs' contingent reversionary interests were not extinguished by the Consent Judgment.

Because of The Hammocks Beach Corporation's premature appeal, the record in this case has not yet been fully developed with respect to The Hammocks Beach Corporation's management and stewardship of the property since 1987. At the trial level, The Hammocks Beach Corporation 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 its management of the property, particularly in the last 20 years. However, as set forth in the Complaint (R. at 5-16), Plaintiffs alleged 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. Thus far in this case, The Hammocks Beach Corporation

has stipulated to the impossibility and impracticability of achieving the purposes of the trust.

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

### **ARGUMENT**

#### I. THE COURT OF APPEALS MAJORITY OPINION ERRED IN DENYING PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S APPEAL AS INTERLOCUTORY.

While the majority opinion correctly concluded that Defendant's appeal was interlocutory, it erred in concluding that this appeal affected a substantial right. In the dissenting opinion, Judge Tyson correctly concluded that Defendant's appeal did not affect a substantial right and thus should have been dismissed by the Court of Appeals as interlocutory. Accordingly, this Court should reverse the decision of the Court of Appeals denying Plaintiff's motion to dismiss Defendant's appeal.

Both the majority and dissent agreed that Defendant was 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). It has repeatedly been 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 the Hammocks Beach Corporation's appeal was interlocutory and it 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 could only obtain appellate review if it established that the challenged order affected 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").

The dissenting opinion in the Court of Appeals correctly noted that this Court and the Court of Appeals "generally have taken a restrictive view of the

substantial right exception." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). The dissent also noted that "[t]he question of whether an interlocutory appeal affects a substantial right must be considered in light of the 'particular facts of that case and the procedural context in which the order from which appeal is sought was entered.'" *Grant*, 170 N.C. App. at 186, 611 S.E.2d at 478 (quoting *Sharpe v. Worland*, 351 N.C. 159, 162-63, 522 S.E.2d 577, 579 (1999)). In concluding that the facts and procedural context of this case did not warrant relaxing the substantial right exception, the dissent explained:

Here, defendant's Rule 12(b) motions to dismiss were made at the earliest stages of litigation. Defendant has not answered plaintiffs' allegations and is under a court order, not appealed from, to respond to plaintiffs' discovery requests. Defendant has not asserted any affirmative defenses by answer. Defendant failed to appeal the denial of an earlier motion to dismiss or the granting of plaintiffs' motion to compel discovery.

The dissent also correctly rejected The Hammocks Beach Corporation's attempt to justify its appeal by merely raising the defenses of collateral estoppel and issue preclusion. "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).

The dissent correctly noted that "review of an interlocutory appeal [based on the defenses of issue preclusion and collateral estoppel] is limited to situations where 'the rejection of those defenses gave rise to a risk of two actual trials resulting in two different verdicts.'" It also correctly concluded that The Hammocks Beach Corporation failed to meet its burden of showing that the rejection of its issue preclusion or collateral estoppel defenses would result in two inconsistent verdicts. As will be further explained in subsequent sections, there is no potential of inconsistent verdicts between this case and the 1987 Consent Judgment. Rather than being inconsistent with the 1987 Consent Judgment, any verdict in this case would simply interpret the meaning and effect of that Consent



Judgment and the impact of events subsequent to its entry, specifically the impossibility and impracticability of the accomplishment of the trust's purposes and Defendant's breach of its trust duties since 1987.

For the reasons set forth below, the defenses of issue preclusion and collateral estoppel are not applicable in this case, and the trial court's denial of Defendant's Further Motion to Dismiss did not affect a substantial right. Accordingly, because Defendant's appeal was interlocutory and did not involve a substantial right, there was no basis for appellate jurisdiction in the Court of Appeals. This Court should reverse the decision of the Court of Appeals and remand the case to that Court with directions that Defendant's appeal be dismissed and this matter remanded to the trial court for further proceedings.

II. THE COURT OF APPEALS MAJORITY OPINION ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING DEFENDANT THE HAMMOCKS BEACH CORPORATION'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE AND HOLDING THAT THE DOCTRINES OF ISSUE PRECLUSION AND COLLATERAL ESTOPPEL BARRED PLAINTIFF'S CLAIMS AND COMPELLED THE TRIAL COURT TO GRANT DEFENDANT'S RULE 12(B)(6) MOTION TO DISMISS.

The dissent in the Court of Appeals correctly rejected Defendant's argument that this case implicates the principle of issue preclusion or *res judicata*. Accordingly, the dissent appropriately concludes that Plaintiffs' claims were not barred by these doctrines and the trial court correctly denied Defendant's Further

Motion to Dismiss. This Court should reverse the decision of the Court of Appeals and remand the case to that Court with directions that Defendant's appeal be dismissed and this matter remanded to the trial court for further proceedings.

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 predated 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.

The Hammocks Beach Corporation essentially contended in the trial court and again on appeal 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 interests 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 (1994) (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 The Hammocks Beach Corporation’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.<sup>1</sup> In essence, the trust and Defendant were given a “second chance” to comply with and fulfill the terms and goals of the trust. The dissenting opinion in the Court of Appeals correctly concluded that, viewing all the evidence in a light most favorable to plaintiffs and giving them the benefit of every reasonable inference to be drawn therefrom, the consent judgment could be construed as a tolling agreement to allow defendant, as trustee, to attempt to continue to “carry out the original intentions of Dr. Sharpe.” However, The Hammocks Beach Corporation has not even disputed that, in the almost 20 years between the 1987 Consent Judgment and the filing of this action on 15 December 2006, it has utterly failed to fulfill the purposes of the trust.

Despite The Hammocks Beach Corporation’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

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<sup>1</sup> 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

implicitly throughout this case that the trust did not continue post-1987 and that Defendant, in effect, took fee simple ownership in the trust property. However, it is clear that the trust did continue after entry of the 1987 Consent Judgment 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 considered in 1987.<sup>2</sup> 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 The Hammocks Beach Corporation's contention that the Consent Judgment terminated Plaintiffs' status as contingent remainder

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trust's purpose and the trustee's fulfillment of its responsibilities are continuing in nature and are subject to review and enforcement by litigation, if necessary, throughout the trust's existence.

<sup>2</sup> 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. As explained by the dissenting opinion in the Court of Appeals and in the next section of this Brief, Plaintiffs believe that the trial court could have concluded as a matter of law that the trust continues in effect and that the Consent Judgment did not extinguish their rights as beneficiaries. However, the trial court could have also 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").

beneficiaries. However, that issue – the effect of the 1987 Consent Judgment on Plaintiffs’ status as contingent beneficiaries – is the central issue to be determined in this case. It is only by accepting The Hammocks Beach Corporation’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*.

As demonstrated above, Defendant’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, then an evidentiary record would need to be developed in discovery on this issue. In that event, the Superior Court properly denied Defendant The Hammocks Beach Corporation’s Further Motion to Dismiss. The majority opinion in the Court of Appeals erred in reversing the trial court’s decision, and this Court should reverse that decision and remand this action for further proceedings in the trial court.

III. THE COURT OF APPEALS MAJORITY OPINION ERRED IN REVERSING THE TRIAL COURT’S ORDER DENYING DEFENDANT THE HAMMOCKS BEACH CORPORATION’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE AND HOLDING THAT THE 1987 CONSENT JUDGMENT SIGNED BY THE PARTIES CLEARLY AND UNAMBIGUOUSLY EXTINGUISHED ALL OF PLAINTIFF’S EXTENSIVE USE AND OCCUPANCY RIGHTS, AS

WELL AS THEIR CONTINGENT REVERSIONARY INTEREST  
IN REAL PROPERTY VESTED IN AND SPECIFICALLY HELD  
BY DEFENDANT AS “TRUSTEE.”

The majority opinion in the Court of Appeals erred in reversing the trial court’s denial of The Hammocks Beach Corporation’s Further Motion to Dismiss and apparently concluding that the 1987 Consent Judgment unambiguously eliminated Plaintiffs’ contingent remainder interests under the trust. However, this conclusion is not supported by the actual language of the Consent Judgment or what can reasonably be presumed to be the parties’ intention in entering the Consent Judgment. Rather, the dissenting opinion in the Court of Appeals correctly concluded that, at a minimum, the 1987 Consent Judgment was ambiguous on the question of whether the Plaintiffs’ interest as contingent remainder beneficiaries continued after the 1987 Consent Judgment.<sup>3</sup> Given this ambiguity, the trial court correctly denied Defendant’s Further Motion to Dismiss. This Court should reverse the majority opinion of the Court of Appeals which reversed the trial court’s order and remand this matter to the Court of Appeals with instructions to remand this matter to the trial court for further proceedings.

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<sup>3</sup> The majority opinion in the Court of Appeals did not clearly hold that the 1987 Consent Judgment also eliminated the trust provision calling for the termination of the trust upon a determination that the trust’s purposes had become impossible or impractical; however, that suggestion can be inferred from the opinion. To the extent that the majority’s opinion suggests this result, it should be rejected. As the dissenting opinion points out, at a minimum, the 1987 Consent Judgment is ambiguous on this point as well and would not be the proper subject of a Motion to Dismiss pursuant to Rule 12(b)(6).

The Court of Appeals' dissent correctly recognized that a determination of the parties' rights, interests and responsibilities with regard to the trust hinges on an interpretation of the 1987 Consent Judgment. As noted in the dissent, "[a] 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) (citation omitted). When a contract is clear and unambiguous on its face, it will be enforced as written by the court as a matter of law. *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 421-22, 547 S.E.2d 850, 852 (2001). However, "[i]f the agreement is ambiguous, interpretation of the contract is a matter for the jury."

Plaintiffs argued in the lower courts that the Consent Judgment was unambiguous in its elimination only of their 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. As recognized by the dissenting opinion in the Court of Appeals, this interpretation of the Consent Judgment was at least as reasonable, and likely more reasonable, than the interpretation advanced by The Hammocks Beach Corporation and accepted by the majority opinion. Ambiguity exists where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties. Furthermore, the fact that a dispute has arisen as to the



parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.” *Id.* at 422, 547 S.E.2d at 852 (internal citation and quotation omitted). “If the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent . . . to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court.” *Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). In the present case, at a minimum, the parties have suggested two plausible interpretations of the language and the parties’ intention in entering the Consent Judgment. As such, at a minimum, the Superior Court was correct in allowing Plaintiffs to proceed with discovery and to present evidence competent to show the parties’ true intentions in entering the Consent Judgment.

A. The 1987 Consent Judgment Is At A Minimum Ambiguous Given The Alternate Interpretation Advanced By Plaintiffs And Thus Plaintiffs’ Claims Should Have Survived The Motion To Dismiss And Been Considered By the Jury.

As explained above, Plaintiffs have advanced an alternate interpretation of the 1987 Consent Judgment to that argued by The Hammocks Beach Corporation and accepted by the majority of the Court of Appeals. This alternate interpretation is supported by the language of the Consent Judgment and the surrounding circumstances and established that, at a minimum, the Consent Judgment is ambiguous and must be interpreted by a jury upon further discovery in this matter.

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 documents 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 Plaintiffs' entitlement to receive the property as contingent beneficiaries. Accordingly, Plaintiffs have standing to pursue the claims asserted in this action.

Contrary to Defendant's argument, the Consent Judgment entered in 1987 did not terminate Plaintiffs' interests 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 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.

In fact, the trial 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 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.

The Hammocks Beach Corporation and the majority opinion in the Court of Appeals rely 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 The 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, Defendant and the majority read this language much too broadly and misinterpret its effect and true intent. Both ignore the fact that, in the very passages quoted above, the Consent Judgment also provides that The Hammocks Beach Corporation 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 that Defendant did not take fee simple title to the property as it, for all intents and purposes, now claims. To interpret the "free and clear" language as extinguishing Plaintiffs' status as contingent beneficiaries,

conveniently ignores that the Consent Judgment explicitly provides that the trust continues and that The Hammocks Beach Corporation 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 event of impossibility or impracticability was an integral part of the trust terms and not affected by the 1987 Consent Judgment.

Unfortunately, the majority opinion in the Court of Appeals accepted The Hammocks Beach Corporation's strained interpretation of the "free and clear" language but struggled, as the dissenting opinion noted, to reconcile this interpretation with other language in the Consent Judgment and the original intent of the settlor in creating the trust. The "free and clear" language must be interpreted 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 many 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 The Hammocks Beach Corporation's additional powers of administration such as the power 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 relinquish all of their interests as contingent beneficiaries and particularly the entitlement to receive the property, as the settlor intended, upon The Hammocks Beach Corporation's continued failure to accomplish the trust's purposes or upon the occurrence of other developments rendering accomplishment of trust purposes by The Hammocks Beach Corporation impossible or impracticable.

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. In the trial court and the Court of Appeals, The Hammocks Beach Corporation relied heavily upon the typical and very general boiler-plate language in the Consent Judgment providing that the parties "fully intend[ed] to bind themselves, their heirs, assigns and successors," but it pointed to no language stating that any of the parties intended that the Hurst and Sharpe heirs were relinquishing or waiving their status 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 Onslow County Superior 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.<sup>4</sup>

While avoiding saying so directly, the logical result of The Hammocks Beach Corporation's argument was that it now holds the trust res "free and clear" of anyone else's claims, essentially in fee simple. The majority opinion also

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<sup>4</sup> As noted earlier, 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

attempts to avoid this statement, while giving The Hammocks Beach Corporation all indicia of fee simple ownership, including complete control of the trust property free of any of Plaintiffs' future contingent interests. The majority opinion strains mightily to reconcile 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 with its acceptance of Defendant's argument that there are no beneficiaries or other parties that can hold The Hammocks Beach Corporation accountable and ensure that the purposes of the trust are served. To do so, the majority somehow concludes that, when the 1987 Consent Judgment referred to the terms of the trust continuing, it meant only the charitable trust purposes. There is no basis in the language of the 1987 Consent Judgment or the original trust documents from the 1950s to reach this conclusion. Without any sound basis in the trust documents, the Consent Judgment or governing law, the majority embraces the settlor's intentions with regard to the trust's charitable purposes but blithely ignores the settlor's wishes regarding alternative disposition of the trust property in the event of impossibility or impracticability.

In reaching its conclusion, the majority opinion in essence concludes that the parties to the Consent Judgment intended to give the Hammocks Beach Corporation a "blank check" and effectively fee simple ownership of the property

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whether, in the totality of the circumstances, the individual's waiver of his right can be characterized as



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* should pass to the Sharpe and Hurst heirs and descendants as contingent beneficiaries of the trust.<sup>5</sup> There is nothing to suggest that the Court and the parties had the authority, or intended, to alter the settlor's intent in this regard, and the majority opinion erred in reaching this contorted conclusion.

In effect, The Hammocks Beach Corporation urged, and the majority opinion accepted, 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, it attempted to, in result and effect, now secure prerogatives of fee simple title sought but not obtained in its 1986 lawsuit. If the parties in

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knowing and voluntary).

<sup>5</sup> Plaintiffs continue to believe 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 relinquish their status 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 or trial on all issues raised.

executing the Consent Judgment had intended to divest Plaintiffs of their status as contingent beneficiaries, the termination would have been clearly articulated in the Consent Judgment.<sup>6</sup> It was error for the majority in the Court of Appeals to infer such a termination here.

The Hammocks Beach Corporation convinced the majority in the Court of Appeals that the Consent Judgment's provisions allowing the sale and encumbrance of the trust res with court approval somehow indicated that Plaintiffs' contingent beneficiary interests were extinguished. However, these powers bestowed in Defendant were not inconsistent with Plaintiffs retaining their reversionary interest. No contingent beneficiary has a guarantee that the trust property will still be intact and available when their contingent interest of possession and ownership vests in the future. Still, in this case, the beneficiaries and Plaintiffs as contingent beneficiaries were afforded some measure of protection by the 1987 Consent Judgment, since it required court approval before any sale or encumbrance. It can be presumed that the trial court would only have granted consent for a sale or encumbrance when it was necessary to further to the trust's purpose. Obviously, the contingent remainder beneficiaries all take their

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<sup>6</sup> 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*. It is absurd to suggest that Plaintiffs would have relinquished their contingent future interests granted by settlor's alternative disposition when the Court lacked the power to alter that status. 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.

interests subject to the chance that the trust res will be expended to accomplish the trust's purpose. Accordingly, the fact that the 1987 Consent Judgment afforded Defendant the potential of selling the trust property did not contradict or contravene Plaintiffs' interests as contingent beneficiaries.

Contrary to traditional rules employed in interpreting agreements purporting to relinquish or waive a party's interests, the majority in the Court of Appeals concludes that, "[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." Quite to the contrary – if the trial court, and the parties to the 1987 Consent Judgment, had intended to remove these provisions from the trust and to contravene the settlor's intent, they would have done so in clear and unequivocal language. In fact, it is difficult to understand how these provisions could be removed and the settlor's intentions still accomplished. The settlor intended for the property to be used for the trust purposes until such time as these purposes were shown to be impossible or impracticable, and at that time, the property would pass to the contingent remainder beneficiaries. To remove the impossibility and impracticability provisions from the trust would be to frustrate the settlor's clearly stated intent and to essentially allow Defendant to maintain possession and control of the property in perpetuity, even if they were no

longer fulfilling the trust's purposes. This construction of the 1987 Consent Judgment is unreasonable and should be rejected.

Additional language in the 1987 Consent Judgment further supports Plaintiffs' position that this agreement unambiguously extinguished their present right of use and enjoyment of the trust property but did not impact their interests as contingent remainder beneficiaries. As noted previously, paragraph 3 of the Consent Judgment stated 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) (Emphasis added.) The parties' choice of the term "any rights" in this clause is telling, given that the vested rights afforded Plaintiffs under the trust agreement were their rights of present use and enjoyment of the property. The Court and parties would not have described Plaintiffs' interests as contingent remainder beneficiaries as "rights" when drafting the Consent Judgment. *See Canoy v. Canoy*, 135 N.C. App. 326, 520 S.E.2d 128 (1999) ("[A] person who holds a contingent remainder has *no immediate fixed right* of future enjoyment because whether or not his remainder will vest, or what portion he is to take, is unknown at the time of the devise.") (emphasis added); *Goldsborough v. Martin*, 41 Md. 488 (Md. Ct. App. 1875) ("For an executory devisee has no estate at all, but only a contingent right to an estate in *futuro*, the heir taking the whole fee in

the interim, and not a mere term bounded by the probable or when it can be made so, the ascertained continuance of his estate.”). Accordingly, when the parties in the 1987 Consent Judgment referred to The Hammocks Beach Corporation holding the trust property, as trustee, free of “any rights” of the Sharpe and Hurst heirs, it is clear that they intended only the present, vested rights of present use and enjoyment of the trust property. Had the parties intended that Plaintiffs relinquish their contingent remainder interests and that The Hammocks Beach Corporation take free of these future, executory interests, they would have explicitly mentioned these interests or used broader language to encompass them.

For instance, when referring to the fee simple interest in certain property granted to the Sharpe and Hurst heirs, the Consent Judgment used much broader terms to signal that The Hammocks Beach Corporation relinquished all rights and interests in this property now held in fee simple by the beneficiaries. (R. at 75, par. 6 of the Consent Judgment) (“Said Sharpe and Hurst defendants are the owners in fee simple of the real property described, respectively, in the preceding paragraphs [ ], free and clear of *any claim* of Hammocks Beach Corporation, trustee.”) (Emphasis added.) As seen from this language, the parties to the Consent Judgment understood how to grant fee simple title to property by using that term and how to amplify the impact of this fee simple title by explaining that other parties relinquished “any claim” to the property. By failing to explicitly state that

Defendant took any property by fee simple title and free of all claims, both present rights of use and future contingent interests, the parties evidenced their intent that Plaintiffs' contingent remainder interests continue after the execution of the Consent Judgment.<sup>7</sup> While Plaintiffs believe this is clear from the language of the Consent Judgment, if this Court determines that there is any ambiguity on this point, this question is one for the jury after further discovery in this matter.

The dissenting opinion in the Court of Appeals correctly concluded that, viewing all the evidence in a light most favorable to plaintiffs and giving them the benefit of every reasonable inference to be drawn therefrom, the Consent Judgment could be construed as a tolling agreement to allow defendant, as trustee, to attempt to continue to "carry out the original intentions of Dr. Sharpe." The dissenting opinion noted that, if this interpretation of the Consent Judgment is correct, plaintiffs' contingent reversionary interests in the property at issue were not extinguished in 1987. The Consent Judgment would have only extinguished plaintiffs' extensive use and occupancy rights in exchange for the property conveyed to plaintiffs in fee simple and allowed defendant to attempt to administer

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<sup>7</sup> As explained in the Statement of Facts, in its limited discovery responses so far, The Hammocks Beach Corporation has produced some handwritten Minutes from a meeting of the Board of Directors of The Hammocks Beach Corporation that took place after the entry of the 1987 Consent Judgment. In a revealing exchange discussing the possibility of developing the Trust property, the Directors of the Hammocks Beach Corporation contemplated that, at a minimum, there was a question whether the interests of contingent beneficiaries such as Plaintiffs remained in effect after the 1987 Consent Judgment. Rule 11(c) Supplement, Exhibit 3, p. 35-36 of Transcript. This question mandates that, at a minimum, this matter be remanded to the trial court for additional discovery and a trial on the merits.

the property to accomplish the trust purposes. Accordingly, Plaintiffs' complaint asserting claims for breach of fiduciary duty and the accounting and termination of the trust should be viewed as a challenge to defendant's stewardship and expenditures during the twenty years that have elapsed since the Consent Judgment was entered in 1987.

The Court of Appeals dissent also appropriately noted that, alternatively, these documents could be viewed as revealing contradictory provisions: (1) defendant, as trustee, holds fiduciary title to the property subject to the express trust terms set forth in the 1950 deed, agreement, and defendant's Certificate of Amendment to their 1948 Certificate of Incorporation, which reserved extensive use and occupancy rights and a contingent reversionary interest to Dr. Sharpe and later to plaintiffs and (2) defendant holds title to the property "free and clear of any rights of" plaintiffs. Based upon these provisions, the dissent noted that it is impossible to ascertain the parties' intent regarding exactly what rights or interests Plaintiffs were relinquishing when they signed the Consent Judgment. Under this interpretation, the terms of the Consent Judgment would be ambiguous at best, could not be "harmoniously construed," and present a question for the jury to resolve. *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695, *aff'd*, 361 N.C. 111, 637 S.E.2d 538 (2006).

Judge Tyson continued: “If the consent judgment is ambiguous, the parties' intent is a question for the jury and not for the court as a matter of law, particularly at a very early stage of the litigation on a Rule 12(b)(6) motion to dismiss.” *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001). Ultimately, the dissent correctly concludes that “the allegations contained [in Plaintiffs' Complaint], treated as true, are sufficient to state a claim upon which relief may be granted.” Accordingly, the trial court's order denying Defendant's Further Motion to Dismiss should have been affirmed by the Court of Appeals. This Court should reverse the majority opinion in the Court of Appeals and remand this case to that Court for further remand to the trial court for further proceedings.

**B. The Interpretation Of the Consent Judgment Advanced By Defendant The Hammocks Beach Corporation And Accepted By The Majority In The Court of Appeals Would Have Far Reaching Consequences That Are Absurd And Not Intended By The Parties to the 1987 Consent Judgment Or The Settlor Of The Trust.**

As the dissenting opinion in the Court of Appeals pointed out, the interpretation of the Consent Judgment advanced by The Hammocks Beach Corporation and adopted by the majority opinion in the Court of Appeals would lead to absurd and unintended consequences. Accordingly, at a minimum, this interpretation should not be adopted as a matter of law and without further evidence being produced regarding the parties' actual intentions in entering the



agreement. As Plaintiffs have contended throughout this litigation, and as more fully explained in the preceding section, a more reasonable interpretation of the agreement would be that it intended to divest Plaintiffs only of their present rights to use the property and not their future interests as contingent remainder beneficiaries. Even assuming the agreement is ambiguous, the proper course would be to remand the case to the trial court so the parties can introduce evidence of their intentions and a jury can determine the most reasonable interpretation of the Consent Judgment, given the language the parties chose, the circumstances surrounding the adoption of the Consent Judgment and the consequences of the various interpretations that could be afforded the Consent Judgment.

As the dissenting opinion pointed out, "[t]he polestar of trust interpretation is the settlors' intent." *Day v. Rasmussen*, 177 N.C. App. 759, 764, 629 S.E.2d 912, 915 (2006) (citation and quotation omitted). The majority's opinion allows The Hammocks Beach Corporation to freely manage, use, borrow against, or sell the trust res for purposes and uses Dr. Sharpe never intended. Under that opinion, Defendant is also now free of any expressly reserved rights to Dr. Sharpe's heirs to hold the trustee accountable for its fiduciary duties. Given Dr. Sharpe's clear preferences for the use of the property, and his provision for alternate disposition to the State as successor trustee or to Plaintiffs as contingent beneficiaries, the majority opinion reaches a conclusion that would never have been contemplated by

Dr. Sharpe or the parties to this action, who were well aware of Dr. Sharpe's intentions which were made clear in the trust documents in the 1950s. *See Wachovia Bank & Trust Co. v. Talafero*, 246 N.C. 121, 97 S.E.2d 776 (1961) (noting that a settlor's intention is always paramount to the wishes of a beneficiary and, unless his purpose is contrary to law or public policy, the courts will give it effect); *Atlantic Discount Corp. v. Mangel's of North Carolina, Inc.*, 2 N.C. App. 472, 163 S.E.2d 295 (1968) (concluding that a construction of a contract leading to an absurd, harsh or unreasonable result should be avoided if possible); *Burwell v. Griffin*, 67 N.C. App. 198, 204, 312 S.E.2d 917, 921 (1984) (stating that contracts "should receive sensible and reasonable constructions and not ones leading to absurd consequences or unjust results").

The dissenting opinion points out several other unintended consequences that may flow from the majority opinion's conclusion that the Consent Judgment unambiguously extinguished plaintiffs' contingent reversionary interest in the property. None of these consequences could be viewed as consistent with the intent of Dr. Sharpe or with the parties' intention in executing the 1987 Consent Judgment. Accordingly, these consequences illustrate the incorrectness of the majority opinion's interpretation of the Consent Judgment and warrant, at least, the remand of this case for further exploration of the parties' intent in entering the Consent Judgment.

In addition to establishing the anomalous situation of giving a trustee, The Hammocks Beach Corporation, the privileges associated with fee simple ownership, the majority opinion also creates a situation where the property at issue will likely eventually be lost to the trust through the doctrine of escheats. Because the 1987 Consent Judgment expressly found and it is also undisputed in this case that The Hammocks Beach Corporation cannot accomplish the purposes for which the trust was created, the trust, according to its own terms, must be terminated. As explained earlier, the State of North Carolina expressly disavowed any interest in the property both in 1987 and again in the present action, removing that contingency. With Plaintiffs removed as contingent beneficiaries, if the trust is terminated, the trust res will likely be left without an owner. If property is left with no owner, is abandoned, or unclaimed, it will escheat to the State of North Carolina. However, in this case, because the State has repeatedly disavowed any interest in the trust res, this result would deny the natural and named objects of the settlor's bounty an asset in preference to total strangers. This result would obviously be contrary to the original intentions of the settlor, Dr. Sharpe, in the 1950s, and to those of the parties to this action in executing the 1987 Consent Judgment. This potential consequence alone would seem to be enough to conclude that the Consent Judgment can only be interpreted to unambiguously preserve Plaintiffs' status as contingent remainder beneficiaries. However, at the least, this

consequence warrants further examination of the issue and further evidence about the parties' intent in entering the Consent Judgment.

The dissenting opinion also points out, as explained earlier in this brief, that the interpretation advanced by The Hammocks Beach Corporation and accepted by the majority opinion actually has the impact of eliminating Dr. Sharpe's alternative plan for the trust property in the event that the trust purposes should ever become impossible or the trust otherwise terminate.<sup>8</sup> With the settlor's alternative plan eliminated, the majority opinion has essentially freed the trustee, The Hammocks Beach Corporation, to assert an action for cy pres under Article 2 of Chapter 36. N.C. Gen. Stat. 36-4-413(b) (2005). In the cy pres proceeding pursuant to N.C. Gen. Stat. 36C-4-413(a)(3), the Hammocks Beach Corporation could potentially convince the trial court to modify the terms of the trust or terminate the trust as a whole, which could result in not only the extinguishment of plaintiffs' contingent reversionary-interest, but also to the court: (1) extinguishing the trust as a whole, and causing the property to escheat to the State or (2) subjecting Dr. Sharpe's original purposes to a wholly-new and different purpose of defendant's choice, subject to court approval. As the dissenting opinion noted, neither of these results

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<sup>8</sup> As explained earlier, The Hammocks Beach Corporation could not invoke the cy pres doctrine to amend the trust in its 1986 action, since the settlor, Dr. Sharpe, clearly provided for an alternative plan upon the termination of the trust. Accordingly, the majority opinion of the Court of Appeals has allowed The Hammocks Beach Corporation to do what it could not in 1986 – escape from Dr. Sharpe's alternative plan that the trust property pass to the State or Plaintiffs, as contingent beneficiaries, should the trust purposes become impossible or impracticable and the trust terminate as the settlor, Dr. Sharpe, intended.

could be what the majority's opinion intended to produce.

Finally, the dissent points out that, the only basis upon which the majority's holding could really be predicated is an unsubstantiated notion that the 1987 Consent Judgment vested defendant with fee simple title to the property. However, as the dissent notes and as explained in the previous section, the parties and the court in the 1987 Consent Judgment specifically chose not to use that operative language in describing the property to be vested in defendant, even though Defendant's 1986 declaratory judgment action specifically sought that result. As explained in the preceding section, the parties used language which tends to indicate The Hammocks Beach Corporation was vested with fiduciary title, subject to the express and continuing terms of the trust, but free of plaintiffs' extensive present use rights and future interests, which severely encumbered the development of the property. Given the provisions in the Consent Judgment making the "Sharpe and Hurst defendants [ ] the owners in fee simple of the real property described, respectively, in the preceding paragraphs four and five," it is clear that, if the parties had intended to grant The Hammocks Beach Corporation title in "fee simple" it would have used this same clear, unequivocal language. Instead, the Consent Judgment repeatedly refers to The Hammocks Beach Corporation as trustee, evidencing that it did not take the property in fee simple. As explained in the previous section, it is clear that the settlor, Dr. Sharpe, never

intended for The Hammocks Beach Corporation to hold the property as fee simple owners and that the parties never intended such a result in executing the 1987 Consent Judgment.

The fact that the 1987 Consent Judgment lifted the absolute prohibition against either sale or incurring debt by defendant in the 1950 deed, agreement, and defendant's Certificate of Amendment to their 1948 Certificate of Incorporation and provided for the possibility of both sales and encumbrances, subject to court approval also does not establish that the Consent Judgment granted The Hammocks Beach Corporation fee simple title to the property in 1987. As the dissenting opinion noted, persons or entities holding title to property in fee simple absolute, free of any claims of another party, need not and do not apply to the superior court to obtain approval of sale or to incur debt and encumber their property. See 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 4-6, at 60 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) ("Perhaps the most important quality of a fee simple estate is that the owner may voluntarily dispose of his land as he sees fit, either by deed or will, free from the control of third persons, so long as he complies with the legislative and constitutional requirements of the state and federal governments as they relate to land."). As Judge Tyson concluded, the Consent Judgment clearly shows defendant was not vested with fee simple title and, at a minimum, a jury question

exists regarding whether plaintiffs' contingent reversionary interest, as expressly reserved by Dr. Sharpe, was extinguished by the 1987 Consent Judgment.

Because the conclusion of the majority opinion in the Court of Appeals produces consequences it, the parties and the settlor of the trust could not have intended, this Court should reverse that decision. This matter should be remanded to the Court of Appeals with instructions that the case be remanded to the trial court for further proceedings. Plaintiffs should be allowed to pursue their claims against The Hammocks Beach Corporation.

IV. THE COURT OF APPEALS MAJORITY OPINION ERRED IN REVERSING THE TRIAL COURT'S ORDER DENYING DEFENDANT THE HAMMOCK BEACH CORPORATION'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE, AS THE ALLEGATIONS OF PLAINTIFF'S COMPLAINT WHEN TAKEN AS TRUE AND VIEWED IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, ARE SUFFICIENT TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Beyond its issue preclusion and collateral estoppel argument, The Hammocks Beach Corporation has not contended that Plaintiffs failed to state a claim upon which relief can be granted. Both the majority and dissent in the Court of Appeals took for granted and assumed that Plaintiffs had otherwise alleged claims upon which relief can be granted. Because Plaintiffs' claims are not barred by the doctrines of issue preclusion or collateral estoppel, this Court should also

conclude that Plaintiffs have stated a claim upon which relief can be granted, reverse the decision of the Court of Appeals and remand this matter to the trial court for further proceedings.

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).

As explained above, beyond attacking Plaintiffs’ standing to assert such claims as beneficiaries under the trust, Defendant has not argued 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). 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 The Hammocks Beach Corporation's contentions that Plaintiffs are precluded as a matter of law by the 1987 Consent Judgment from asserting their claims.<sup>9</sup> 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 reverse the Court of Appeals decision and reinstate the trial court's order denying Defendant's Further Motion to Dismiss.

### **CONCLUSION**

Based upon the foregoing, Plaintiffs-Appellants respectfully urge this Court to reverse the majority opinion of the Court of Appeals which reversed the Superior Court's order denying Defendant The Hammocks Beach Corporation's Further Motion to Dismiss Plaintiff's Complaint. Based on the reasoning of the dissent in the Court of Appeals, this Court should remand this case to the Court of Appeals with instructions that it be remanded to the Superior Court for further proceedings.

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<sup>9</sup> Before the Court of Appeals, Defendant contended that the trial court's denial of its Further Motion to Dismiss contravened a prior order entered by another superior court judge and was inconsistent with the court's granting of the State of North Carolina's motion to dismiss. The Court of Appeals ignored these arguments, as it should have, as they are unremarkable and meritless. The trial court's order denying Defendant's Further Motion to Dismiss did not overrule any other orders entered in this matter. Furthermore, 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

Respectfully submitted this the 22 day of October, 2008.

THE FRANCIS LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Charles T. Francis", written over a horizontal line.

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were much different, and the impact of the 1987 Consent Judgment on their respective interests was very different. The trial court correctly denied Defendant's Further Motion to Dismiss.

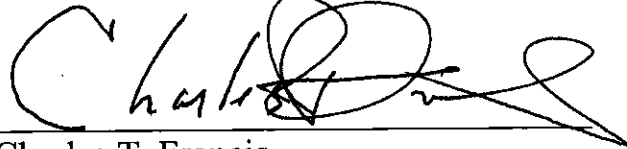
**CERTIFICATE OF SERVICE**

The undersigned attorney for Plaintiffs hereby certifies that on this day the foregoing **PLAINTIFFS-APPELLANTS' NEW 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 22 day of October, 2008.

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