

NORTH CAROLINA COURT OF APPEALS

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HARRIETT HURST TURNER and )  
JOHN HENRY HURST, )

Plaintiffs-Appellants, )

vs. )

THE HAMMOCKS BEACH )  
CORPORATION, NANCY )  
SHARPE CAIRD, SETH )  
DICKMAN SHARPE, SUSAN )  
SPEAR SHARPE, WILLIAM )  
AUGUST SHARPE, NORTH )  
CAROLINA STATE BOARD OF )  
EDUCATION, ROY A. COOPER, )  
III, in his capacity as Attorney )  
General of the State of North )  
Carolina, )

Defendants-Appellees. )

From Wake County  
No. 06 CVS 18173

CLERK COURT OF APPEALS  
OF NORTH CAROLINA

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PLAINTIFFS-APPELLANTS' BRIEF

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PLAINTIFFS-APPELLANTS' BRIEF

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ISSUES PRESENTED

- I. WHETHER THE TRIAL COURT ERRED IN APPOINTING THE STATE BOARD OF EDUCATION AS TRUSTEE?
II. WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW PLAINTIFFS-APPELLANTS TO PURSUE POST-JUDGMENT DISCOVERY REGARDING THE BOARD'S REPRESENTATION THAT IT WOULD NOT AND COULD NOT ACCEPT TENDER OF APPOINTMENT AS TRUSTEE TO THE TRUST?

## **INTRODUCTION**

This case presents an opportunity for this Court to right a wrong. Appellants, grandchildren and heirs to John and Gertrude Hurst, are contingent beneficiaries to a trust consisting of 290 acres of coastal land in Onslow County known as The Hammocks. Appellants filed this lawsuit in 2006, seeking to terminate the trust because its purposes were impossible or impracticable, and because the trustee, The Hammocks Beach Corporation (HBC), had breached its fiduciary duties and grossly mismanaged the property.

Appellants have shouldered alone the expense and burden of this protracted litigation to terminate the trust. In bringing suit, Appellants joined the North Carolina Attorney General and the North Carolina State Board of Education (the Board). Under the documents creating the trust, the Board was designated successor trustee and therefore a necessary party to this lawsuit. The Board filed its Answer and Motion to Dismiss, admitted that a prior Consent Judgment expunged any interest it had in the trust, and successfully sought dismissal with prejudice early in this case on that basis.

In the protracted time from filing to verdict, Appellants engaged in hotly contested litigation against HBC, generating a published opinion from each of this State's appellate courts, and culminating in a verdict for Appellants following a two-week jury trial. Following the verdict in favor of Appellants, the trial court, in

error, believed that the syntax of the trust documents required the court to formally tender the trusteeship appointment to the Board, and the Board reject the tender, before title could vest in Appellants.

What should have been a mere formality—"offering" trusteeship to an agency that had judicially admitted it had no interest in the trust, as trustee or otherwise—turned into an outrageous, unlawful and unjust land grab by the State. As late as 30 September 2010—during the trial—the Board's attorney reiterated to Appellants' counsel that the Board could not and would not serve as successor trustee. To the utter shock of Appellants, the representations made and reiterated by the Board's attorney and relayed to the trial court turned out to be false. Despite its binding and unequivocal judicial admission that the prior Consent Judgment "expunged any interest that the [Board] may have had in the [t]rust," the Board nevertheless reversed course post-judgment and purported to accept the tender of trusteeship. Though precluded by the law of the case, controlling precedent and the jury verdict, the trial court, over Appellants' objections, nevertheless permitted the Board's post-trial reversal and appointed the Board successor trustee.

If the Board is allowed to rewrite clear, black letter law by now denying its binding admissions, and if the trial court is permitted to disregard those judicial admissions and the law of the case, Appellants' time, expense and effort in

undertaking this contentious litigation for over five years will be wasted, and they will be unjustly robbed of the property that the jury verdict requires be conveyed to them. Furthermore, the express intent of the settlor—that Appellants receive the property upon a finding of impossibility or impracticability and the Board’s refusal to serve as trustee—will be thwarted.

Clear and controlling principles of law as well as basic notions of fair play, equity, and simple justice demand reversal of the trial court’s appointment of the Board as trustee.

### **STATEMENT OF THE CASE AND FACTS**

In the early twentieth century, William Sharpe, a neurosurgeon from New York City, travelled to coastal Onslow County, North Carolina on vacations. (R pp 5, 21). In his travels to North Carolina, Dr. Sharpe, then a young doctor, met John Lewis Hurst, a young, African-American guide for the Onslow Gun and Rod Club. (T[II] 252:5-6). Through hunting and fishing outings, Dr. Sharpe and John Lewis Hurst formed a lifelong friendship and working relationship which resulted in Dr. Sharpe purchasing roughly 10,000 acres of Onslow County land, consisting of approximately 810 acres of high mainland land, 2,000 acres of sandy beach outer banks (Bear Island) and 7,000 acres of marshland. (The Hammocks). (R pp 5, 21). Mr. Hurst located portions of the property for Dr. Sharpe’s purchase. (T[II] 252:8-9). After acquiring The Hammocks, Dr. Sharpe continued practicing

medicine in New York. (T[III] 252:10–13). John Lewis Hurst and his wife, Gertrude, moved onto The Hammocks to manage the staff and extensive property and provide service to Sharpe family members and guests, facilitating the Sharpe’s enjoyment of The Hammocks. (R p 47; T[III] 242:2–255:9). Over four decades, Dr. Sharpe and the Hursts maintained a mutually beneficial business relationship and warm personal friendship built on mutual trust and shared values and interests. (R p 5).

Eventually, Dr. Sharpe informed the Hursts of his desire to gift The Hammocks to them upon his death. (R pp 5, 21). Gertrude Hurst, having formerly served as a black teacher in the then racially segregated school system, requested that Dr. Sharpe instead gift the property in such a manner that North Carolina’s African-American teachers and their then existing organizations could enjoy the property. (R pp 5–6, 21; R S p 622).

Acting on Mrs. Hurst’s request, in 1950, Dr. Sharpe and his wife executed a deed (the Deed) conveying the property to a recently established nonprofit entity, HBC, as trustee. (R pp 6, 21–22; R S pp 616–18; Doc. Ex. Pp 1-3). Contemporaneously, the Sharpes executed an agreement (the Agreement), amplifying the trust arrangement. (R pp 6, 22, 47–48; Doc. Ex. pp 4-5). (The Deed and the Agreement are referred to collectively as the Trust.)

The Trust provided that the land was “to be held in trust for recreational and educational purposes for the use and benefit of the members of The North Carolina Teachers Association, Inc. and such others, as are provided for in the Charter of the Hammocks Beach Corporation, Inc.” (R S 618). The Certificate of Incorporation of HBC alluded to the specific charitable purpose of the Trust, providing that HBC was to “provide, maintain and administer” The Hammocks and “its assembly, vacation and recreation facilities primarily for the teachers in public and private elementary, secondary, and collegiate institutions for Negroes in North Carolina . . .” (R S 621; Doc. Ex. p 36). The Certificate of Incorporation set forth the policy of HBC:

The Hammocks Beach Project was never and is not now intended to become a playground for the general public. . . . The project is primarily for Negro teachers, and its availability for their use at all times is to be safeguarded with utmost care. . . . This limitation is not to be interpreted as undue discrimination against any other group, but simply as reasonable adherence to the major purpose of the project – a vacation and assembly facility for the Negro teachers of North Carolina.

(R S p 622).

Significantly, Dr. Sharpe planned for the eventuality that the Trust purposes might one day become impracticable or impossible. In such an event, after a declaration of impracticability or impossibility, the Trust property “may be transferred” to the Board as trustee to continue the Trust “for the purpose set forth” in the Deed and the Agreement. (R S p 617). If the Board refused to accept

appointment as trustee for this purpose, the property would instead be conveyed to the Sharpes and the Hursts and their respective "heirs and descendants." (R S p 617). In particular, through an express grant or reservation of contingent remainder or reversionary interests, the Trust provides that the Hurst family would receive the mainland property and the Sharpe family would receive the beach property. (R S p 617).

In a 1986 action filed by HBC, The Hammocks Beach Corporation v. The Fresh Air Fund, et al., 86-CVS-1466 (Onslow Co. Sup. Ct), the Sharpe and Hurst heirs contended that fulfillment of the Trust terms had become impossible or impracticable, and that the court should declare the Trust terminated and mandate a conveyance of all the property to the heirs or adjudicate title in their names. (R p 26). Prior to trial, the parties reached a settlement, approved by the court in a consent judgment (the Consent Judgment), that enabled HBC to retain title as trustee to a portion of the land to attempt to serve the Trust purposes, with additional powers of administration to enable it to improve the property to the extent reasonably necessary, and vested in the Sharpe and Hurst families a portion of the real property in exchange for their relinquishing rights of immediate use (cultivation, quarrying, etc.) in the portion to be held solely by HBC. (R pp 18-39).



In approving the Consent Judgment, the trial court made findings of fact that desegregation in the public schools and society generally had impacted the Trust purposes, and stated:

Thus, by reason of a change of circumstances not foreseeable in 1950, financial and physical factors render fulfillment of the terms of the trust impossible, and that is the case whether the trustee be [HBC] or the Board. Even if the Board could lawfully take title in its name, which under statutes governing title to state property it cannot now do, its members have disclaimed any interest in the Board's serving as trustee or otherwise attempting to adapt the property to the stated purpose of the trust.

...

The trust is impossible or impracticable of fulfillment whether the trustee continues to be [HBC] or whether, in the event the Board would so agree, the trust responsibilities should be assumed by it or by any other agency of state government. Thus, Dr. Sharpe's alternate plan of having the Board assume the trust responsibilities in the event of the impossibility or impracticability of the trust terms also fails for the same reasons.

(R pp 25-26).

The Consent Judgment, signed by the Attorney General, also states that "[t]he Attorney General has advised the Court that the [Board] has no interest in succeeding [HBC] as trustee and would not agree to do so."<sup>1</sup> (R p 27).

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<sup>1</sup> While the Board has repeatedly disclaimed any interest in serving as trustee, the State has shown a keen interest in acquiring the property for its own use. First, HBC, as trustee and with the concurrence of Dr. Sharpe and the Hursts, conveyed Bear Island to the State of North Carolina, without compensation. (R pp 6, 22). HBC thereafter acquiesced in the State's claim of title to approximately 7,000 acres of marshland. (R pp 6, 23). Testimony of HBC's director

Appellants initiated this action on 15 December 2006, contending that, despite the additional powers granted by the Consent Judgment, HBC had continued to fail to fulfill the Trust terms. (R p 10). Appellants therefore sought Trust termination and conveyance of the Trust property, and vesting of fee simple title thereof, to the contingent beneficiaries, Appellants. (R p 12). In addition to naming HBC, the current trustee, as a defendant, Appellants properly joined and obtained jurisdiction over the Board, the putative successor trustee, and Roy A. Cooper, III, in his capacity as Attorney General of the State of North Carolina (together, the State Defendants). (R p 2).

The State Defendants answered the specific allegations of the Complaint, admitting that (i) the Board was designated as a contingent trustee under the Trust to serve under certain circumstances and for the specific purpose of continuing the Trust for the purpose for which it was established; (ii) the Board did not dispute the findings of the Consent Judgment that the Trust purposes were impossible or impracticable of fulfillment whether the trustee continued to be HBC or whether the Trust responsibilities would be assumed by the Board; (iii) Dr. Sharpe's alternative plan of having the Board assume the Trust responsibilities in the event of impossibility or impracticability of fulfillment of the Trust terms also failed for

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elicited at trial revealed HBC's plans to sell more land to the State and the State's desire to acquire fee simple title to additional acreage. (T[IV] 657:10-25).

the same reasons; and (iv) the Board disclaimed any interest as a contingent trustee under the Consent Judgment. (R pp 12, 92–93).

In the same pleading, the Board moved to dismiss (R p 94), explicitly relying upon its admissions in its Answer—that it cannot serve as trustee, that it had disclaimed any interest in serving as contingent trustee—and representing to the trial court that “[t]he Consent Judgment **expunged any interest** that the [Board] may have had in the Trust.” (R p 94) (emphasis added). At the hearing on its Motion to Dismiss, the Board’s attorney, Thomas Ziko, explained that his clients had “no interest in the underlying property,” that the Consent Judgment had “disposed of the [Board]’s interest in this matter,” and that the Board had “disclaimed their interest as a contingent trustee.” (R S p 493–95). Mr. Ziko further explained that his “clients, although named as defendants, have no interest in how the parties resolve this dispute.” (R S p 495). Thus, based upon the clear judicial admissions by the State Defendants in disclaiming any interest in the Trust, Appellants did not oppose their dismissal with prejudice, and the trial court accordingly entered an order granting the State Defendants’ motion on 24 August 2007. (R pp 96–97; R S p 495).

Without assistance or support from the State Defendants, Appellants litigated the case for the better part of the next four years, successfully defending an interlocutory appeal that traversed its way through both North Carolina

appellate courts, culminating in a unanimous written opinion from the Supreme Court of North Carolina affirming the trial court's denial of HBC's Motion to Dismiss. See Turner v. Hammocks Beach Corp. (Turner II), 363 N.C. 555, 557, 681 S.E.2d 770, 772 (2009), rev'g Turner v. Hammocks Beach Corp. (Turner I), 192 N.C. App. 50, 664 S.E.2d 634 (2008). (R S p 385-95).

Finally, in September 2010, the case was tried before the Honorable Carl R. Fox. After a two-week trial, Appellants prevailed on all issues submitted to the jury. The jury found that: (i) Appellants retained a future interest in the Trust property following the Consent Judgment; (ii) since 1987, it has become impossible or impracticable to use the Trust property for the purposes specified by Dr. William Sharpe and his wife; and (iii) the Board of Directors of HBC acted arbitrarily, unreasonably or contrary to its duties as trustee by not declaring, by a majority vote of the directors, that it has become impossible or impracticable to carry out the purpose of the Trust consistent with the Deed. (R pp 119-21).

Despite the jury finding that the Trust purposes are impossible or impracticable for any trustee, including the Board, the trial court entered an Order on 26 October 2010 (the October Order) in which it declared that:

**[a]lthough the record indicates that the State has previously declined to serve as successor trustee of this trust, pursuant to the aforementioned Deed creating the trust it appears to the Court that following entry of Judgment upon the jury verdict, the [Board] may now be entitled to tender of appointment**

**as successor trustee to administer said trust for the purposes set forth in the trust. . .”<sup>2</sup>**

(R p 122–23) (emphasis added).

Despite its binding admissions and representations,<sup>3</sup> on 4 November 2010, the Board reversed course and, without notice to Appellants, adopted a resolution purporting to accept appointment as trustee, contingent upon approval by the Council of State. (R p 138).

On 6 December 2010, Appellants filed a motion seeking reconsideration of the October Order and objecting to any appointment of the Board as successor trustee. (*See* R pp 124–27 (motion); R pp 192–206 (supporting affidavit); R S pp 457–543 (supporting brief and exhibits)).

On 13 December 2010, Appellants also sought to depose Thomas Ziko, the Board’s attorney, and Lewis Ledford, the North Carolina State Parks Director, and subpoenaed documents to enhance the evidentiary record of the Board’s repeated representations disclaiming interest in the Trust, and to marshal evidence that the

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<sup>2</sup> For most of the trial, the trial judge seemed to appreciate that the Board was foreclosed from reemerging to assert an interest in serving as successor trustee. (T[VI] 1048:7–9). However, the trial court ultimately departed from this correct view. Appellants argued to the trial court that the Trust documents did not require tendering appointment as trustee to the Board again, because it had already disclaimed any interest in appointment by seeking dismissal in this action and further because it had already turned down appointment as trustee in the Consent Judgment. (T[VI] 1030:2–1032:10; 1052:7–22; 1054:2–11; 1064:8–16; 1066:25–1067:23).

<sup>3</sup> When informed by the trial court of its intended plan, Appellant’s counsel called to communicate the formal tender procedure envisioned by the trial court to the attorney for the Board, Thomas Ziko. (R p 195). Mr. Ziko reiterated that the Board could not and would not serve as successor trustee, and this information was relayed to the trial court. (R p 195; T[VI] 1089:2–22).

Board's plans, if appointed trustee, conflict with the purposes mandated by the settlor. (R pp 128-42). The State's attorneys objected to these efforts. (R pp 169-86).

By Order entered 12 January 2011 (the January Order), the trial court sustained the Board's objections to this discovery and appointed the Board trustee over Appellants' objections, subject to approval of the land transfer by the Council of State pursuant to N.C. Gen. Stat. § 146-26. (R pp 236-42).

Appellants gave timely notice of appeal of the October and January Orders on 26 January 2011. (R pp 254-56). Appellants moved the trial court to stay the January Order appointing the Board as trustee pending appeal (R S pp 643-67), which the trial court denied. (R S pp 668-70). Counsel for the Board then indicated that the Council of State would move forward to consider the appointment, despite the pendency of this appeal. (R S pp 687-88, 723). Accordingly, Appellants filed a Petition for Writ of Supersedeas and Motion for Temporary Stay with this Court on 7 March 2011, seeking a stay of the January Order. (R S pp 572-725). This Court issued a temporary stay on 8 March 2011 (R S p 726-27) and, after receiving opposing briefs from HBC (R S pp 821-37) and the Board (R S pp 728-820), issued its writ of supersedeas on 24 March 2011. (R S pp 838-39).

The certificate of delivery of the completed transcript was filed on 29 August 2011, the Proposed Record was served on 31 October 2011, and the Settled Record on Appeal was timely filed in the Court of Appeals on 21 November 2011 and docketed on 14 December 2011. (R pp 318–19). The printed Record on Appeal was mailed by the Clerk on 16 December 2011.

**STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW**

The January Order leaves nothing to be judicially determined between the parties to this action and, accordingly, constitutes the “final judgment” from which appeal lies of right to the Court of Appeals in accordance with the provisions of N.C. Gen. Stat. § 7A-27(b).

The October Order was interlocutory because, on its face, it contemplated further proceedings and orders from the trial court, and therefore is reviewable with the January Order pursuant to N.C. Gen. Stat. § 1-278. See File v. File, 195 N.C. App. 562, 567, 673 S.E.2d 405, 409 (2009) (explaining that an “interlocutory order” is one that does not determine the issues, but directs some further proceeding preliminary to a final decree).

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The first issue involves several questions of law, including whether the judicial admissions in the Board's Answer and Motion to Dismiss, the doctrines of judicial and equitable estoppel, and principles of res judicata each independently foreclose the trial court from appointing the Board as trustee. See In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (noting that, generally, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law") (citations omitted). Questions of law are subject to de novo review by this Court, and the trial court's determinations are given no deference. See, e.g., Riley v. Ken Wilson Ford, Inc., 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993).

The second issue involves a question regarding the trial court's decision on Appellants' discovery requests, a determination subject to an abuse of discretion standard of review. E.g., Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788 (2001).

### **II. THE TRIAL COURT ERRED IN APPOINTING THE STATE BOARD OF EDUCATION AS TRUSTEE**

In light of the findings of fact, conclusions of law and adjudications in the Consent Judgment, the admissions of the State Defendants in their Answer and Motion to Dismiss this action, the subsequent Order dismissing the State



Defendants, and the jury verdict and judgment in this case, the Board was precluded from accepting appointment as successor trustee to administer the Trust. Accordingly, the trial court erred both in its decision to offer appointment as trustee to the Board and its subsequent appointment of the Board as successor trustee.

**A. The Trial Court Erred in Appointing the Board as Trustee Given That the Board's Purported Interest in the Trust Had Already Been Judicially Determined and Extinguished**

The Board's purported interest in this Trust has already been judicially determined: the Board, a necessary party to this action, disclaimed any interest it may have had as successor trustee, and was dismissed as a party-defendant for that reason. Governing case law and the law of the case preclude the Board from now reasserting a right in the Trust. Accordingly, the trial court erred in appointing the Board as successor trustee.

In a proceeding to terminate a trust, a "trustee" is a necessary party. N.C. Gen. Stat. § 36C-4-410(b). A "trustee" includes "an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court." N.C. Gen. Stat. § 36C-1-103(22). "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party." Garrett v. Rose, 236

N.C. 299, 307, 72 S.E. 2d 843, 848 (1952). See also Wall v. Sneed, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) (“Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined.”) (quotations and citations omitted); cf. G. Gray Wilson, North Carolina Civil Procedure, 19-4 (3d ed. 2007) (“A party is not unnecessary simply because he does not care about the outcome of the lawsuit or believes as a practical matter that he has nothing to lose whatever the result is.”). In order to terminate a trust—and thereby determine the rights of all parties to the trust—a successor trustee must be made a party in order for the court to render a decision binding on all persons who potentially have an interest in the trust.

For this reason, Appellants joined the Board as a defendant. The Board answered, admitting several allegations in the Complaint, including paragraph 38, which alleged in pertinent part:

Because the trust purposes have become impossible or impracticable, because the North Carolina State Board of Education may not serve as successor trustee, and in any event the substitution of the Board of Education would not cure the impossibility or impracticability, the trust and N.C. Gen. Stat. § 36C-4-410 mandate that the trust property be deeded by The Hammocks Beach Corporation to the heirs and descendants of John Hurst and Gertrude Hurst.

(R pp 12, 93).

In the same document, the Board moved to dismiss the Complaint. In support of its Motion, the Board represented that “[t]he Consent Judgment

**expunged any interest** that the State Board of Education may have had in the Trust,” including serving as contingent successor trustee. (R p 94). (emphasis added). On that basis—i.e., that it had no interest as a contingent successor trustee—it contended it was not a proper party, as it no longer qualified as a necessary party under N.C. Gen. Stat. § 36C-4-410(b) based on the effect of the Consent Judgment.

The Board’s rights in the Trust therefore have been judicially determined: it has none. When not appealed, the Order dismissing the Board with prejudice became the law of this case. See Bailey v. State, 351 N.C. 440, 445, 526 S.E.2d 657, 661 (2000). In error, the trial court disregarded the law of the case in appointing the Board as successor trustee.<sup>4</sup>

Had the Board claimed an interest in the Trust, it was obligated to respond to the Complaint, assert its supposed interest, and remain in the case in order to determine the validity of that purported right. It did the opposite—it admitted that it had no rights. To allow the Board to now opportunistically disregard its binding admissions and the judicial process it utilized to gain a dismissal in the first place

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<sup>4</sup> In fact, this Court has already recognized the Board’s unambiguous disavowal of its interest in the Trust: “The State **expressly renounced its interest in 1987 and again in this action**, wherein the State sought and secured dismissal with prejudice.” Turner I, 192 N.C. App. at 68, 664 S.E.2d at 645 (Tyson, J., dissenting) (emphasis added); Id. at 71, 664 S.E.2d at 647 (same). See also Turner II, 363 N.C. at 557, 681 S.E.2d at 772 (noting that, as of 1987, the State Defendants had advised that the Board had no interest in succeeding HBC as trustee and would not agree to do so, and “**thus moved to be dismissed as parties from the present action**”) (emphasis added).

subverts the trust termination process and the statutory framework that deems successor trustees such as the Board necessary parties. The failure of the trial court to give effect to the finality of the judicial determination dismissing the Board from this action is error. The January Order appointing the Board as successor trustee should be reversed.

**B. The Board's Binding Judicial Admissions In This Case Prohibited It from Accepting Appointment as Trustee and the Trial Court from Appointing It as Trustee**

In binding judicial admissions in this case, the Board unequivocally disclaimed its interest in serving as successor trustee. Several legal doctrines prohibited the Board from now taking an inconsistent position to seize control of the land post-verdict and precluded the trial court from appointing the Board as successor trustee. This Court should reverse the January Order appointing the Board as trustee for this reason as well.

The Board admitted in its Answer and Motion to Dismiss that: "The Consent Judgment **expunged any interest** that the State Board of Education may have had in the Trust." (R p 94) (emphasis added). This admission alone mandates reversal of the trial court's decision to allow the Board to accept trusteeship pursuant to the very instrument in which the Board clearly admitted it had no interest.

A judicial admission is made for the purpose of removing a fact or facts from the realm of dispute between litigants. Such an admission is binding in every sense, absent a showing of fraud, misrepresentation, undue influence or mutual mistake. Evidence

offered in denial of the admitted fact should undoubtedly be rejected.

Patrick v. Williams, 102 N.C. App. 355, 362, 402 S.E.2d 452, 456 (1991) (quotations and citation omitted). The Board, like any other litigant, is “bound by [its] solemn admissions” contained in its answer. Id. As a result, whether the Board had any interest in the Trust was “no longer the subject of inquiry,” and the trial court was obligated to enforce the admission as a “substitute[] for legal proof” of such fact. Chisholm v. Hall, 255 N.C. 374, 377, 121 S.E.2d 726, 729 (1961) (quotation omitted). As Appellants stated to the trial court during trial (T[VI] 1030:2–1032:10; 1052:7–22; 1054:2–11; 1064:8–16; 1066:25–1067:23), the judicial admission made it unnecessary for Appellants to offer evidence that the Board’s interest in the Trust was expunged. See Sorrell v. Sorrell's Farms & Ranches, Inc., 78 N.C. App. 415, 417, 337 S.E.2d 595, 596 (1985) (noting that stipulation made it unnecessary to offer evidence concerning matter stipulated).<sup>5</sup>

In addition to unequivocally admitting the Board’s interest had been expunged, the Board’s Answer and Motion to Dismiss also admitted the

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<sup>5</sup> Despite this controlling authority, the trial court explained that its decision to disregard the Board’s admissions “hinged on the fact there was no evidence in the record from which the Court – the jury could find that the State of North Carolina had abandoned any interest in the property . . . There was no evidence in the record about it . . .” (R S pp 681–82; see also R S pp 707–708). The trial judge’s statement, its focus on whether evidence established the Board’s declination, and the January Order itself illustrate the trial court’s failure to appreciate that an admission in a pleading has the same effect as a jury finding. Bradley v. Bradley, 697 S.E.2d 422, 427 (N.C. Ct. App. 2010) (“An admission in a pleading has the same effect as a jury finding, and is conclusive upon the parties and the trial judge.”) (citation omitted).

allegations in paragraphs 36 and 38 of Appellants' Complaint. (*See* R pp 12, 93). By this affirmative admission, and its failure to deny the specific allegations of these paragraphs, see N.C.R.Civ.P. 8(d), the Board admitted the following sentence from paragraph 38 in Appellants' Complaint:

Because the trust purposes have become impossible or impracticable, **because the State Board of Education may not serve as successor trustee, and in any event the substitution of the Board of Education would not cure the impossibility or impracticability**, the trust and N.C. Gen. Stat. 36C-4-410 mandate that the trust property be deeded by the Hammocks Beach Corporation to the heirs and descendants of John and Gertrude Hurst. . . .

(R p 12) (emphasis added). See *Accelerated Framing, Inc. v. Eagle Ridge Builders, Inc.*, 701 S.E.2d 280, 283 (N.C. Ct. App. 2010) (explaining that “[f]acts alleged in the complaint and admitted in the answer are conclusively established by the admission”) (quotations and citation omitted).

The State Defendants reiterated and relied upon these admissions at the hearing on their Motion to Dismiss, when the Board's lawyer, seeking dismissal, represented to the court that the Board had “no interest in the underlying property,” and had “disclaimed their interest as a contingent trustee.” (R S pp 493–94). Mr. Ziko articulated that the Consent Judgment had “dispose[d] of the [Board]'s interest in this matter,” and his “clients, although named as defendants, have no interest in how the parties resolve this dispute.” (R S pp 494–95). Having admitted that it may not serve as successor trustee and sought to “be dismissed as

parties to the present proceedings” for that very reason (R p 94), the Board is bound by that admission now and cannot accept appointment as successor trustee. See Tate v. Action Moving & Storage, Inc., 95 N.C. App. 541, 545, 383 S.E.2d 229, 232 (1989) (noting that “[a] party is bound by his pleadings . . . He cannot subsequently take a position contradictory to his pleadings.”). Had the Board believed that it could serve as successor trustee upon the entry of a judgment removing HBC, then it would have been incumbent on the Board to remain a party to the action.

The Board has not, and cannot, make any claim of fraud, misrepresentation, undue influence, or mutual mistake related to its admission in its pleadings that its interest was expunged. The Board is therefore bound by its judicial admissions. It was error for the trial court to conclude to the contrary.

Even if the Board could somehow overcome its clear and binding judicial admissions, it is still equitably and judicially estopped from now changing its position. Equitable estoppel applies

when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts

State Highway Comm’n. v. Thornton, 271 N.C. 227, 240, 156 S.E.2d 248, 258 (1967) (quotations and citations omitted). Here, the Board offensively used its

admission—that the Consent Judgment expunged its interest in the Trust—to obtain a dismissal from the action. Appellants reasonably relied on this representation and admission in not opposing the Board’s motion to dismiss, leading to the Board’s dismissal with prejudice. (R pp 96–97). Appellants forwent conducting discovery and presenting evidence concerning the Board’s judicial admission that it had no interest in serving as successor trustee, as it reasonably believed that issue was “removed . . . from the realm of dispute” in the case. Patrick, 102 N.C. at 362, 402 S.E.2d at 456; see also Holland Group, Inc. v. North Carolina Dept. of Administration, 130 N.C. App. 721, 726–727, 504 S.E.2d 300, 304–305 (1998). The Board’s admissions and reiteration of that position were relied upon and relayed to the trial court in subsequent discussion of the court’s contemplated October Order setting a hearing to tender appointment as successor trustee to the State. (T[VI] 1089:2–22; T[VII] 1276:16–21). If the Board is allowed to deny its binding admissions, Appellants’ time, expense and effort in this litigation for over five years will be wasted, and they will unjustly be denied the property the jury verdict requires should transfer to them under the settlor’s plan. The doctrine of equitable estoppel prevents such an unjust maneuver.<sup>6</sup>

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<sup>6</sup>The Board has suggested that Appellants could not invoke this estoppel doctrine because, during the course of a two hour closing statement, Appellants’ counsel briefly informed the jury that, upon HBC’s removal, appointment would be tendered to the Board. Appellants objected to this tender plan since the Board had previously declined in 1987 and again in its Answer and Motion to Dismiss. (T pp 1030:2-1032:10; 1052:7-22; 1054:2-11; 1064:8-16; 1066:25-1067:23). When the trial court overruled Appellants, they yielded to the trial court’s



Judicial estoppel likewise prohibits such cavalier treatment of the judicial process. Judicial estoppel “prohibit[s] parties from deliberately changing positions according to the exigencies of the moment” and “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” Whitacre P’ship v. BioSignia, Inc., 358 N.C. 1, 28, 591 S.E.2d 870, 888 (2004) (quotations and citation omitted). See also Rand v. Gillette, 199 N.C. 462, 463, 154 S.E. 746, 747 (1930) (“A party is not permitted to take a position in a subsequent judicial proceeding which conflicts with a position taken by him in a former judicial proceeding, where the latter position disadvantages his adversary. . . ”). Judicial estoppel generally applies where: (1) the party’s subsequent position is “clearly inconsistent” with its earlier position; (2) the party “has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding might pose a threat to judicial integrity by leading to inconsistent court determinations or the perception that either the first or the second court was misled”; and (3) “the party seeking to assert an inconsistent position would derive

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decision. At that point, it was appropriate for Appellants’ counsel to accurately explain the process chosen by the court. This explanation had no impact on the outcome, as the tender process was not dispositive of the three issues presented to the jury. Further, this explanation did not negate the relief sought in the Complaint, which was in evidence and the thrust of counsel’s assertions to the Court and throughout opening statement and closing arguments, that Appellants sought termination of the trust and reversion of the property to them. (T[I] pp 31:24-32:1; 36:17-23; 128:24-129:2; 160:12-14; 184:5; 192:7-12).

an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” Whitacre, 358 N.C. at 28–29, 591 S.E.2d at 888. (quotation omitted).

For the Board to now attempt to assert an interest in the Trust and contend that it can serve as successor trustee is completely inconsistent with its position in the Consent Judgment and, more importantly, with earlier admissions made and positions asserted in the present litigation. Allowing the Board to now assert a clearly inconsistent position and accept appointment would lead to inconsistent court determinations—specifically, (1) that the Board is entitled to dismissal because its interest as successor trustee was expunged, and (2) that the Board is entitled to appointment as successor trustee. These two determinations cannot be reconciled.

Finally, permitting the Board to retract its position will unfairly allow the Board to benefit from the time, expense, and effort<sup>7</sup> borne solely by the Appellants litigating this case, without granting Appellants the opportunity to challenge the Board’s newly-asserted interest in the Trust by contesting its Motion to Dismiss, undertaking discovery on issues pertaining to the Board’s eligibility and ability to serve as successor trustee, and moving for summary judgment on the issue. Had the Board remained a party, evidence would have been offered and jury questions

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<sup>7</sup> In contrast to the discharge of its trusteeship duties, HBC took an aggressive, hands-on approach to the defense of this action, filing several dispositive motions and steadfastly refusing to comply with even basic discovery obligations. (See R p 40, R S pp 346, 415 (orders denying HBC’s serial dismissal motions), R S pp 406–12 (order describing and sanctioning HBC for repeated discovery abuses and awarding Appellants over \$10,000 in attorneys’ fees)).

proposed to resolve the issue at trial. The Board's tactics, if allowed, make a mockery of the solemnity the judicial system demands. The January Order, in error, disregarded these fundamental principles of fair play, respect for the judicial process, and the rights of litigants.<sup>8</sup> The January Order should be reversed.

**C. The Trial Court's Appointment of the Board as Trustee Contradicts the Jury's Verdict That the Trust Purposes Are Impossible or Impracticable**

Allowing the Board to accept appointment as trustee also conflicts with the jury verdict. The jury was asked in Issue 2: "Since 1987, has it become impossible or impracticable to use the Trust Property and land for the purposes specified by Dr. William Sharpe and his wife in the Deed and Agreement executed in 1950?" "Yes," the jury answered. (R p 120). While the Deed provides that the Trust property "**may** be transferred" to the Board to act as trustee, the Board may accept such transfer **only** "for the purpose of continuing the trust herein declared." (R S p 617; Doc. Ex. p 2) (emphasis added). The jury's finding of impossibility

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<sup>8</sup> The trial court's disregard or misapprehension of basic legal principles is illustrated by remarks made by the judge during trial and post-verdict. (T[VI] 1028:2-5; 1029:20-25; 1030:2-6; T[Appt] 9:8-25; 11:1-10; 35:11-17; 37:4-6; 38:21-25; 39:1-9; 43:2-5; 51:4-13; 56:1-17; 57:7-25; 71:5; 86:3-23; 90:9-17; 103:9-17; 108:11-19). These remarks suggest an ill-advised and legally unsupported view that the State is entitled to greater latitude in its litigation tactics and is less constrained by concerns of judicial admissions, judicial and equitable estoppel, and fair play than are private litigants. Despite its attempts to excuse its actions by now espousing an alleged public interest, the State must be held to the same standards as all litigants. This Court should not allow the Board to pretend that it has not previously disavowed any interest in serving as successor trustee simply because the State experienced a post-verdict change of heart and decided that it wishes to obtain this property for purposes clearly inconsistent with the settlor's intent.

and impracticability of the Trust purposes was not limited to HBC.<sup>9</sup> Rather, the jury found that the purposes are impossible or impracticable in general, irrespective of who is serving as trustee.

Since the jury has found Trust's purposes to be impossible or impracticable, it would, of course, also be impossible or impracticable for the Board to continue the Trust for these purposes, as it would be obligated to do under the plain terms of the Trust. In light of the jury finding, allowing the Board to accept appointment as successor trustee effectively nullifies the jury's verdict and constitutes another instance of reversible error.

The purpose of the Trust was clear: "[t]he Hammocks Beach Project was never and is not now intended to become a playground for the general public"; rather, The Hammocks "is primarily for Negro teachers, and its availability for their use at all times is to be safeguarded with utmost care." (R S p 622). See Callaham v. Newsom, 251 N.C. 146, 149, 110 S.E.2d 802, 804 (1959) ("The intent of one who creates a trust is to be determined by the language he chooses to convey his thoughts, the purpose he seeks to accomplish, and the situation of the several parties to or benefited by the trust.") (citation omitted).

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<sup>9</sup> The decision to pose the question of impossibility or impracticability to the jury in general terms without regard to the identity of the trustee was deliberate. At the urging of HBC, the trial court deleted the term "Hammocks Beach Corporation" from the jury question and instructions and instead chose to make Issue 2 more general. (T[VI] 1073:2-19; 1078:4-1080:9; T[VII] 1094:19-1095:13; 1232:16-1233:22)

In the face of this jury verdict and its prior acknowledgements in 1987 and in this case that the Trust purposes are impossible or impracticable of fulfillment, the Board (and trial court) are trying to substitute another purpose for that of Dr. Sharpe. (T[Appt] p 83:22–25). In direct contravention of the settlor’s intent, the State now plans, over Appellants’ objections, to convert the Trust property to a park for the general public by having the Board cede management of the property to the Division of Parks. (See R 134–36, T[Appt] p 32:9–13).

This is impermissible. It is well established that a “trustee has no power to change the purpose of a charitable trust, for example, to convert a trust to aid education into one for relief of the poor.” See George G. Bogert, The Law of Trusts and Trustees, § 393 n.5 (2010) (citing Brown v. Mem’l Nat’l Home Found., 329 P.2d 118 (Cal. Dist. Ct. App. 1958) (superseded by statute on other grounds), explaining that a “corporation to which property has been conveyed for named charitable purposes has no power to change the purposes of the trust by an amendment to its charter or by-laws”). Notably, the Consent Judgment entered in 1987 did not attempt to alter the Trust purposes, as the parties and the court correctly recognized that these purposes could not be amended from the settlor’s original intent.

It simply is not credible for the Board to now argue that appointing it to serve as successor trustee would further the settlor’s intent. The settlor’s intent

was to provide a recreational area for underserved African-Americans. The settlor did not state any general charitable intent to the public, the State of North Carolina, or even the Board. Neither the Board nor the trial court is authorized to alter the Trust purposes to further policy objectives of expanding the state's parks system or for any other purpose outside that envisioned by the settlor. In effect, the Board advocated, and the trial court applied, the *cy pres* doctrine. This too was error.

In limited circumstances, N.C. Gen. Stat. § 36A-53 gives “the courts the power to apply the *cy pres* doctrine to charitable trusts.” See YWCA v. Morgan, 281 N.C. 485, 489, 189 S.E.2d 169, 171 (1972). The doctrine allows a court, in the event that the “purpose set forth in a charitable trust becomes impossible, illegal or impracticable,” to redirect the bequest to “a purpose as near as possible to that originally selected” by the settlor. Id. However, “the statute applies only when three conditions have been met: (1) the testator manifested a general charitable intent; (2) the trust has become illegal, impossible, or impracticable; (3) the testator has not provided for an alternative disposition if the trust fails.” Id. The *cy pres* doctrine is inapplicable here, however, because conditions (1) and (3) are not present. The settlor, Dr. Sharpe, had *specific* charitable purposes that he intended to accomplish—“a vacation and assembly facility for the Negro teachers of North Carolina” (R S p 622); the Trust does not manifest a general charitable intent—to the contrary, “[t]he Hammocks Beach Project was never and is not now intended

to become a playground for the general public.” (R S p 622). Condition (3) is likewise unsatisfied, as Dr. Sharpe provided for an alternate disposition if the Trust fails: the transfer of the beach property to his heirs and the mainland property to the Hurst heirs. See Wilson v. First Presbyterian Church, 284 N.C. 284, 200 S.E.2d 769 (1973) (where will creating trust contained a residuary clause and testatrix’s specific and limited charitable intent could not be fulfilled, the *cy pres* doctrine had no application and the residuary devisee was entitled to receive the trust property).

The Board acknowledged as much in 2007 at the hearing on its Motion to Dismiss when its attorney, Mr. Ziko, explained to the court that “this is not an appropriate action for a [*cy pres*] action, because, in fact, the trust provided for distribution of the – of the trust assets to – to residual beneficiaries.” (R S p 494). And because the settlor provided an alternate process should the trust fail, Mr. Ziko acknowledged that “it’s not appropriate for the Attorney General to be involved in, because the Court cannot [*cy pres*] this trust and direct it to another charitable purpose, because there were contingent residual individuals identified in the trust.” (R S pp 494–95). For that reason, again, Mr. Ziko reiterated that his “clients, although named as defendants, have no interest in how the parties resolve this dispute.” (R S p 495). Given the admissions and statements in the State Defendants’ Answer and Motion to Dismiss, amplified by these statements, this

Court should not condone the Board's attempt to seize the property now, thus thwarting Dr. Sharpe's expressed intent—as acknowledged by the Board—that the Trust property be conveyed to the heirs under these circumstances.

In entering the January Order appointing the Board, the trial court was dismissive of the clear alternative distribution mandated by the settlor (T[Appt] p 57). Because the January Order impermissibly substituted the judgment of the trial court and the Board for the clearly stated alternative disposition plan of the settlor, this Order should be reversed.

**D. The Board Was Collaterally Estopped by the 1987 Consent Judgment from Accepting Appointment as Trustee**

Even without the Board's admissions in this case, as a matter of law the Consent Judgment expunged any interest the Board had in the Trust, and the Board is collaterally estopped from claiming otherwise. Accordingly, the trial court erred in appointing the Board as successor trustee on this basis as well.

The four elements of collateral estoppel are (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined. Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986). A consent judgment is a final judgment on the merits for purposes of res judicata and collateral estoppel. E.g., NationsBank of N.C. v. Am. Doubloon Corp., 125 N.C. App. 494, 504, 481 S.E.2d 387, 393



(1997). In the prior 1987 action culminating in the Consent Judgment, the defendants—Appellants here—sought a termination of the trust, just as they do in the instant litigation. Further, the relative interests of the parties in the Trust were actually litigated and established in the Consent Judgment. The Board was made a party to the action; the issue of the interest of the Board was unequivocally determined. The court clearly found that “[the Board’s] members have disclaimed any interest in the Board’s serving as trustee or otherwise attempting to adapt the property to the stated purposes of the trust” and “[t]he Attorney General has advised the Court that the [Board has] no interest in succeeding [HBC] and would not agree to do so.” (R pp 25, 27). The Board is collaterally estopped from asserting otherwise.

Res judicata likewise precludes the Board from strategically switching its position. “[A] consent judgment is res judicata as between the parties upon all matters embraced therein.” McLeod v. McLeod, 266 N.C. 144, 153, 146 S.E.2d 65, 71 (1966). Res judicata bars the Board “from relitigating a second action identical to the first where a court of competent jurisdiction has already rendered a final judgment on the merits.” Wilson v. Watson, 136 N.C. App. 500, 502, 524 S.E.2d 812, 813 (2000). As the Consent Judgment—a final judgment on the merits involving identical parties, Appellants and the Board—has already determined that

the Board has no interest in the Trust, the Board is precluded from taking a contrary position in this litigation.

The decision of the trial court allowing the Board to accept appointment as trustee despite the clear effect of the Consent Judgment thus constitutes reversible error under doctrines of collateral estoppel and res judicata. The Board's perversion of these court proceedings to attempt an uncompensated seizure of property is not made righteous—or legal—simply because it intends to use the land as a park. This Court should reverse the trial court's January Order appointing the Board as trustee.

### **III. THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANTS TO PURSUE POST-JUDGMENT DISCOVERY REGARDING THE BOARD'S REPRESENTATION THAT IT WOULD NOT AND COULD NOT ACCEPT TENDER OF APPOINTMENT AS TRUSTEE TO THE TRUST**

The discovery sought by Appellants would not have been necessary had the trial court correctly concluded that the Board was precluded from serving as trustee. However, when the trial court tendered appointment and the Board signaled its intent to change its position and accept appointment as trustee, the Board's ability to serve, as well as its previous representations to the contrary, became relevant to the trial court's determination of whether the Board could and should actually be appointed. Because it was relevant to this determination by the trial court, it became a proper basis for discovery. See N.C. Gen. Stat. § 1A-1,

N.C.R.Civ.P. 26 (test for discovery relevancy is whether requests “reasonably calculated to lead to the discovery of admissible evidence). However, the trial court denied Appellants the opportunity to conduct any discovery on this issue, opting instead to appoint the Board as trustee on a cold record despite Appellants’ specific challenges to the Board’s suitability as trustee. (*See* R pp 192–206; R S pp 457–543).

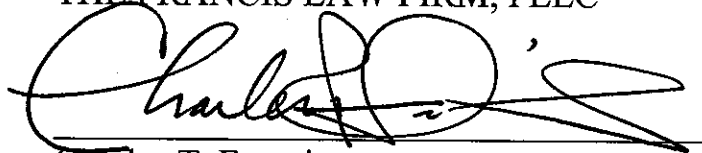
The trial court’s decision to ignore this potential information indicates its intent to appoint the Board as trustee, regardless of whether the Board was eligible to serve or could serve in compliance with the settlor’s intentions. The trial court’s decision to deny Appellants’ request to conduct discovery and to rule without the benefit of this discovery also shows a manifest lack of reason and an abuse of discretion. The trial court’s decision should be reversed.

### **CONCLUSION**

If not corrected, the January Order will do gross injustice to Appellants. The Order appointing the Board as successor trustee was wrong. This Court should reverse the trial court’s Order appointing the Board as trustee and remand this case for entry of an Order by the trial court distributing the property consistent with the Trust terms.

Respectfully submitted, this the 17th day of January, 2012.

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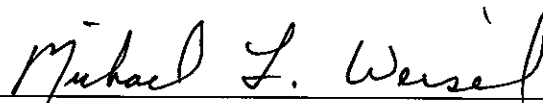
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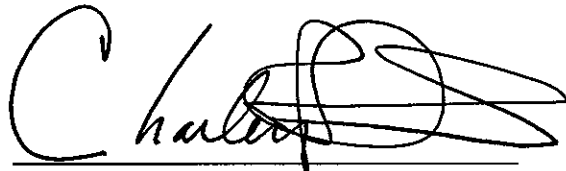
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Plaintiffs-Appellants certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, table of authorities, certificate of service, this certification of compliance and appendices) as reported by the word-processing software.

  
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Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I, Charles T. Francis, attorney for Plaintiffs-Appellants Harriett Hurst Turner and John Henry Hurst, certify that I served the foregoing Brief, upon the following parties and in the manner below specified, by depositing a copy thereof for each such party(ies) in a separate envelope bearing sufficient postage and depositing the same in the United States Mail at Raleigh, North Carolina:

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NORTH CAROLINA:  
ONCLOW COUNTY:

The foregoing certificate of Sidney Lieberman, J. E. Trexler and L. H. Jobe, a Notary Public of King Co. N. Y. Onslow and Wake County, is adjudged to be correct and sufficient. Let the instrument together with certificates be registered.

\* witness my hand and seal this the 22 day of September, 1950.

Kora M. Phillips, Asst. Clerk Superior Court.

Filed for registration at 11 o'clock A.M. September 22, 1950, and duly recorded September, 1950.

Mildred N. Thomas, Register of Deeds.

\*\*\*\*\*  
DR. WILLIAM SHARPE AND WIFE  
TO  
THE HAMMOCKS BEACH CORPORATION, INC.

9-22-50

NORTH CAROLINA:  
ONCLOW COUNTY:

THIS DEED, made this 10th day of August, 1950, by Dr. William Sharpe and wife, Mrs. Josephine W. Sharpe of the City of New York, State of New York, parties of the first part, to The Hammocks Beach Corporation, Inc., a corporation organized and existing under and by virtue of the laws of the State of North Carolina, with its principal office and place of business in the City of Raleigh, Party of the second part:

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of One (\$1) dollar and other good and valuable considerations to them paid by the parties of the second part, the receipt of which is hereby acknowledged have bargained and sold and by these presents do hereby give, grant, bargain, sell and convey to the party of the second part, the herein after tracts or parcels of land to be held in trust for recreational and educational purposes for the use and benefit of the members of The North Carolina Teachers Association, Inc. and such others as are provided for in the Charter of the Hammocks Beach Corporation, Inc., the same being more particularly described as follows:

FIRST TRACT: Beginning at the head of Ephraim Creek in the Foster line, and running thence North 24-1/4 West 75 poles to the Hammocks Road; thence continuing the same course north 24-1/4 West 96 poles to Halls Creek; thence still continuing the same course north 24 1/4 West 131 poles 10 links to the Smith Avenue Road; thence with the Smith Avenue Road North no degrees 30' West 14 poles to a bridge on the Smith Avenue Road; thence south 78 West 96 poles 10 links to a corner of the old Morton land and the Stanley lands; thence south 6-1/2 West 130 poles to a stake in the side of the path and a marked oak; thence south 6-3/4 West 67-1/2 poles to a pine in Turtle Hole Creek; thence down and with the run of Turtle Hole Creek to Halls Creek; thence down and with Halls Creek to Queens Creek, at White's Point; thence with Queens Creek to Snelly Point; thence with the shore to the mouth of Ephraim Creek; thence up and with Ephraim Creek to the Beginning, being the same lands conveyed by John F. Murrill et als to Missouri A. Smith as will appear from deed recorded in Book 48, at page 428, and by A. C. Huggins, Commissioner to Missouri A. Smith, as will appear from deed recorded in Book 48, at page 364, and from S. A. Starling, Commissioner to P. B. Smith as will appear from Deed recorded in Book 103, at page 88, known as the Hammocks.

SECOND TRACT: A tract of land containing 145 acres, more or less, lying and being in the County of Onslow, on the eastward end of Bear Banks, adjoining the lands of Levi Newbold, Beginning at a Snell Road on the South side of Boat Creek; thence South to Newbold's corner, a holly, and passing said holly, still south 195 poles with Newbold's line to the beach; thence along the Sea Shore N. 39 east 160 poles to the mouth of White Oak River; thence up said river to the mouth of Boat Creek; thence up Boat Creek to the Beginning.

THIRD TRACT: Adjoining the lands of H. D. Heady and others and known as the Levi Newbold patent containing 100 acres, more or less, and being the same tract of land granted by the State of North Carolina to Levi Newbold, recorded in Grant Book No. 2 at page 89, Registry of Deeds of Onslow County.

FOURTH TRACT: BEGINNING at the southwest corner of the H. D. Heady patent at a stake on the seashore and runs along said patent line north 3 degrees east 45 poles to a stake in said line; thence south 75 degrees West 120 poles to a stake; thence south 3 degrees West 46 poles to the seashore; thence north 75 east 120 poles to the Beginning. Being the land granted to Fowler H. Heady by the State of North Carolina, containing 35 acres. See "Record of Land Grants", page-103, Registry of Deeds of Onslow County.

PLAINTIFF'S  
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FIFTH TRACT: BEGINNING at northwest corner of Abram Meadows patent on the Banks Channel and runs with said patent line South 30 degrees east 80 poles to the season pole along the seashore south 63 degrees west 200 poles; thence north 30 degrees west 80 poles to the Banks Channel and with said Channel to the Beginning, containing 100 acres. See grant from State of North Carolina to John Riggs, Grant Book 2 at page 210, Registry of Deeds of Onslow County.

SIXTH TRACT: Lying on Bear Bank Beginning at the northwest corner of John Riggs patent on the Banks Channel and runs with said patent line South 30 degrees east 80 poles to the season pole; thence along the seashore south 63 degrees west 180 poles to Bear Inlet; thence with the Sound or Banks Channel to the Beginning, containing 65 acres. See grant from State of North Carolina to Asa Riggs, in Grant Book 2, at page 212, Registry of Deeds of Onslow County.

SEVENTH TRACT: Beginning at the northwest corner of John Riggs patent on the Banks Channel and runs with said patent line South 30 degrees east 80 poles to the season pole; thence along the seashore south 63 degrees west 10 poles to Bear Inlet; thence with the sound or Banks Channel to the Beginning, containing 65 acres. See grant from State of North Carolina to Asa Riggs in Grant Book 2 at page 212, Registry of Deeds of Onslow County.

EIGHTH TRACT: BEGINNING at Levi Newbold's southeast corner; thence South 54 west 200 poles near a Duck Pond; thence north 30 west 80 poles to the Banks Channel; thence along the Channel South 54 east 200 poles to said Newbold's corner; thence along his line South 30 east 80 poles to the Beginning, reference to Grant Book 2 page 62.

NINTH TRACT: Lying and being in Swansboro Township, Onslow County, North Carolina, adjoining the lands of Abram Meadows and others, and being the same tract of land granted by the State of North Carolina to Levi Newbold, recorded in Grant Book Number 2, page 69, Registry of Deeds of Onslow County.

IN TRUST AND CONFIDENCE that the said Hammocks Beach Corporation, Inc. shall forever hold the property and land herein conveyed for recreational and educational purpose to the use and benefit of the members of The North Carolina Teachers Association, Inc. and such others as are provided for in the Charter of The Hammocks Beach Corporation, Inc.

IT IS FURTHER PROVIDED AND DIRECTED by the said grantors, parties of the first part, 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 and if such impossibility or impracticability shall have been declared to exist by a vote of the majority of the directors of the Hammocks Beach Corporation, Inc., 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 decided by said Hammocks Beach Corporation, Inc. to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants; The Hurst family shall have the mainland property and the Sharpe family shall have the beach property;

And the said Grantors, for themselves, their heirs hereby agree to and with the said party of the second part, Grantee aforesaid, that in the event it becomes necessary for the property herein described to be reconveyed to the said Grantors herein or the heirs of said Grantors, that they do hereby covenant and agree that they will cause to be made by a competent realtor familiar with building and material a just and fair appraisal of the buildings located and constructed on said property hereby conveyed and will pay to the party of the second part such value for said buildings as may be declared to exist at the time of the reconveyance to the said grantors, or their heirs.

HOWEVER, it is specifically understood and agreed by and between the grantors and grantees herein that the said grantors and their heirs and John Hurst, his children and grandchildren shall have the right of ingress and egress on all of said land and shall further have the exclusive commercial rights to seine, fish, crab and right to cultivate commercially oysters in said waters and on said land whenever they desire, and shall further have the commercial right of quarrying on said land, together with their children and grandchildren; the transfer or assignment of these rights, however are prohibited;

IT IS FURTHER UNDERSTOOD that the grantor herein reserves for themselves, their heirs jointly with John Hurst and Gertrude Hurst, their children and grandchildren; the farming rights to that oblong area as by survey of the mainland west of a straight line formed by the fuley just east of the big oak tree and along the fence north of the big barn, to the fence on the west continuance with the fence of the main gate and entry north to the end of the property along the Foster line and Ephant's Creek, being approximately 100 acres, more or less to be used by the Sharp and Hurst families, their children and grandchildren for their own personal income from farming and stock raising purposes, also the cleared area as by survey of approximately ten acres along the West side of the adjacent road to Swansboro where the tobacco barns and sawmills are now situated; the said John Hurst and wife Gertrude Hurst,

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their children and grandchildren shall further have the exclusive right to the use and benefit and the benefit of their family, the house in which they now live, including ten acres of land surrounding the same; it is further understood that Dr. William Sharpe and his heirs shall have the use and benefit of the Sharp home place located on the mainland of said property, including five acres of land surrounding the same; there is also reserved for Dr. William Sharp and his heirs a bungalow which is on the beach including five acres of land surrounding the same;

THERE IS ALSO RESERVED AND EXCEPTED from this conveyance the crop of trees of the beach property (Bogue End of the Beach) for a distance approximately one-half of a mile to the site of proposed Harva Road to Mainland and of the entire mainland property of woodlands consisting of approximately 350 acres for the use of the Sharpe and Hurst families, their children and grandchildren for twenty years from date of this deed, to be used and sold by them for lumber when needed by the Hammocks Beach Corporation, Inc. and only sold to outsiders if the Hammocks Beach Corporation, Inc. does not need the same; and it is agreed that no trees shall be cut for lumber purposes if they are less than twelve inches in diameter at knee height, and such trees as are cut shall be replaced by the Sharp and Hurst families with young trees according to modern forestry methods;

IT IS FURTHER UNDERSTOOD AND AGREED that the Sharp and Hurst families will assume and pay taxes on all of said property which is reserved for their use and as a condition precedent to this conveyance; it is understood and agreed between the Grantors and Grantee that the entire property known as the Hammocks conveyed herein is never to be sold or mortgaged by the grantee, except that it is understood by the grantor that the property described herein may be transferred to the North Carolina State Board of Education for the purpose of carrying out the trust set forth herein, or conveyed to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants as stated above.

It is further understood and agreed that the Grantors herein, if they desire may, with the approval of the Board of Directors of The Hammocks Beach Corporation, Inc. select and set aside a tract of one half to one acre from the land herein described to be used for a cemetery or burial site for themselves, their heirs and for John Hurst, his family and heirs;

TO HAVE AND TO HOLD the above described land to the said Hammocks Beach Corporation, Inc. party of the second part, in fee simple, for recreational and educational purposes for the use and benefit of the North Carolina Teachers Association, Inc. and such others, as are provided for in the Charter of the Hammocks Beach Corporation, Inc.

And the said parties of the first part, do for themselves, their heirs, executors, administrators, covenant to and with the said party of the second part, The Hammocks Beach Corporation, Inc. that they are seized of said premises in fee and have a right to convey the same in fee simple; and that the same is free and clear from all encumbrances; and that they will warrant and defend the title herein conveyed against the lawful claims of all persons whomsoever.

IN TESTIMONY WHEREOF, the said parties of the first part have hereunto set their hands and seals, this 6th day of September, 1950.

Dr. William Sharpe (Seal)

Mrs. Josephine W. Sharpe (Seal)

STATE OF NEW YORK  
COUNTY OF KING.

I, Sidney Lieberman, a Notary Public in and for the above named State and County do certify that before me personally appeared this day Dr. William Sharpe and wife Mrs. Josephine W. Sharpe, who acknowledged the due execution of the foregoing instrument for the purpose therein expressed.

Witness my hand and Notarial Seal, this 6th day of September, 1950.

Sidney Lieberman, Notary Public.

N. P. Seal  
My com. exp: 9/30/52

NORTH CAROLINA;  
ONSLOW COUNTY:

The foregoing certificate of Sidney Lieberman Notary Public of King County, N. Y. is adjudged to be correct and sufficient. Let the instrument together with certificates be registered.

Witness my hand and seal this the 22 day of September, 1950.

Nora E. Phillips, Asst. Clerk Superior Court.  
Filed for registration at 11 o'clock A.M. September 22, 1950, and duly recorded September 22, 1950.

Mildred M. Thomas, Registrar of Deeds.

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AGREEMENT.  
DR. WILLIAM SHARPE AND WIFE  
THE HAMMOCKS BEACH CORPORATION, INC.  
AND  
JOHN HURST AND WIFE.  
NORTH CAROLINA:  
WAKE COUNTY:

9-22-50

THIS AGREEMENT, made this 6 day of September by and between Dr. William Sharpe and wife, Mrs. Josephine W. Sharpe of the State of New York, City of New York, parties of the first part; The Hammocks Beach Corporation, Inc., a corporation organized and existing under and by virtue of the laws of the State of North Carolina, with its principal office and place of business in the City of Raleigh, party of the second part; John Hurst and wife, Gertrude Hurst of Onslow County, North Carolina, parties of the third part;

WITNESSETH: That whereas, the parties of the first part by Deed dated the 10th day of August, 1950, have conveyed to the Hammocks Beach Corporation, Inc., party of the second part, certain property located in Onslow County, North Carolina to be held in trust for recreational and educational purposes for the use and benefit of the members of The North Carolina Teachers Association, Inc. and such others as are provided for in the Charter of the Hammocks Beach Corporation, Inc., and whereas, the parties of the first part, more than thirty years ago purchased said property and have had as tenants in charge of said property John Hurst and his wife, Gertrude Hurst; and whereas, because of the loyalty and faithfulness to the parties of the first part there has grown a mutual friendship between the said parties of the first part and John Hurst and wife, Gertrude Hurst; and whereas, the said party of the first part, Dr. William Sharpe, discussed with John and Gertrude Hurst the proposition of making a devise to them of all of said land, and the said Gertrude Hurst having at one time been a public school teacher in North Carolina realized the benefit that might accrue to all the teachers of the State and others as provided in the Charter of the Hammocks Beach Corporation, Inc., by the use of said land, and requested the said Dr. William Sharpe to give all of the said property to the teachers and others as provided in the Charter of the Hammocks Beach Corporation, Inc.; and whereas, said parties of the first part desire to have the said John Hurst and wife, Gertrude Hurst, their children and grand-children remain on said property conveyed to the Hammocks Beach Corporation, Inc., and enjoy the fruits which have come as a result of their work, and the work of their father and mother, and may have continuous employment on said property with the Hammocks Beach Corporation, Inc., as long as they desire and their capabilities will permit them to perform the services which may be needed on said property by the Hammocks Beach Corporation, Inc.

The said parties hereto do contract and agree as follows: That in consideration of the premises and further in consideration of the sum of One (\$1.00) Dollar in hand paid to the party of the second part by the parties of the first part, and in further consideration of the charitable and generous spirit of the parties of the first part and parties of the third part, the said parties of the second part to contract and agree to and with the parties of the first and third part as follows:

1. That it is understood and agreed that the property conveyed to the Hammocks Beach Corporation, Inc., grantee by Dr. William Sharpe, grantor, is never to be mortgaged or sold by the Hammocks Beach Corporation, Inc. except as stated in the deed; the said property may be conveyed to the North Carolina State Board of Education, for the purpose of continuing the trust hereby created, or re-conveyed to Dr. William Sharpe, his heirs and descendants and to John Hurst, his heirs and descendants.
2. That in the development of the property known as The Hammocks Beach Corporation, Inc. the first main building erected will be named "Gertrude M. Hurst Hall", and the second important building shall be named "Josephine W. Sharpe Hall".
3. It is further agreed by and between the parties of the first part and party of the second part, that John Hurst, Gertrude Hurst, their children and grandchildren shall be permitted to live on and have the use of the mainland in the area where their home is now located, as shown on map and set forth in the deed of conveyance.
4. That the Hammocks Beach Corporation, Inc., party of the second part will employ to work on said project the members of the Hurst family, their children and grandchildren in any capacity for which their abilities would be satisfactory to the Board of Directors, and that there will be no "outside" labor employed unless the Board of Directors deems it necessary.
5. The party of the second part further agrees and hereby gives to the Hurst family and their heirs, the exclusive right to operate on the land reserved for their use a general store for supply the daily wants and needs of the guests of the project.

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6. It is further stipulated and agreed that the Sharps Family, their children and grandchildren may have the use of the big house on the mainland and its adjacent area as by survey and as set forth in the Deed of Conveyance. They shall further have the right to live in and use the bungalow on the eastern end of the beach property and the adjoining area of five acres, as well as the use of the entire mainland and beach property for recreation, hunting and fishing, and the Sharps and Hurst family may further use the property for grazing their livestock when such use does not interfere with the activities of the project.

7. It is further agreed between all of the parties to this agreement that the main road on said property as shown on map recently made, shall be opened for use and will be extended along the fence from beside the big barn down to the shore front at the site of the old cotton gin, the future site for the wharf and entrance to the bridge to be constructed across the inland waterway, said road shall be kept open for use of the guests of the Hammocks Beach Corporation, Inc. and its members, the Sharps and Hurst families, their children and grandchildren.

It is also understood and agreed that the Sharps and Hurst families, their children and grandchildren shall have the right to own and to operate for the use and convenience of the project and guests of the project, one or more passenger and freight boats, the same may be docked at such place or places on the waters of the mainland or the beach as may be desired.

The parties of the first and parties of the third part also agree that any disputes which may arise between the members of the Hurst family over their right to use the land set aside for their use and their rights under the conveyance made by Dr. William Sharps, to the Hammocks Beach Corporation, Inc., shall be submitted to the members of the Sharps family for arbitration.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals this day and year first above written.

Dr. William Sharps (Seal)  
 Mrs. Josephine W. Sharps (Seal)  
 John L. Hurst (Seal)  
 Gertrude E. Hurst (Seal)  
 Hammocks Beach Corporation, Inc.  
 By Harold L. Trigg, President.

ATTEST: J. W. Seabrook, Secretary.

Corporate Seal.

STATE OF NEW YORK,  
 COUNTY OF KING.

I, Sidney Lieberman, a Notary Public in and for the above named State and County do hereby certify that before me personally appeared this day Dr. William Sharps and wife Mrs. Josephine W. Sharps who acknowledged the due execution of the foregoing instrument for the purposes therein expressed.

Witness my hand and Notarial Seal this 6 day of September, 1950.

Sidney Lieberman, Notary Public.

N. P. Seal  
 My com. exp: 3/30/52

NORTH CAROLINA:  
 ONELOW COUNTY:

I, J. E. Trexler, a Notary Public in and for the above named State and County, do hereby certify that before me personally appeared this day John Hurst and wife Gertrude Hurst, who acknowledged the due execution of the foregoing instrument for the purposes therein expressed.

Witness my hand and Notarial Seal this 14 day of September, 1950.

J. E. Trexler, Notary Public.

N. P. Seal  
 My com. exp: Oct. 12, 1951.

NORTH CAROLINA:  
 WAKE COUNTY:

This 15th day of September, 1950, personally came before me J. W. Seabrook, who being by me duly sworn, says that he knows the common seal of the Hammocks Beach Corporation, Inc. and is acquainted with H. L. Trigg, who is president of the corporation and that he, the said J. W. Seabrook is Secretary of the said corporation, and saw the said President sign the foregoing instrument and saw the said common seal of said corporation affixed to said instrument by said president and that he the said J. W. Seabrook signed his name in attestation of the execution of said instrument in the presence of said President of said corporation.

Witness my hand and seal this 15th day of September, 1950.  
 L. H. Jobs, Notary Public.

N. P. Seal  
 My com. exp: March 3, 1951.



# NORTH CAROLINA

## Department of The Secretary of State

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To all whom these presents shall come, Greetings:

I, Elaine F. Marshall, Secretary of State of the State of North Carolina, do hereby certify the following and hereto attached to be a true copy of

### ARTICLES OF INCORPORATION

OF

### THE HAMMOCKS BEACH CORPORATION

the original of which was filed in this office on the 2nd day of October, 1948.



Certification# 91257359-1 Reference# 10450947-ACH Page: 1 of 8  
Verify this certificate online at [www.secretary.state.nc.us/verification](http://www.secretary.state.nc.us/verification)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at the City of Raleigh, this 4th day of March, 2011.

*Elaine F. Marshall*

Secretary of State



59529

CERTIFICATE OF INCORPORATION  
OF  
THE HAMMOCKS BEACH CORPORATION

This is to certify that we the undersigned, do hereby unite ourselves together into a corporation under and by virtue of the laws of North Carolina, as contained in Chapter 55 of the General Statutes entitled "Corporations" and the several amendments thereto, and to that end do hereby set forth:

1. The name of the corporation is The Hammocks Beach Corporation.
2. The location of the principal office of the corporation in this State is at Raleigh, Wake County, North Carolina.
3. The objects for which this corporation is formed are as follows:
  - (a) To provide, maintain and administer the properties or interests therein which may be acquired by this corporation in the property known as the "Hammocks" in Onslow County, North Carolina, and its assembly, vacation and recreation facilities primarily for the teachers in public and private elementary, secondary, and collegiate institutions for Negroes in North Carolina who may wish to use the said facilities as individuals or groups subject to regulations set by the Board of Directors; and for such other groups as are hereinafter set forth.
  - (b) To make available, subject to the regulations of the Board of Directors, the above named facilities for meetings of groups as follows: The North Carolina Teachers Association and any of its sub-divisions (district associations, committees, departments, sections, city and county units); Educational or church groups sponsored by one or more of the colleges for Negroes in North Carolina; Youth groups as follows: New Farmers of America, 4-H Clubs, Boy and Girl Scouts, YMCA and YWCA Clubs; State Congress of Negro Parents and Teachers, State Medical Association, State Inter-denominational Alliance, State Nurses' Association, State Bar Association; Staff personnel of the United States Agricultural Extension Service (Farm and Home Agents); And such other organizations of equivalent humanitarian purpose to those named above whose applications or request may be approved by a quorum of the Board of Directors of the Hammocks Beach Corporation within the limits of the purpose of the Project.



(c) The objects and purposes of the Corporation shall be subject to the donor's wishes as stated herewith:

POLICY

The Hammocks Beach Project was never and is not now intended to become a playground for the general public. The whole idea was inspired by the devoted service and benevolent spirit of Gertrude Hurst, a former rural teacher, who might have had the control of the property for herself and her family, but, instead, chose to suggest that it be used to provide vacation and assembly facilities for the many classroom teachers of North Carolina whose limited income would not finance vacations at costly resorts.

The project is primarily for Negro teachers, and its availability for their use at all times is to be safeguarded with utmost care. This limitation is not to be interpreted as undue discrimination against any other group, but simply as reasonable adherence to the major purpose of the project - a vacation and assembly facility for the Negro teachers of North Carolina.

The availability of the facilities for meetings of organized groups of comparable status as approved by the Board of Trustees is to be regulated always in the light of the primary purpose of the Project.

4. And in order to properly prosecute the objects and purposes herein set forth; the corporation shall be controlled by a Board of Directors which shall consist of twenty-four persons, to be selected as follows:

The Superintendent of Public Instruction of the State of North Carolina;

The Director of The Division of Negro Education of the State Department of Public Instruction of the State of North Carolina.

The Presidents of the eleven Negro Colleges in North Carolina which grant degrees and are accredited by the State Department of Public Instruction of North Carolina at the time of this incorporation, to-wit: Agriculture and Technical College, Greensboro, North Carolina; Barber-Scotia College, Concord, North Carolina; Bennett College, Greensboro, North Carolina; Fayetteville State Teachers College, Fayetteville, North Carolina, Johnson G. Smith University, Charlotte, North Carolina; Livingstone College, Salisbury, North Carolina; Saint Augustine's College, Raleigh, North Carolina;

Shaw University, Raleigh, North Carolina; Elizabeth City State Teachers College, Elizabeth City, North Carolina; Winston-Salem Teachers College, Winston-Salem, North Carolina; North Carolina College, Durham, North Carolina;

The President of the North Carolina Teachers Association;

The Secretary of the North Carolina Teachers Association;

The Presidents of the four districts of the North Carolina Teachers Association;

The State Supervisor of Negro elementary schools in the State of North Carolina;

Two Negro women who are classroom teachers in public schools located in the State of North Carolina;

Two other Negro citizens having residence in the State of North Carolina.

The Superintendent of Public Instruction, the Director of the Division of Negro Education, the Supervisor of Negro Elementary Schools, the Presidents of the Negro Colleges in North Carolina, the President and the Secretary of the North Carolina Teachers Association, and the President of each of the four divisions of the North Carolina Teachers Association referred to herein before shall hold office as members of the Board of Directors of The Hammocks Beach Corporation only so long as they occupy said positions and upon death, resignation or other circumstances causing them to vacate their office, their places shall be filled immediately by the persons succeeding them.

The selection and term of office of the two women who are classroom teachers and the other two Negro citizens of North Carolina shall be made and fixed by the Board of Directors which shall also have the power to elect their successors in office.

(a) The Corporation shall have full power and authority to purchase, lease and otherwise acquire, hold, mortgage, convey and otherwise dispose of all kinds of property, both real and personal, both in this State and all other States, territories and dependencies of the United States, except that it is agreed between Dr. William Sharpe and the incorporators

herein that the properties known as the "Hammocks" or interest therein, which may be conveyed to the Directors of the Corporation by Dr. William Sharpe shall not be used for any purpose except those specified herein in the conveyance therein by said Dr. William Sharpe to this corporation.

(b) The Corporation shall further have full power and authority to construct, equip and maintain buildings, or to permit approved organizations and/or institutions to construct, equip and maintain buildings, to install, maintain and operate all kinds of mechanical appliances, to operate the same by steam, water, electricity, and generally to perform all acts which may be deemed necessary or expedient for the proper and successful prosecution of the objects and purposes for which the Corporation is created.

5. The Corporation shall have no capital stock, and is a non-profit corporation.

6. Membership in the Hammocks Beach Corporation shall be open to all organized groups of persons who meet the requirements which may be imposed for use of the premises of said Corporation by its Board of Directors.

7. The names and post office addresses of the incorporators are as follows: Dr. Clyde A. Erwin, Raleigh, North Carolina; Dr. N. C. Newbold, Raleigh, North Carolina; Ferdinand D. Bluford, President, Agriculture and Technical College, Greensboro, North Carolina; L. S. Cozart, President, Barber-Scotia College, Concord, North Carolina; Dr. David D. Jones, President, Bennett College, Greensboro, North Carolina; Dr. J. W. Seabrook, President, Fayetteville State Teachers College, Fayetteville, North Carolina; H. Liston, President, Johnson C. Smith University, Charlotte, North Carolina; W. J. Trent, President, Livingstone College, Salisbury, North Carolina; Alphonso Elder, President, North Carolina College, Durham, North Carolina; Dr. H. L. Trigg, St. Augustine's College, Raleigh, North Carolina; S. D. Williams, President, Elizabeth City Teachers College, Elizabeth City, N. C.; F. L. Atkins, President, Winston-Salem Teachers Col-

lega, Winston-Salem, North Carolina; Hugh V. Brown, Goldsboro, North Carolina; W. I. Greene, Raleigh, North Carolina; Mrs. Anne P. Toliver, Asheville, North Carolina; T. A. Parker, Durham, North Carolina; W. R. Collins, Smithfield, North Carolina; Mrs. Ethel W. Greene, Raleigh, North Carolina; Mrs. Belle Diggs McC<sup>an</sup>kle, Winston-Salem, North Carolina; W. A. Foster, Goldsboro, North Carolina; Dr. Max T. King, Franklinton, North Carolina; Minnie Ruth Lawrence, Raleigh, North Carolina; J. H. Wheeler, Durham, North Carolina.

8. The period of existence of this corporation is unlimited.

9. The Board of Trustees of this corporation shall have the power by vote of a majority of all of the Directors to make, alter, amend, and rescind the by-laws of this corporation.

IN TESTIMONY WHEREOF we have hereunto set our hands and seals this

25th day of September, 1948.

XX (SEAL)

Clyde A. Erwin (SEAL)  
Clyde A. Erwin

N. C. Newbold (SEAL)  
N. C. Newbold

Ferdinand D. Bluford (SEAL)  
Ferdinand D. Bluford

L. S. Coxart (SEAL)  
L. S. Coxart

David D. Jones (SEAL)  
David D. Jones

W. W. Seabrook (SEAL)  
W. W. Seabrook

H. Linton (SEAL)  
H. Linton

W. J. Trent (SEAL)  
W. J. Trent

Alphonso Elder (SEAL)  
Alphonso Elder

H. L. Trigg (SEAL)  
H. L. Trigg

Robert P. Daniel (SEAL)  
Robert P. Daniel

S. D. Williams (SEAL)  
S. D. Williams

F. L. Atkins (SEAL)  
F. L. Atkins

Hugh V. Brown (SEAL)  
Hugh V. Brown

W. I. Greene (SEAL)  
W. I. Greene

Mrs. Anne P. Toliver (SEAL)  
Mrs. Anne P. Toliver

T. A. Parker (SEAL)  
T. A. Parker

W. R. Collins (SEAL)  
W. R. Collins

Mrs. Ethel W. Greene (SEAL)  
Mrs. Ethel W. Greene

Mrs. Belle Diggs McGorkle (SEAL)  
Mrs. Belle Diggs McGorkle

W. A. Foster (SEAL)  
W. A. Foster

Max T. King (SEAL)  
Max T. King

Minnie Ruth Lawrence (SEAL)  
Minnie Ruth Lawrence

J. H. Wheeler (SEAL)  
J. H. Wheeler

NORTH CAROLINA  
WAKE COUNTY

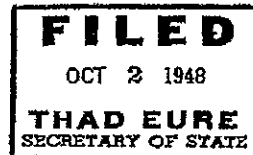
I, Charles Erwin, a Notary Public in and for the above named State and County, do hereby certify that this day personally appeared before me ~~William~~ Clyde A. Erwin, N. C. Newbold, Ferdinand D. Bluford, L. S. Cozart, David D. Jones, J. W. Seabrook, H. Liston, W. J. Trent, Alphonso Elder, H. L. Trigg, Robert P. Daniel, S. D. Williams, F. L. Atkins, Hugh V. Brown, W. I. Greene, Mrs. Anne P. Toliver, T. A. Parker, W. R. Collins, Mrs. Ethel W. Greene, Mrs. Belle Diggs McGorkle, W. A. Foster, Max T. King, and J. H. Wheeler who acknowledged the due execution of the foregoing instrument for the purpose therein expressed.

Witness my hand and Notarial Seal, this 25<sup>th</sup> day of September,  
1948.

My commission expires:

Nov. 30, 1948

Chas. R. Drager  
Notary Public



06C 118173

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO.: \_\_\_\_\_

HARRIETT HURST TURNER and  
JOHN HENRY HURST,

Plaintiffs,

vs.

THE HAMMOCKS BEACH  
CORPORATION, NANCY SHARPE  
CAIRD, SETH DICKMAN SHARPE,  
SUSAN SPEAR SHARPE, WILLIAM  
AUGUST SHARPE, NORTH CAROLINA  
STATE BOARD OF EDUCATION, ROY  
A. COOPER, III, in his capacity as  
Attorney General of the State of North  
Carolina,

Defendants.

COMPLAINT

2006 DEC 15 P 1:50  
WAKE COUNTY, CSC

Plaintiffs, complaining of the acts of the Defendants, allege and state that:

1. Plaintiff Harriett Hurst Turner is a citizen and resident of Wake County, North Carolina. Plaintiff Harriett Hurst Turner is an heir and descendent of both the late Gertrude Hurst and the late John Hurst.

2. Plaintiff John Henry Hurst is a citizen and resident of Onslow County, North Carolina. Plaintiff John Henry Hurst is an heir and descendent of both the late Gertrude Hurst and the late John Hurst.

3. Upon information and belief, Defendant The Hammocks Beach Corporation is a corporation organized under the laws of the State of North Carolina with its principal place of business and agent for service of process in Wake County, North Carolina. Defendant The

Hammocks Beach Corporation is the trustee of certain real property pursuant to the terms of a charitable trust created by Dr. William Sharpe and Josephine W. Sharpe on September 6, 1950.

4. Upon information and belief, Defendant Nancy Sharpe Caird is a resident of Ireland, is over the age of 18 and is otherwise competent. Defendant Caird is an heir and descendent of the late Dr. William Sharpe.

5. Upon information and belief, Defendant Seth Dickman Sharpe is over the age of 18 and is otherwise competent. Defendant Seth Dickman Sharpe is an heir and descendent of the late Dr. William Sharpe.

6. Upon information and belief, Defendant Susan Spear Sharpe is a resident of Maine, is over the age of 18 and is otherwise competent. Upon information and belief, Defendant Susan Spear Sharpe is an heir and descendent of the late Dr. William Sharpe.

7. Upon information and belief, Defendant William August Sharpe is a resident of Maine, is over the age of 18 and is otherwise competent. Upon information and belief, Defendant William August Sharpe is an heir and descendent of the late Dr. William Sharpe.

8. Upon information and belief, Defendant North Carolina State Board of Education is an agency of the State of North Carolina. Defendant North Carolina State Board of Education is designated as a contingent trustee of the trust established by the Sharpes, to serve under certain circumstances and for the specific purpose of continuing the trust for the purpose for which it was established.

9. Roy A. Cooper, III serves as the Attorney General of the State of North Carolina. Defendant Cooper or his successor, if any, is named in his official capacity.

10. This Court has personal jurisdiction over the Defendants pursuant to N.C. Gen. Stat. §§ 1-75.4.



11. This Court has subject matter jurisdiction in this action pursuant to N.C. Gen. Stat. §§ 7A-240 and 7A-243.

**FACTUAL BACKGROUND**

12. The allegations contained in Paragraphs 1 through 11 are re-alleged and incorporated by reference as if fully set forth herein.

13. Dr. William Sharpe (sometimes hereafter referred to as "Dr. Sharpe") was one of the early neurosurgeons practicing in New York City. In 1923, he acquired approximately 810 acres of high land on the mainland adjacent to Queens Creek and Foster's Bay in Onslow County, North Carolina. In 1930 and 1931, he purchased adjacent property consisting of approximately 2,000 acres of sandy beach outer banks (known as Bear Island) and approximately 7,000 acres of marshland. The high land on the mainland portion was capable of reforestation or cultivation and was known as "The Hammocks." The land was acquired by him as a place to which he could retreat from the demands of his professional life. The Hammocks became dear to Dr. Sharpe, as did an Onslow County couple with whom he became acquainted and who moved onto the property as its managers and caretakers. That couple were John and Gertrude Hurst (sometimes hereafter referred to as "Mr. and Mrs. Hurst"). Over a four decade period, Dr. Sharpe and Mr. and Mrs. Hurst maintained a mutually beneficial business relationship and warm personal friendship built on mutual trust, shared values and interests, and genuine affection for one another.

14. Eventually, Dr. Sharpe apprised Mr. and Mrs. Hurst of his desire to devise the Hammocks to them. As stated in the Agreement dated September 6, 1950, and recorded in the Onslow County Registry at Deed Book 221, Page 634 ("the Agreement"), Gertrude Hurst, having formerly served as a black teacher in the then racially segregated public school system,

requested Dr. Sharpe instead make a gift of the property in such manner that African-American teachers and their then existing organizations could enjoy the property.

15. Pursuant to Mrs. Hurst's request, and rather than wait until his death, Dr. Sharpe, in 1950, by deed of gift, deeded certain real property to a nonprofit corporation, as trustee. The Hammocks Beach Corporation was the name given to the trustee entity, and its charter spelled out its purpose—to administer the property given to it by Dr. Sharpe “primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina...and for such other groups as are hereinafter set forth.” The deed to The Hammocks Beach Corporation as trustee restricted the use of the property “for the use and benefit of the members of The North Carolina Teachers Association, Inc., and such others as are provided for in the Charter of the Hammocks Beach Corporation.” The deed is recorded in the Onslow County Register of Deeds at Deed Book 221, Page 636 (“the Deed”).

16. The terms of the trust Deed from Dr. Sharpe to The Hammocks Beach Corporation, as amplified by the simultaneously executed Agreement, subjected the trust property to numerous rights of use and possession in the Sharpe and Hurst families, including the right to cultivate, to quarry, to raise livestock, to travel over the land incident to taking fin fish and shellfish in adjacent waters, and to reside there. According to a 1987 Consent Judgment entered by the Onslow County Superior Court, the trust property, originally consisted of approximately 10,000 acres. Approximately 2,000 oceanfront acres were, with the concurrence of Dr. Sharpe and Mr. and Mrs. Hurst, conveyed by The Hammocks Beach Corporation as trustee, to the State of North Carolina, without compensation, and now comprise Hammocks Beach State Park. The trustee thereafter acquiesced in the claim by the State of North Carolina of the title to approximately 7,000 acres of marshland.

17. The Hammocks Beach Corporation at one time leased two small portions of the property, consisting of approximately 30 and 26.5 acres, respectively, for summer camp purposes to the North Carolina Agricultural Extension Service (for use by the 4-H organization) and to the Future Farmers of America.

18. Upon information and belief, both tenants long ago abandoned use and possession of the aforementioned leased portions of trust property and the improvements utilized by these tenants are in a state of decay and disrepair. There is an assembly building on the property which, over the years, has been used sporadically. Upon information and belief, the assembly building long ago ceased to be used for this purpose and is now in a state of decay and disrepair.

19. In the Agreement and in the Deed, Dr. Sharpe made certain provisions looking to the possibility that fulfillment of the purposes of the trust might one day become impossible or impracticable. He directed that in such event, and after declaration of same by its Board of Directors, The Hammocks Beach Corporation should convey the property to the North Carolina State Board of Education (hereinafter "the Board") 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 a conveyance for that purpose, the property would instead be conveyed to Dr. Sharpe and to John and Gertrude Hurst and their "heirs and descendants." 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 decided by said The Hammocks Beach Corporation, Inc., to Dr. William

Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants; the Hurst family shall have the main land property and the Sharpe family shall have the beach property.”

20. In a 1986 action filed by The Hammocks Beach Corporation in Onslow County Superior Court, 86 CVS 1466, the Sharpe and Hurst heirs contended that fulfillment of the trust terms had become impossible or impracticable, that The Hammocks Beach Corporation had acted capriciously and contrary to the intent of the settlor in not declaring its recognition of such, and that the court should declare the trust terminated and either mandate a conveyance of all of the property to the Sharpe and Hurst families or adjudicate title in their names.

21. Prior to the trial of the 1986 action, the parties reached a settlement, approved by the Court in a Consent Judgment, that (1) enabled The Hammocks Beach Corporation to retain title as trustee to a portion of the land to attempt to serve the trust purposes, with additional powers of administration aimed at enabling it to improve the property to the extent reasonably necessary, and (2) vested in the Sharpe and Hurst families a portion of the real property in exchange for their relinquishing rights of immediate use for cultivation, quarrying, raising livestock, fishing, residency, recreation and other activities in the portion to be held solely by The Hammocks Beach Corporation as trustee.

22. In approving the Consent Judgment in 1987, the Court found that there was substantial evidence that the fulfillment of the terms of the trust created by the Deed from Dr. William Sharpe to The Hammocks Beach Corporation was impossible or impracticable. Specifically the Court found that:

The integration of the public schools which occurred following the gift of the property to Hammocks Beach Corporation has impacted on both the constituency which Dr. Sharpe intended to benefit from the trust and on the ability of Hammocks Beach Corporation to obtain financial support for the improvement

of The Hammocks to serve its intended purpose. The North Carolina Teachers Association, Inc., the black teachers organization intended as the primary beneficiary, and several of the all-black youth and civic organizations listed in the Charter of Hammocks Beach Corporation, either do not now exist or are relatively nonfunctional. Only the 4-H and the FFA organizations use the property, and then only during the summer months, and only to the extent of approximately four per cent of the 805 acres held in trust.

The amended charter of Hammocks Beach Corporation calls for a board of directors of thirty-one persons, over half of whom are officers or designees of the North Carolina Teachers Association, Inc., an organization which no longer exists . . . Thus, by reason of a change of circumstances not foreseeable in 1950, financial and physical factors render fulfillment of the terms of the trust impossible, and that is the case whether the trustee be Hammocks Beach Corporation or the Board. Even if the Board could lawfully take title in its name, which under statutes governing titles to state property it cannot now do, its members have disclaimed any interest in the Board's serving as trustee or otherwise attempting to adapt the property to the stated purposes of the trust. In any event, the Board could not, and will not, spend tax revenues for the purpose of administering or improving a racially segregated facility.

The integration of the public schools and the virtual disintegration of the organizations for black people which were contemplated by Dr. Sharpe as primary beneficiaries and financial supporters of the trust are circumstances unforeseen by Dr. Sharpe and, in combination with the rights vested in the Sharpe and Hurst families and the prohibition against the mortgage and sale of property, render the fulfillment of the trust terms impossible or impracticable of fulfillment.

The trust is impossible or impracticable of fulfillment whether the trustee continues to be Hammocks Beach Corporation or whether, in the event the Board would so agree, the trust responsibilities should be assumed by it or by any other agency of state government. Thus, Dr. Sharpe's alternate plan of having the Board assume the trust responsibilities in the event of the impossibility or impracticability of fulfillment of the trust terms also fails for the same reasons.

23. In the Consent Judgment, the Court ordered that The Hammocks Beach Corporation, as trustee, was vested with title to a substantial portion of the real property which was conveyed by Dr. William Sharpe to The Hammocks Beach Corporation, trustee, by the Deed dated August 10, 1950, recorded in the Onslow County Registry at Book 221, Page 636. The Consent Judgment provided that The Hammocks Beach Corporation, trustee, holds title to said property 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 the Agreement dated September 6, 1950, and recorded in the Onslow County Registry at Book 221, Page 643, including the Plaintiffs' remainder rights. However, the Consent Judgment did provide that the trustee was no longer under a prohibition against the mortgaging or sale of said property, after receiving Court approval and in order to further the purposes of the trust.

24. Despite the fact that The Hammocks Beach Corporation was given additional authority to generate funds to improve the trust property and better effectuate trust purposes, upon information and belief, it has taken no steps since 1987 to improve the trust property or to fulfill the purposes of the trust.

25. Since 1987, The Hammocks Beach Corporation has failed to fulfill the trust terms in that the trust property has not been utilized by the North Carolina Teachers Association, Inc., or the other civic organizations listed in the Charter of The Hammocks Beach Corporation, which either do not exist or are otherwise nonfunctional. In the 19 years since the entry of the Consent Judgment, only the 4-H and the FFA organizations have used the property, and then only during the summer months. As stated, upon information and belief, both of those tenants have now ceased their use and occupancy of even that small portion of the trust property and the improvements formerly occupied by those tenants are in a state of vacancy and decay.

26. As in 1987, fulfillment of the trust terms has become impossible or impracticable.

27. Upon information and belief, The Hammocks Beach Corporation has failed to account for trust funds and has negligently mismanaged said funds.

**FIRST CLAIM FOR RELIEF**  
**(Accounting)**

28. The allegations contained in Paragraphs 1 through 27 are re-alleged and incorporated by reference as if fully set forth herein.

29. Pursuant to N.C. Gen. Stat. § 36C-4-405.1, the settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested party may commence a proceeding for an accounting of the trustee's administration of the trust. Plaintiffs are remainder beneficiaries and interested parties within the meaning of the aforementioned statute.

30. This Court should order The Hammocks Beach Corporation to account to this Court and all interested parties for its administration of the trust.

**SECOND CLAIM FOR RELIEF**  
**(Termination of Trust and Reversion to Contingent Beneficiaries)**

31. The allegations contained in Paragraphs 1 through 30 are re-alleged and incorporated by reference as if fully set forth herein.

32. As in 1987, fulfillment of the trust terms has become impossible or impracticable.

33. Pursuant to N.C. Gen. Stat. § 36C-4-410, a court should terminate a trust if the purposes of the trust have become impossible to achieve.

34. The trust should be terminated according to its own terms, as it has now become impossible or impracticable to use the Hammocks property as directed by the trust or to achieve the trust's purposes.

35. The Deed from the grantors provided 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 Hurst 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.”

36. In the 1986 action referenced above, the North Carolina State Board of Education disclaimed any interest it held in serving as trustee or otherwise attempting to adapt the trust property to the stated purposes of the trust.

37. Indeed, as the Onslow County Superior Court found in the 1987 Consent Judgment, “The trust is impossible or impracticable of fulfillment whether the trustee continues to be Hammocks Beach Corporation or whether, in the event the Board would so agree, the trust responsibilities should be assumed by it or by any other agency of state government. Thus, Dr. Sharpe’s alternate plan of having the Board assume the trust responsibilities in the event of the impossibility or impracticability of fulfillment of the trust terms also fails for the same reasons.”

38. Because the trust purposes have become impossible or impracticable because the North Carolina State Board of Education may not serve as successor trustee, and in any event the substitution of the Board of Education would not cure the impossibility or impracticability, the trust and N.C. Gen. Stat. § 36C-4-410 mandate that the trust property be deeded by The Hammocks Beach Corporation to the heirs and descendants of John Hurst and Gertrude Hurst. This Court should enter an order terminating the trust established by Dr. William Sharpe on September 6, 1950 and vesting fee simple title to the trust res in the contingent beneficiaries of the trust, the heirs and descendants of the late Gertrude Hurst and the late John Hurst, as provided in the Deed and Agreement.

39. The beach property has already been conveyed by The Hammocks Beach Corporation to the State of North Carolina.



40. A portion of the original mainland property is still held by The Hammocks Beach Corporation in trust and must, pursuant to the terms of the trust, be conveyed to Plaintiffs, the John and Gertrude Hurst heirs and descendants.

**THIRD CLAIM FOR RELIEF**  
**(Breach of Fiduciary Duty)**

41. The allegations contained in Paragraphs 1 through 40 are re-alleged and incorporated by reference as if fully set forth herein.

42. Under N.C. Gen. Stat. § 36C-4-405.1, the settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested person may maintain a proceeding to enforce a charitable trust, including a proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud. Plaintiffs are remainder beneficiaries and interested persons within the meaning of the aforementioned statute.

43. The Hammocks Beach Corporation has negligently mismanaged the trust property by failing to utilize it for the trust purposes and in other ways to be proven at trial.

44. Upon information and belief, it is believed that The Hammocks Beach Corporation has failed to follow corporate formalities or to otherwise regularly carry on corporate affairs for its stated purpose.

45. Because Defendant The Hammocks Beach Corporation breached its fiduciary duty, Plaintiffs are entitled to recover compensatory damages from Defendant The Hammocks Beach Corporation in an amount in excess of \$10,000.00.

46. Because the actions of Defendant The Hammocks Beach Corporation were grossly negligent, Plaintiffs are entitled to recover punitive damages from Defendant The Hammocks Beach Corporation in an amount in excess of \$10,000.00.

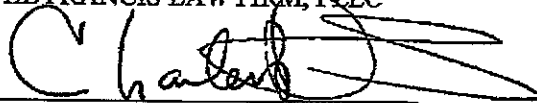
**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray the Court that:

1. The Court enter an Order requiring Defendant The Hammocks Beach Corporation to account to this Court and all interested parties for its administration of the trust;
2. The Court enter an Order terminating the trust established by Dr. William Sharpe on September 6, 1950, and vesting fee simple title to the trust res in the contingent beneficiaries of the trust, the heirs and descendants of the late Gertrude Hurst and the late John Hurst, as provided in the Deed and the Agreement;
3. They recover judgment against Defendant The Hammocks Beach Corporation in an amount in excess of \$10,000.00 for compensatory damages;
4. They recover judgment against Defendant The Hammocks Beach Corporation in an amount in excess of \$10,000.00 for punitive damages;
5. They recover interest as allowed by law on any judgment obtained against Defendants;
6. They recover costs and expenses of this action, including reasonable attorney's fees as allowed by law, from Defendants;
7. They recover any further relief that the Court deems appropriate.

This the 15 day of December, 2006.

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

COPY

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
File No. 06 CV 018173

HARRIETT HURST TURNER, AND  
JOHN HENRY HURST,

PLAINTIFFS,

v.

THE HAMMOCKS BEACH CORPORATION,  
NANCY SHARPE CAIRD,  
SETH DICKMAN SHARPE,  
SUSAN SPEAR SHARPE,  
WILLIAM AUGUST SHARPE,  
NORTH CAROLINA STATE BOARD OF  
EDUCATION,  
ROY A. COOPER, III, IN HIS CAPACITY AS  
ATTORNEY GENERAL OF THE STATE OF  
NORTH CAROLINA.

DEFENDANTS.

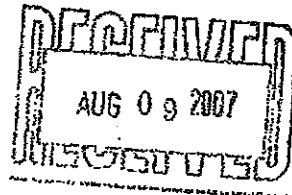
ANSWER AND MOTION TO DISMISS  
OF THE NORTH CAROLINA  
STATE BOARD OF EDUCATION  
AND  
THE NORTH CAROLINA  
ATTORNEY GENERAL

2007  
AUG 9 11 23 AM  
CLERK OF SUPERIOR COURT

PURSUANT to N.C.R. Civ. P., Rules 8 and 12(b)(6), the North Carolina State Board of Education and the North Carolina Attorney General, through undersigned counsel, submit the following answer to the Complaint and move to dismiss themselves as parties to this action:

ANSWER

1. Paragraph 8 of the Complaint alleges that pursuant to the terms of a charitable trust created by Dr. William Sharpe and Josephine W. Sharpe on September 6, 1950 (the "Trust"), the North Carolina State Board of Education is designated as a contingent trustee of the Trust established by the Sharpes, to serve under certain circumstances and for the specific purpose of continuing the Trust for the purpose for which it was established. The State Board of Education



and Attorney General admit these allegations.

2. Paragraph 9 of the Complaint alleges that Roy A. Cooper, III, is the Attorney General of the State of North Carolina. The State Board of Education and the Attorney General admit these allegations.

3. Paragraphs 29 and 42 of the Complaint allege that under N.C. Gen. Stat. § 36C-4-405.1, the Attorney General may maintain a proceeding to enforce a charitable trust, including a proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud. The State Board of Education and the Attorney General admit these allegations.

4. Paragraphs 20 through 23 of the Complaint allege that a Consent Judgment was entered in the case of The Hammocks Beach Corporation v. The Fresh Air Fund, et al., 86 CVS 1466 (Onslow Co. Sup. Ct. filed Oct. 29, 1987) (the Consent Judgment). The State Board of Education and the Attorney General admit these allegations.

5. Paragraphs 36 through 38 of the Complaint allege that under the Consent Judgment the parties and the Court found that because of the impossible or impracticable nature of the Trust the State Board of Education could not serve as trustee and the State Board of Education disclaimed any interest as a contingent trustee. The State Board of Education and the Attorney General admit these allegations.

The remaining allegations do not relate to either the State Board of Education or the Attorney General and the State is not obligated to respond to those allegations.

**MOTION TO DISMISS**

**THE STATE BOARD OF EDUCATION AND THE ATTORNEY GENERAL  
ARE NOT PROPER DEFENDANTS TO THIS PROCEEDING**

Relying upon the allegations and answers recited above, the State Board of Education and the Attorney General show the Court:

1. The Consent Judgment expunged any interest that the State Board of Education may have had in the Trust;

2. While N.C. Gen. Stat. § 36C-4-405.1 authorizes the Attorney General, a district attorney, a beneficiary or any other interested person to maintain a proceeding to enforce a charitable trust, the authority to enforce a charitable trust does not make the Attorney General or any of the other persons who have authority under that statute a proper defendant to this action; and

3. The Attorney General has no present intention of maintaining any action to enforce the Trust.

Therefore, the Complaint fails to state a claim against either the State Board of Education or the Attorney General and they are not proper parties to this action.

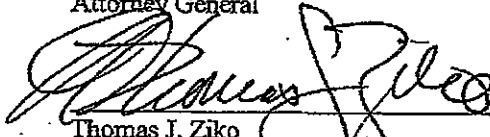
**WHEREFORE**, the State Board of Education and the Attorney General respectfully pray that:

1. The plaintiffs have and recover nothing from these defendants;
2. They be dismissed as parties to the present proceedings; and
3. They be awarded costs for this proceedings and any other relief to which they might be

entitled.

RESPECTFULLY submitted this the 8th day of August 2007.

ROY COOPER  
Attorney General

A handwritten signature in black ink, appearing to read "Thomas J. Ziko", written over a horizontal line.

Thomas J. Ziko  
Special Deputy Attorney General  
Education Section  
N.C. Department of Justice  
Post Office Box 629  
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N.C. Bar No. 8577  
[tziko@ncdoj.gov](mailto:tziko@ncdoj.gov)



NORTH CAROLINA }  
COUNTY OF ONSLOW }

87-40-1411  
IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
86-CVS-1466g

FILED  
87 OCT 29 AM 11:31  
ONSLOW COUNTY, C.S.C.

HAMMOCKS BEACH CORPORATION,  
a nonprofit corporation,

Plaintiff

-vs-

THE FRESH AIR FUND, et al,

Defendants

CONSENT JUDGMENT

PRELIMINARY STATEMENT

This action was filed on the 28th day of July, 1986, by Hammocks Beach Corporation, plaintiff herein. Plaintiff is the trustee pursuant to the terms of a charitable trust created by Dr. William Sharpe on September 6, 1950. The original res of the trust was approximately 10,000 acres of beach front and adjacent properties in Onslow County, North Carolina. As a result of several mesne conveyances, the res of the trust now consists of approximately 805 acres. That remaining portion is the subject of this lawsuit.

In this action, plaintiff seeks declaratory relief in the form of a judgment quieting title to the property or, alternatively, ordering an alternative disposition of the property and administration of the trust to fulfill as nearly as possible the manifested general intention of the settlor, Dr. William Sharpe. The living Sharpe and Hurst defendants filed answer claiming that plaintiff has failed to properly administer the trust and asserting

a counterclaim, asking the court to order the trust terminated or, in the alternative, to exercise the statutory equivalent of the cy pres power, or to remove Hammocks Beach Corporation as trustee, or to clarify the property interests held by the parties. Said living Sharpe and Hurst defendants are sometimes hereinafter referred to as the "Sharpe and Hurst defendants" to distinguish them from unborn parties represented by guardians.

Ned S. Hurst, Guardian ad Litem for the unknown and unborn heirs of Gertrude Hurst and the late John L. Hurst, and John T. Carter, Jr., Guardian ad Litem for the unknown and unborn heirs of William Sharpe and wife, Josephine W. Sharpe, have each filed answer similar to that filed by the living Sharpe and Hurst defendants.

Counsel for the Sharpe and Hurst defendants have stated to the Court that they have written authorization from the late Josephine W. Sharpe to represent her interests in this cause, which writing further authorizes William Sharpe to act for her in agreeing to any negotiated settlement. It is unnecessary for the Court to rely on such authorizations, however, since if Josephine W. Sharpe at the time of her death had any interest in subject property (which the Court hereafter finds she did not), that interest was devised by her to The Herald Tribune Fresh Air Fund, a charitable corporation of the State of New York now known as The Fresh Air Fund, and said Fund was duly served with copy of summons and complaint and, as hereinafter recited, claims no interest in said property.



Under the terms of the trust, the North Carolina State Board of Education was designated as contingent trustee subject to certain occurrences as referred to hereinafter. The Charitable Trust Administration Act, N.C.G.S. § 36A-53, requires that in every proceeding brought to modify or construe the terms of a charitable trust, the North Carolina Attorney General be offered an opportunity to appear and be heard. Both the State Board of Education and the Attorney General of North Carolina have been made a party defendant in order to represent the interests of the public and have filed answer.

The dispute between plaintiff and defendants has continued for over a decade. The impediments to the administration of the trust as contemplated by the settlor have existed and frustrated the plaintiff's attempts to develop the property for over thirty years. Considering all circumstances, including the delays, uncertainties, risks, and prohibitive costs inherent in this litigation, the parties hereto, without in any way conceding error in their respective legal positions, have entered into a compromise resolution and agreement and consented to the entry of this Consent Judgment, fully intending to bind themselves, their heirs, assigns, and successors.

Based upon all matters of record in this case and upon the consent of the parties, the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Dr. William Sharpe was one of the early neurosurgeons practicing in New York City. In 1923, he acquired approximately 810 acres of high land adjacent to Queens Creek and Foster's Bay in Onslow County, North Carolina. In 1930 and 1931, he purchased adjacent property consisting of approximately 2,000 acres of sandy beach outer banks (known as Bear Island) and approximately 7,000 acres of marshland. The high land portion was capable of reforestation or cultivation and was known as "The Hammocks." The land was acquired by him as a place to which he could retreat from the demands of his professional life. The Hammocks became dear to Dr. Sharpe, as did an Onslow County couple with whom he became acquainted and who moved onto the property as its tenants and caretakers. That couple were John and Gertrude Hurst, who became very close to Dr. and Mrs. Sharpe and who acted in loco parentis for the Sharpe children during times when the children would visit The Hammocks during vacations from school.

Eventually, Dr. Sharpe apprised John and Gertrude Hurst of his desire to devise The Hammocks to them. As stated in the Agreement dated September 6, 1950, and recorded in the Onslow County Registry at Deed Book 221, page 634, Gertrude Hurst, having formerly served as a black teacher in the then racially segregated public school system, requested Dr. Sharpe instead to make a gift of the property in such manner that black teachers and various youth organizations could enjoy the property. Pursuant to that

request, and rather than wait until his death, Dr. Sharpe, in 1950, by deed of gift, gave The Hammocks to a nonprofit corporation, most of the incorporators of which were black school teachers. Hammocks Beach Corporation was the name given to such entity, and its charter spelled out its purpose -- to administer the property given to it by Dr. Sharpe "primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina . . . and for such other groups as are hereinafter set forth." The deed to Hammocks Beach Corporation as trustee restricted the use of the property for the use and benefit of the members of "The North Carolina Teachers Association, Inc., and such others as are provided for in the Charter of Hammocks Beach Corporation."

The terms of the trust deed from Dr. Sharpe to Hammocks Beach Corporation, as amplified by a simultaneously executed agreement, subjected all or portions of The Hammocks to numerous rights of use and possession in the Sharpe and Hurst families, including the right to cultivate, to quarry, to raise livestock, to travel over the land incident to taking fin fish and shellfish in adjacent waters, and to reside there. The trust property, originally consisting of approximately 10,000 acres, has now been reduced to approximately 805. Approximately 2,000 ocean front acres were, with the concurrence of Dr. Sharpe and Mr. and Mrs. Hurst, conveyed by Hammocks Beach Corporation trustee, to the State of North Carolina, without compensation, and now comprise Hammocks Beach

State Park. The trustee thereafter acquiesced in the claim by the State of North Carolina of title to approximately 7,000 acres of marshland.

Hammocks Beach Corporation has leased two areas of The Hammocks, consisting of approximately 30 and 26.5 acres, respectively, for summer camp purposes to the North Carolina Agricultural Extension Service (for use by the 4-H organization) and to Future Farmers of America. There is an assembly building on the property which, over the years, has been used sporadically. Hammocks Beach Corporation has had irregular meetings there of its board of directors and members.

Although there was, in 1950, no indication that within that decade the United States Supreme Court would decide a case which would eventually desegregate the public school systems, Dr. Sharpe made certain provisions in the deed looking to the possibility that fulfillment of the purposes of the trust may become impossible or impracticable. He directed that in such event, and after declaration of same by its Board of Directors, Hammocks Beach Corporation should convey the property to the North Carolina State Board of Education (hereinafter "the Board") as trustee "for the purpose of continuing the trust," and further directed that if the Board refused to accept a conveyance for that purpose, the property would instead be conveyed to Dr. Sharpe and to John and Gertrude Hufst and their "heirs and descendants."

The integration of the public schools which occurred following the gift of the property to Hammocks Beach Corporation has

impacted on both the constituency which Dr. Sharpe intended to benefit from the trust and on the ability of Hammocks Beach Corporation to obtain financial support for the improvement of The Hammocks to serve its intended purpose. The North Carolina Teachers Association, Inc., the black teachers organization intended as the primary beneficiary, and several of the all-black youth and civic organizations listed in the Charter of Hammocks Beach Corporation, either do not now exist or are relatively nonfunctional. Only the 4-H and the FFA organizations use the property, and then only during the summer months, and only to the extent of approximately four per cent of the 805 acres held in trust.

The amended charter of Hammocks Beach Corporation calls for a board of directors of thirty-one persons, over half of whom are officers or designees of the North Carolina Teachers Association, Inc., an organization which no longer exists.

The trust terms prohibit the mortgaging or sale of property. Hammocks Beach Corporation has, in recent years, not been able even to defray ad valorem taxes on the property and has never improved or developed the property to an extent which approaches its potential or is consistent with the value of the property. Even if financial resources were available, the significant rights of use and occupancy vested in the Sharpe and Hurst families so encumber the land that under modern circumstances it would be totally impracticable to devote funds to improving the land for recreational activities that would conflict with such rights in the

Sharpes and Hursts. Thus, by reason of a change of circumstances not foreseeable in 1950, financial and physical factors render fulfillment of the terms of the trust impossible, and that is the case whether the trustee be Hammocks Beach Corporation or the Board. Even if the Board could lawfully take title in its name, which under statutes governing titles to state property it cannot now do, its members have disclaimed any interest in the Board's serving as trustee or otherwise attempting to adapt the property to the stated purposes of the trust. In any event, the Board could not, and will not, spend tax revenues for the purpose of administering or improving a racially segregated facility.

The integration of the public schools and the virtual disintegration of the organizations for black people which were contemplated by Dr. Sharpe as primary beneficiaries and financial supporters of the trust are circumstances unforeseen by Dr. Sharpe and, in combination with the rights vested in the Sharpe and Hurst families and the prohibition against the mortgage and sale of property, render the fulfillment of the trust terms impossible or impracticable of fulfillment.

The trust is impossible or impracticable of fulfillment whether the trustee continues to be Hammocks Beach Corporation or whether, in the event the Board would so agree, the trust responsibilities should be assumed by it or by any other agency of state government. Thus, Dr. Sharpe's alternate plan of having the Board assume the trust responsibilities in the event of the

impossibility or impracticability of fulfillment of the trust terms also fails for the same reasons.

Hammocks Beach Corporation contends that either it should be vested with fee simple title to a portion of the trust property or that the terms of the trust should be modified so that an appropriate portion of the trust property may be held by it free of any rights vested in the Sharpe and Hurst families and with authority to mortgage and sell in its discretion.

The Sharpe and Hurst defendants, on the other hand, contend that fulfillment of the trust terms has become impossible or impracticable, that Hammocks Beach Corporation has acted capriciously and contrary to the intent of the settlor in not declaring its recognition of such, and that the court should declare the trust terminated and either mandate a conveyance of all of the property to the Sharpe and Hurst families or adjudicate title in their names.

The Fresh Air Fund, devisee under the will of the late Josephine W. Sharpe, has been duly served with copy of summons and complaint and has not filed answer. Its attorney, E. Douglas Hamilton, of the New York Bar, has advised the court by letter that it will not file answer. The late Josephine W. Sharpe had no interest in The Hammocks at the time of the 1950 trust deed other than an inchoate right of dower, and her joinder in the execution of that deed extinguished that interest. At the time of her death, she had no interest in the property, either by reason of the terms

of the trust deed or the terms of her predeceased husband's will, or otherwise. She, therefore, owned no interest which she could have included in the devise to The Fresh Air Fund contained in her will. Certified copy of her duly probated will is appended to written stipulations by the parties approved by the Court on this date.

Ned S. Hurst, Guardian ad Litem for the unknown and unborn heirs of John L. Hurst and wife, Gertrude Hurst, and John T. Carter, Jr., Guardian ad Litem for the unknown and unborn heirs of William Sharpe and wife, Josephine W. Sharpe, have each filed answer wherein they have fully asserted the interests of their wards and they have appeared before the court and otherwise protected their position.

The Attorney General of the State of North Carolina has filed answer and, through Andrew A. Vanore, Jr., Chief Deputy Attorney General, appeared before the court and asserted the public interest. The Attorney General has advised the Court that the State Board of Education has no interest in succeeding Hammocks Beach Corporation as trustee and would not agree to do so, and otherwise takes no position in respect to this litigation.

In an effort to avoid the risk of a trial of this action and in search of a means of continuing the trust so as to carry out the original intentions of Dr. Sharpe, the parties have negotiated at great length. Through their counsel, they have stated to the court that, subject to the court's approval, they have agreed to



the entry of a judgment which would (1) enable Hammocks Beach Corporation to retain title to a sufficient portion of the land to serve the trust purposes, with additional powers of administration which should enable it to improve the property to the extent reasonably necessary, and (2) vest in the Sharpe and Hurst families a reasonable portion of the land in exchange for their relinquishing rights in that portion to be vested solely in Hammocks Beach Corporation as trustee.

The two aforesaid Guardians and the Attorney General have stated to the Court their belief that the settlement proposed is in the best interest of those they represent.

CONCLUSIONS OF LAW

The court concludes as a matter of law that:

(a) The court has jurisdiction of the subject matter and over each of the parties to this action.

(b) There is substantial evidence, and the Court finds, that the fulfillment of the terms of the trust created by the deed from Dr. William Sharpe to Hammocks Beach Corporation is impossible or impracticable. If this litigation is not compromised and a trial ensues, Hammocks Beach Corporation will incur a substantial risk that the counterclaims of the 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.

(c) The settlement which has resulted from negotiations between the parties, whereunder Hammocks Beach Corporation as

trustee would hold title to an appropriate portion of The Hammocks free of any claims of the Sharpes and Hursts and with broader administrative powers, with the remainder of said property being vested in the Sharpe and Hurst defendants, is fair, reasonable, and in the best interests of the present and prospective beneficiaries of the trust, as well as the public interest, and is accordingly approved. The Court finds that such negotiations have been in good faith and at arms' length and further finds that in so negotiating and agreeing to this settlement, Hammocks Beach Corporation, as trustee, has acted properly and in the best interest of the trust.

(d) The agreed settlement is fair and in the best interests of the unknown and unborn Sharpe and Hurst heirs, who have been fully and adequately represented by counsel.

(e) The Fresh Air Fund, a nonprofit corporation of the State of New York which has succeeded to the interests, if any, of the late Josephine W. Sharpe in the subject property, has not filed answer. The court has found that the late Josephine W. Sharpe had no title to the subject property which could have been devised by her to The Fresh Air Fund and, accordingly, The Fresh Air Fund has no interest in the property which is the subject of this action.

ADJUDICATION

IT IS, THEREFORE, BY CONSENT, ORDERED AND ADJUDGED that:

1. Hammocks Beach Corporation, trustee, is vested with title to the following described portion of the real property which was conveyed by Dr. William Sharpe to Hammocks Beach Corporation, trustee, by deed dated August 10, 1950, recorded in the Onslow County Registry at Book 221, page 636:

TRACT I: Being all of Section 3 containing 289.50 acres, more or less, as shown on plat entitled "Section Three, The Hammocks," dated May 1, 1985, prepared by Donald C. Clements, Jr., R.L.S. number L-2460, recorded October 20, 1986, in Map Book 24, Page 74, Slide D-22, in the office of the Register of Deeds of Onslow County, North Carolina, said recorded plat being incorporated herein by this reference for the purpose of providing a particular description.

TRACT II: Being 29.91 acres, more or less, located at the terminus of Secondary Road No. 1552, the western boundary adjoining the waters of Queens Creek, the northern boundary leaving the waters of Queens Creek and running North 54 degrees 7 minutes East 884.0 feet to a set iron pipe, the eastern boundary running South 36 degrees 33 minutes East 1144 feet to a set iron pipe and the Southern boundary running South 64 degrees 07 minutes West 1091.59 feet along an old fence on line, all as shown on plat entitled "Section Four, The Hammocks," dated May 1, 1985, prepared by Donald Clements, Jr., R.L.S. number L-2460, recorded October 20, 1986, in Map Book 24, page 75, Slide D-23, in the office of the Register of Deeds of Onslow County, North Carolina, said recorded plat being incorporated herein by this reference for the purpose of providing a particular description.

2. Hammocks Beach Corporation, trustee, holds title to said property 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 536, and in Agreement dated September 6, 1950, and recorded in the Onslow County Registry at Book 221, page 634. Said trustee shall not, however, be under a prohibition against the mortgaging or sale of said property. On application to the court by motion, copy of which shall be served on the Attorney General, the Court may approve the encumbering of said property, or the sale of a portion thereof, for the purpose of generating funds for use in furtherance of the terms of the trust.

3. Said 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.

4. The defendants William Sharpe, Jr., and Nancy S. Caird are hereby respectively vested with fee simple title to the following described portions of the real property which was conveyed by deed dated August 10, 1950, from Dr. William Sharpe to Hammocks Beach Corporation:

TRACT I: Being that certain tract of land containing 253.97 acres, more or less, which is all of the land north of that boundary designated as North 54 degrees 7 minutes East 884.0 feet, and west of that boundary designated as North 36 degrees 33 minutes East 1144 feet of the 283.88 acre tract shown on that certain plat entitled "Section Four, The Hammocks," dated May 1, 1985, prepared by Donald Clements, Jr., R.L.S., number L-2460, recorded October 20, 1986, in Map Book 24, Page 75, Slide D-23, in the office of the Register of Deeds of Onslow County, North Carolina, said recorded plat being incorporated herein by this reference for the purpose of providing a particular description.

TRACT II: All of that tract designated as "Sharpe Home Place," containing 2.26 acres more or less, as shown on plat entitled "Sharpe Home Place and Section One, The Hammocks," dated May 1, 1985, prepared by Donald Clements, Jr., R.L.S., number L-2460, recorded October 20, 1986, in Map Book 24, Page 72, Slide D-20, in the office of the Register of Deeds of Onslow County, North Carolina, said recorded plat being incorporated herein by this reference for the purpose of providing a particular description.

5. The defendant Gertrude Hurst is hereby vested with fee simple title to the following described portions of the real property which was conveyed by deed dated August 10, 1950, from Dr. William Sharpe to Hammocks Beach Corporation:

TRACT I: Being all of Section One containing 72.06 acres, more or less, as shown on plat entitled "Sharpe Home Place and Section One, The Hammocks," dated May 1, 1985, prepared by Donald Clements, Jr., R.L.S., number L-2460, recorded October 20, 1986, in Map Book 24, Page 72, Slide D-20, in the office of the Register of Deeds of Onslow County, North Carolina, said recorded plat being incorporated herein by this reference for the purpose of providing a particular description.

TRACT II: Being all of that property not designated Town of Swansboro Property, 30 foot right of way, and 75 foot right of way, containing 3 acreage designations of 141.77 acres ±, 5.46 acres ±, and 18.06 acres ±, all as shown on that certain plat entitled "Section Two, The Hammocks," dated May 1, 1985, prepared by Donald Clements, Jr., R.L.S., number L-2460, recorded October 20, 1986, in Map Book 24, Page 73, Slide D-21, in the office of the Register of Deeds of Onslow County, North Carolina, said recorded plat being incorporated herein by this reference for the purpose of providing a particular description.

6. Said Sharpe and Hurst defendants are the owners in fee simple of the real property described, respectively, in the preceding paragraphs four and five, free and clear of any claim of Hammocks Beach Corporation, trustee.

7. The titles hereby adjudged to be vested shall not require further instruments of conveyance. However, each party hereto agrees to comply with any reasonable request of another

party to execute such further document as may be necessary to effectuate the purpose of this Judgment.

8. Neither of the parties to this action who are receiving title pursuant to the foregoing adjudication, nor any heir, assignee, or successor of such party, shall permit or engage in construction of any improvements of any kind (other than street intersections) within a zone extending 100 feet on each side of the center line of State Road 1511, said road being delineated on the aforesaid plats of The Hammocks, dated May 1, 1985.

9. The titles herein vested in the parties are subject to a right of way, and said parties hereby grant a right of way, to the State of North Carolina in the access road leading to Hammocks Beach State Park (the Park); said access road running west from the southern end of SR 1511 to the Park, as shown on maps recorded in the Onslow County Registry in Map Book 24, Pages and Slides: p. 72, Slide D-20; p. 73, Slide D-21; p. 74, Slide D-22; and p. 75, Slide D-23. Within thirty days after being so requested by the North Carolina Department of Transportation plaintiff and the defendants Sharpe and Hurst shall convey said right of way to the State by deed or deeds prepared by said Department.

10. The Sharpe and Hurst defendants loaned the sum of \$25,207.86 to Hammocks Beach Corporation to enable it to pay ad valorem taxes and its agreed portion of the cost of surveying the trust property. Hammocks Beach Corporation is indebted to the Sharpe and Hurst defendants for the payment of said funds, together

with accrued interest at the rate of 7 1/2% per annum from October 1, 1985, until the date of the entry of this judgment. Thereafter interest shall accrue at a rate equal to the Wachovia Bank & Trust Co., N.A. prime rate. The full principal sum and accrued interest shall be paid within 60 days after the closing of the first sale by Hammocks Beach Corporation of a portion of the trust real estate but in no event later than August 31, 1989. Title to the property hereinabove adjudicated to be vested in Hammocks Beach Corporation is, until the full payment of said indebtedness, charged with a lien in favor of the payees of said indebtedness which shall be enforceable as if secured by a deed of trust containing statutory powers of foreclosure, with a trustee to be appointed, if a foreclosure shall be called upon, by the Clerk of Superior Court of Onslow County. The Sharpe and Hurst defendants are payees of said indebtedness in the proportions of one-half to William S. Sharpe, Jr., and Nancy S. Caird, and one-half to Gertrude Hurst.

11. This judgment shall be recorded in the Onslow County Registry and shall be cross-indexed to the names of the parties hereto.

12. The court shall retain jurisdiction to hear motion filed by any party with respect to either the implementation of the terms of this judgment or compliance therewith.

13. Each party shall bear its own costs.

This 29<sup>th</sup> day of October, 1987.

*David E. Laid*

Judge of Superior Court



Consented To By:

Will S.  
William Sharpe

by: Nancy E. Caird  
Will S. atty-in-fact  
Nancy E. Caird, by her  
attorney-in-fact William Sharpe

Gertrude Hurst  
Gertrude Hurst

Ed. Hurst  
Ed. Hurst

Ruth H. Williams  
Ruth H. Williams

Harold Hurst Jr.  
Harold Hurst Jr.

Harriett Hurst  
Harriett Hurst

Jesse O. Hines Sr.  
Jesse O. Hines Sr.

Johnell Hurst  
Johnell Hurst

John H. Hurst  
John H. Hurst



Venice Hurst Cook  
Venice H. Cook

J. A. Carter, Jr.  
John A. Carter, Jr., Guardian  
ad Litem for the unknown and  
unborn heirs of the late William  
Sharpe and the late Josephine W.  
Sharpe

Ned S. Hurst  
Ned S. Hurst, Guardian ad Litem  
for the unknown and unborn heirs  
of Gertrude Hurst and  
the late John Hurst

A. A. Vanore, Jr.  
Andrew A. Vanore, Jr.  
Chief Deputy Attorney General

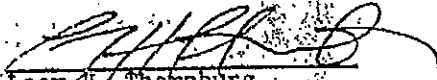
Wombles Carlyle Sandridge & Rice

By: Deway W. Wells  
Deway W. Wells  
Attorneys for William Sharpe  
and Nancy E. Caird

Warlick, Milsted, Dobson & Carter

By: Carl S. Milsted  
Carl S. Milsted  
Attorneys for Gertrude Hurst

STATE OF NORTH CAROLINA



Lacy H. Thornburg  
Attorney General

HAMMOCKS BEACH CORPORATION

BY: *Lucas B. Jones*

FERGUSON, STEIN, WATT, WALLAS  
& ADKINS, P.A.

BY: *[Signature]*

Attorneys for Hammocks Beach Corporation

KNOW ALL MEN BY THESE PRESENTS that I, Nancy S. Caird, a resident of Dublin, Ireland, hereby appoint William Sharpe my attorney in fact and authorize him to act for me in all matters affecting my interest in any real property situated in Onslow County, North Carolina, and in particular my interest in property known as The Hammocks, with the same force and effect and to all intents and purposes as though I were personally present and acting for myself, hereby ratifying and confirming whatever my said attorney in fact shall do by authority hereof. Without limiting the generality of the foregoing, I appoint the said William Sharpe for me and in my name and on my behalf, to execute and acknowledge all papers appropriate for the prosecution and defense of all suits, all documents as may be required by any court in which an action shall be pending affecting said property, and in particular to execute on my behalf all documents which in his discretion may be appropriate in respect to the entry of a Consent Judgement arising out of the negotiated settlement of a civil action now pending styled Hammocks Beach Corporation, Plaintiff, v. The Fresh Air Fund, et al, defendants, pending in the Superior Court of the County of Onslow, State of North Carolina, having file number 84-CVS-1466.

This Power of Attorney shall continue in effect until revoked by me or until my death, notwithstanding any incapacity or mental incompetence which occurs to me after this date. No revocation by me shall be effective until the same shall be filed with the Clerk of Superior Court of Onslow County in the cause aforesaid bearing file number 84-CVS-1466.

IN WITNESS WHEREOF, I have signed, sealed and acknowledged this Power of Attorney this 4th day of September 1987.

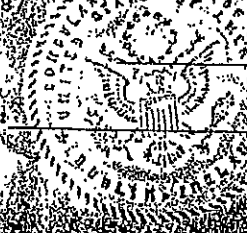
*Nancy S. Caird* (SEAL)  
Nancy S. Caird

REPUBLIC OF IRELAND  
COUNTY AND CITY OF DUBLIN  
EMBASSY OF THE UNITED STATES OF AMERICA

SS

I, Eileen A. Malloy, Consul of the United States of America at Dublin, Ireland, duly commissioned and qualified, do hereby certify that Nancy S. Caird personally came before me this day and acknowledged the due execution of the foregoing Power of Attorney.

Witness my hand and official seal this 4th day of September, 1987.



*Eileen A. Malloy*  
EILEEN A. MALLOY  
Consul of the United States of America

XXXXXXXXXXXXXXXXXXXX

§36C-4-409

§36C-4-410 ART. 4. CREATION, MODIFICATION AND TERMINATION §36C-4-410

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may enforce such a trust.  
Subdivision (3) requiring distribution to the settlor or the settlor's successors in interest of property not required for the intended use of the trust is new to North Carolina law.

Subdivision (4) was added to the section to bring forward the provisions of former G.S. 36A-146 regarding trusts and other arrangements for cemetery lots and burial structures.

**SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)**

Effective October 1, 2007, this section is amended to provide that (i) a noncharitable trust without an ascertainable beneficiary terminates after twenty-one years and (ii) the

manner in which any assets remaining in the trust are to be distributed when the trust terminates.

**Editor's Note.**

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this

act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

**§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.**

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416. A settlor may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee is a necessary party to any proceeding under this Article.

(c) Repealed by Session Laws 2006-259, s. 13(c), effective October 1, 2006.

**History.**

2005-192, s. 2; 2006-259, s. 13(c); 2007-106, s. 16.

**OFFICIAL COMMENT**

Subsection (a) lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts Section 61 (Tentative Draft No. 3, approved 2001). Terminations under subsection (a) may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in Sections 411-414, which also address trust modification. Of these sections, all but Section 411 apply to charitable trusts and all but Section 413 apply to noncharitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon

termination of a trust under §50,000 (Section 414), and a petition to approve or disapprove a proposed trust division or consolidation (Section 417). Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411 to terminate or modify a trust.

Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (b) grants a settlor standing to petition the court under Section 413 to apply cy pres to modify the settlor's charitable trust.

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**NORTH CAROLINA COMMENT**

Subsection (b) is consistent with the provisions of former G.S. 36A-125.11(b) in allowing proceedings for modification and termination of an irrevocable trust to be commenced by a trustee or beneficiary but differs from prior law in allowing the settlor to bring an action to approve or disapprove a modification or termination of a trust by consent of the settlor and

the beneficiaries. The last sentence of this subsection was added to bring forward the provision in former G.S. 36A-125.11(b) requiring the trustee to be a necessary party to any such proceeding.

Subsection (c) was added to this section to clarify the jurisdiction of a proceeding to modify or terminate a trust.

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**SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)**

Effective October 1, 2006, this section is amended to delete the provisions of subsection

(c) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

**SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)**

Effective October 1, 2007, this section is amended to clarify that there is no requirement that a trust combination or division under G.S.

36C-4-417 must be accomplished by judicial order.

**Editor's Note.**

Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

**§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.**

(a) If the settlor and all beneficiaries of a noncharitable irrevocable trust consent, they may compel the modification or termination of the trust without the approval of the court even if the modification or termination is inconsistent with a material purpose of the trust. If any beneficiary (i) is a minor or incompetent or a person who is unborn or whose identity or location is unknown and (ii) is unable to be represented under Article 3 of this Chapter, the settlor or any competent adult beneficiary or the representative of any beneficiary properly represented under Article 3 of this Chapter may institute a proceeding before the court to appoint a guardian ad litem. The court shall allow the modification or termination if the court finds that, following the appointment of a guardian ad litem, all beneficiaries or their representatives

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additions to the trust, wherever and however created. The term "express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk of superior court. This Chapter also applies to any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. This Chapter does not apply to constructive trusts, resulting trusts, conservatorships, estates, trust accounts as defined in G.S. 53-146.2, 54-109.57, 54B-130, and 54C-166, trust funds subject to G.S. 90-210.61, custodial arrangements under Chapter 33A of the General Statutes and Chapter 33B of the General Statutes, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another.

History.  
2005-192, s. 2.

OFFICIAL COMMENT

The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 401-402. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts Sections 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 2, 5-16C (1959).

The Uniform Trust Code is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust

created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding. See, e.g., Uniform Probate Code Section 5-411(a)(4).

NORTH CAROLINA COMMENT

This section modifies the Uniform Trust Code, which provides that the Code applies to "express trusts," by bringing forward the provisions of former G.S. 36A-22.1(5) of the Trust

Administration Act which give specific examples of what is and is not included within the term "express trusts". The Uniform Trust Code did not list any such examples.

§ 36C-1-103. Definitions.

The following definitions apply in this Chapter:

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- (1) Action. — When applicable to an act of a trustee, includes a failure to act.
- (2) Ascertainable standard. — A standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.
- (3) Beneficiary. — A person who:
  - a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer, but excluding a permissible appointee of a power of appointment; or
  - b. In a capacity other than that of trustee, holds a power of appointment over trust property.
- (4) Charitable trust. — A trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).
- (5) Environmental law. — A federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
- (6) General guardian. — As defined in G.S. 35A-1202(7).
- (7) Guardian of the estate. — As defined in G.S. 35A-1202(9).
- (8) Guardian of the person. — As defined in G.S. 35A-1202(10).
- (9) Interests of the beneficiaries. — The beneficial interests provided in the terms of the trust.
- (10) Internal Revenue Code. — The Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.
- (11) Jurisdiction. — When applicable to a geographic area, includes a state or country.
- (12) Person. — An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
- (13) Power of withdrawal. — A presently exercisable general power of appointment other than a power:
  - a. Exercisable by a trustee and limited by an ascertainable standard; or
  - b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
- (13a) Principal place of administration. — The trustee's usual place of business where the records pertaining to the trust are kept or the trustee's residence if the trustee has no usual place of business. In the case of cotrustees, the principal place of administration is one of the following:
  - a. The usual place of business of the corporate trustee if there is a corporate cotrustee.
  - b. The usual place of business or residence of any of the cotrustees if there is no corporate cotrustee.

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- (14) Property. — Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
- (15) Qualified beneficiary. — A living beneficiary to whom, on the date the beneficiary's qualification is determined, any of the following apply:
  - a. Is a distributee or permissible distributee of trust income or principal.
  - b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subdivision a. of this subdivision terminated on that date without causing the trust to terminate.
  - c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- (16) Revocable. — When applicable to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
- (17) Settlor. — A person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.
- (18) Spendthrift provision. — A term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.
- (19) State. — A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.
- (20) Terms of a trust. — The manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established in a judicial proceeding.
- (21) Trust instrument. — An instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.
- (22) Trustee. — Includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trusts.

**History.**  
 2001-413, s. 1; 2005-192, s. 2; 2007-106, s. 2;  
 2009-222, s. 1.

**OFFICIAL COMMENT**

A definition of "action" (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the Uniform Trust Code where reference is made to

an "action" by the trustee that the term includes a failure to act.

The definition of "ascertainable standard" (paragraph (2)) was added to the Code by a

2004 amend used only in 2004 amend 103(11) and the definitio Section 103 e Code.

"Beneficiar a trust as def addition to I beneficiaries Pursuant to if a beneficia future. The t beneficiaries the terms of t received thei ing by assign pointment, r an interest, g antilapse st named benef trust. The fa fits from the person is a b trustee nor p beneficiaries pensionation fr (Third) of Tr Draft No. 2, e ond) of Trust

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1 arguments and he said, no, I think that there are, you know,  
2 issues to go forward on, and there's no collateral estoppel.  
3 So he denied the 12(b)(6).

4 The defendants took the unusual step, without having  
5 it certified, of filing an interlocutory appeal to the Court  
6 of Appeals on that issue, because there is some authority for  
7 the proposition that if you have a collateral estoppel  
8 defense you can file an interlocutory appeal so you don't  
9 lose the rights you're trying to assert. So they did that.  
10 And the Court of Appeals took it and they heard it. And two  
11 of the judges up there agreed with them and dismissed our  
12 case.

13 Judge Tyson disagreed, and he wrote a very strong  
14 dissent. And we have included in our -- attached to our  
15 trial brief that Court of Appeals decision with the dissent  
16 for your review, if helpful.

17 And he said, no, actually, I think it's unambiguous  
18 that they retained these rights, but it is at least  
19 ambiguous, and so it goes back to a jury trial. Based on  
20 that dissent, we appealed to the Supreme Court. The Supreme  
21 Court heard oral argument and unanimously reversed the Court  
22 of Appeals and reinstated our case, sent us back down here to  
23 conduct discovery for the last year.

24 So discovery has gone forward for the last year, and  
25 the case is now before the Court, you know, we would contend.

1 on our claim for trust termination and reversion. And our  
2 position is that the relevant issues for you there -- and  
3 these are outlined in the pretrial under our issues on page  
4 18, would be since 1987, has it become impossible or  
5 impractical to use the trust property and land for the  
6 purposes specified by Dr. Sharpe and his wife in the deed and  
7 agreement executed in 1950?

8 Second, on that issue, has HBC -- sometimes I'll  
9 refer to them in shorthand as HBC -- acted arbitrarily and  
10 contrary to its duties as trustee in failing to declare that  
11 it has become impossible and impracticable by a vote --  
12 impracticable by a vote of the majority of the directors of  
13 HBC?

14 Third, has the State of North Carolina declined to  
15 accept the trust property for the purposes specified by  
16 Dr. Sharpe and refused to serve as successor trustee?

17 And fourth, and this is the issue we've just been  
18 discussing, in the '87 Consent Judgment, did the plaintiffs  
19 give up all future reversionary interest in the event of  
20 continuing impossibility and impracticability? There is also  
21 a breach of fiduciary duty claim and an accounting claim.

22 As you can tell from the way that I have outlined  
23 these issues, in the 23 years since the Consent Judgment, we  
24 think the evidence shows that it continues to be impossible  
25 and impracticable to use the property for trust purposes.

1 THE COURT: Wow.

2 MR. FRANCIS: Yeah. And she's listed as a witness,  
3 so she may -- is one of the signatories of the Consent  
4 Judgment. So she may testify. She's 91 years old.

5 They contend that she is -- has a future  
6 reversionary interest if such was maintained. I mean, they  
7 contend there was no reversionary interest, but if there was,  
8 they say she's an heir and descendant. We say not because  
9 she just came from John and not Gertrude.

10 All right. And they also contend that the Sharpes  
11 should be parties because of the language I read to you. Our  
12 position before Judge Blount, which she agreed with was, no,  
13 the beach land was to go to the Sharpes, the mainland to the  
14 Hursts. The beach land is gone, and so it's only the Hursts  
15 that are involved. And Judge Blount agreed with that as far  
16 as who the necessary parties were.

17 But in terms of the management of the trial, that's  
18 an issue for a later date. If they win, we don't get to the  
19 issue. If we win, I think that the way the trust reads, the  
20 duty of the trustee is now to distribute the property to the  
21 beneficiaries. And if it appears there is a disagreement  
22 about who the beneficiaries are, then the Court would resolve  
23 that in subsequent proceedings.

24 THE COURT: Okay.

25 MR. FRANCIS: That's the way I think. So that is

1           On number 8, I understood your ruling to be  
2 plaintiff's motion to exclude evidence regarding potential  
3 Hurst heirs or Sharpe heirs and their distribution rights,  
4 da-da-da.

5           So it's not just -- not just -- our motion was  
6 directed toward not only excluding that evidence as it  
7 related to the Hursts, but also any evidence and arguments  
8 about the Sharpes also.

9           THE COURT: That was my understanding also.

10          MR. EMORY: Your Honor, then to be clear, the last  
11 sentence says that the '87 Consent Judgment is authentic and  
12 admissible and free to use the document as evidence in the  
13 case.

14          THE COURT: Sure.

15          MR. EMORY: For example, to the extent that the  
16 plaintiffs testify or expect to testify -- and one of the  
17 reasons they brought this case was to keep the Sharpes from  
18 getting the land, not to -- that it seems to me the jury  
19 would -- ought to hear that.

20          Not to determine who the parties ought to be, but as  
21 to their intent in bringing the case, their intent in signing  
22 the Consent Judgment and as to the relief.

23          MR. FRANCIS: I don't expect them to testify to  
24 that. That's not our position. Our position is we brought  
25 the case to terminate the trust and the trustee, perhaps with

1 the Court's guidance, will distribute it to whoever should  
2 get it. It had nothing to do with keeping the Sharpes from  
3 getting anything.

4 MR. EMORY: One of the plaintiffs so testified in  
5 deposition.

6 MR. FRANCIS: Well --

7 THE COURT: Well, the testimony is not really  
8 dispositive of those type of things, is it?

9 MR. EMORY: No. And I don't suggest that it is, but  
10 it seems to me it's something the jury ought to determine in  
11 making a dispositive decision.

12 THE COURT: Well --

13 MR. EMORY: And that is the only reason we say that.  
14 I mean, we're not -- we're not -- it's not our intention and  
15 we have no evidence on which we relied to reargue to the  
16 jury, the issue of proper parties. So this is for a  
17 separate -- a separate --

18 THE COURT: So someone testified they brought this  
19 action to do what?

20 MR. EMORY: Why did you sue the Sharpes?

21 Sued the Sharpes to keep them from getting the land  
22 in 1987. I mean, in this case.

23 MR. FRANCIS: First of all --

24 THE COURT: That is real curious.

25 MR. FRANCIS: Well --

1 the defendant, and ladies and gentlemen of the jury. Good  
2 afternoon. We got a chance to get to know each other for the  
3 last 24 hours, and I appreciate your attention to the matter  
4 so far.

5 I represent Harriett Hurst Turner and John Henry  
6 Hurst, the plaintiffs in this case, against The Hammocks  
7 Beach Corporation. Harriett and John have brought this  
8 lawsuit as the grandchildren and as the heirs and descendants  
9 of John Louis Hurst, and Gertrude Hurst, against The Hammocks  
10 Beach Corporation, which is the trustee of the real estate  
11 that you heard about in jury selection so far.

12 The purpose of the lawsuit is to terminate the trust  
13 that exists by which The Hammocks Beach Corporation manages  
14 this property.

15 Because it is clear as day, and it will be as clear  
16 as day to you by the end of this trial, that it has become  
17 impossible and impractical to use the trust property for the  
18 purposes that were required by the trust that established it  
19 in 1950.

20 The plaintiffs, John and Harriett, are also seeking  
21 to hold the trustee, The Hammocks Beach Corporation,  
22 responsible for their many violations and breaches of their  
23 duties as trustees, especially in the last 23 years. It's  
24 called breaches of fiduciary duty. That's the legal term.

25 But we'll show you as we go through the evidence,

1           And what I'm saying to you in this opening, what the  
2 evidence is going to show in this case, is that The Hammocks  
3 Beach Corporation in the last 23 years not only just violated  
4 their duties as trustee, they have violated that trust  
5 relationship. And that's why this trust has got to end.

6           The parties -- they worked pretty well. You'll hear  
7 about this from Ms. Williams. Things worked pretty well in  
8 the 1950s and '60s, basically because it was new, people were  
9 excited, they built the new buildings, and quite frankly,  
10 because black people didn't have a lot of other places to go.

11           It changed in the 1960 and '70s where everybody  
12 could go wherever they could afford to go. You could go to  
13 Wrightsville Beach, you could go to Myrtle Beach, or you  
14 could go wherever. And what happened was the people that  
15 were running Hammocks Beach failed to keep up with the times.

16           They didn't build any new amenities that would  
17 attract people to go there. They didn't bring qualified  
18 people in to help them run a huge asset like this. In 1959  
19 and 1960, they gave that island to the State of North  
20 Carolina for no consideration.

21           Now, whatever you think about that being a state  
22 park -- it's a nice thing for the State of North Carolina.  
23 You know, they gave it to them for no money. That 2,000-acre  
24 island.

25           And what they've done over the years, is they've



1 of Gertrude Hurst, one in a million people would do that.  
2 And how it was squandered over the years by The Hammocks  
3 Beach Corporation.

4 Because the evidence will show by their actions in  
5 managing this property, that it has become clearly impossible  
6 and impracticable in the last 23 years to use the property  
7 and land for the purposes specified. The trust should be  
8 terminated.

9 The North Carolina State Board of Education has  
10 declined to serve as the trustee. And you will see in the  
11 Consent Judgment, we'll show you where they have declined to  
12 serve and reiterated that declaration again in this case.

13 And The Hammocks Beach Corporation has acted  
14 contrary to law in its duties as a fiduciary in refusing to  
15 recognize that fact. The document says that when it becomes  
16 impossible or impracticable, then they are supposed to, by  
17 vote of the majority of the board of directors, recognize  
18 that and terminate the trust.

19 And one of the duties of a trustee is to recognize  
20 when you are no longer needed. Okay. If you hire me to be a  
21 trustee for your child and you put \$500,000 in the trust, we  
22 get down to where there is only \$25,000 in the trust, and  
23 you're paying me \$1,000 a month, then I need to terminate  
24 that trust.

25 There is more money going to me than going to your

1 knowledge of the Hurst family in the 1940s and the 1950s.

2 Now, you were starting to describe what the Hammocks  
3 was like before Hammocks Beach Corporation became the  
4 trustee --

5 A. Uh-huh.

6 Q. -- and before the gift by Dr. Sharpe to the teachers.

7 During that time, was -- the time that Dr. Sharpe  
8 owned it, was the Hammocks a functioning farm and so forth?

9 A. Yes, it was.

10 Q. Tell the jury about that, please.

11 A. They had a farm, but they had tenants. I'm sure all of  
12 you know what I mean when I say "tenants," who worked the  
13 farm. Granddaddy was the overseer. Granddaddy is John Louis  
14 Hurst. He also had a fishery and different people were  
15 employed there.

16 And trucks would come in to get the fish. Mostly,  
17 they would get mullet fish. This fishery was located down  
18 from the teachers' main building. And it took -- well, this  
19 time of year on, maybe October was when the fish really would  
20 start coming in there.

21 And this was a lot of livelihood for people because  
22 we don't have factories in Onslow County. We have Camp  
23 LeJeune. Either you are civil service, you farm, which all  
24 the farmland stock is on, or you fish.

25 So this was work for them. And when I say "fish," I

1 don't just mean throwing out a fishing line like you guys do,  
2 I mean with a net. Shellfish, which is your oyster and your  
3 shrimp. They did that out there.

4 Q. Was there also a sawmill on the property?

5 A. Oh, yes. He had a sawmill. Grandma and Granddaddy's  
6 house is still preserved. The material that that house was  
7 built out of, before I was born, was -- those trees was there  
8 on the Hammocks and Granddaddy, with the sawmill with all his  
9 help, that's where that timber came from, the wood to build  
10 the house.

11 Q. Were there animals grazing on the property?

12 A. Yes, there were.

13 Q. Tell the jury about that.

14 A. The -- the -- there were all kinds of animals. But  
15 what was so amazing, on the little island across from my  
16 house, there were several of them. You could see the wild  
17 hogs and the goats out there grazing.

18 Sometimes they would come across and you could see  
19 the deer, which you can still see that, going over to the  
20 beach in certain seasons. They had to cross the intercostal  
21 waterway, but it's just a beautiful outdoor scene. Very  
22 pretty.

23 Q. And was there machinery on the property that had to be  
24 maintained?

25 A. Oh, yes. Like the tractors, different things like

1 that. And Granddaddy was more or less, I guess you could  
2 say, jack-of-all-trades. He took care of the machinery, the  
3 animals, the boats.

4 There were boats because we used to -- it was  
5 amazing when we were in college. We rushed to see who could  
6 get the most boats to rent because we would rent a boat out,  
7 but it seemed like every time I'd rent a boat, the people  
8 would keep it all day.

9 But, if my husband rented a boat, they would bring  
10 it back at a certain time. So he could rent his boats more  
11 often. So all that had to be kept up.

12 Q. That's what I was about to ask you. What was John  
13 Hurst's role, Granddaddy's role, at the Hammocks property when  
14 Dr. Sharpe owned it?

15 A. He was -- they had a very close relationship, but he  
16 was in charge of everything, all the operations going on.

17 Q. Tell the jury about some of John Hurst's skills and  
18 abilities in managing a property of that size.

19 A. As I said -- well, I did not say this. He did not have  
20 a college education. Grandma did, but he didn't. But he was  
21 skilled in so many things. I guess you'd call that a person  
22 with a lot of common sense and wisdom.

23 So he was able to do these different things as far  
24 as -- as I foresaid, taking care of the equipment, taking  
25 care of the farm, and instructing the tenants as to what to

1 do and what not to do.

2           What was expected. Make preparation for Dr. Sharpe  
3 and his guests when they came down. Let me give you an  
4 example. Dr. Sharpe would bring down doctors, people who  
5 worked with him.

6           And the first time we ever saw that, I really  
7 couldn't picture him being a doctor because he always dressed  
8 down. And when I say "down," I mean dungarees-type stuff  
9 because he had been robbed once. He never wore any jewelry  
10 because of the robbery.

11           But anyway, one particular time, there was this  
12 black doctor, and he had never missed church in 35 years. So  
13 grandma didn't have church at her church that particular  
14 night, but up at my community, we had church. So it was to  
15 our advantage because they came and Dr. Sharpe made a great  
16 donation to the church.

17           He was that type of person. He would go to the  
18 schools or the church or wherever he went. He loved to  
19 match. You raise 2 or 3,000, I'll match you. That was my  
20 first impression of the man.

21 Q.       Was there an incident that you recall where -- did --  
22 did Granddaddy John Hurst and Dr. Sharpe go fishing  
23 together?

24 A.       Yes, sometimes. And they worked -- you'd see them  
25 beside the road, pushing bushes down.

1 A. Things like that. Uh-huh.

2 Q. All right. How did -- how did Dr. William Sharpe and  
3 Granddaddy John Hurst meet and get acquainted with each  
4 other?

5 A. Oh, that was during -- that was back when Granddaddy  
6 was young. He was working for Onslow Gun and Ride Club.  
7 That was even before Camp LeJeune was there, when they met.  
8 And he was in search of property. And Granddaddy found the  
9 property for him.

10 Q. Okay. Tell the jury just a bit about how Dr. Sharpe  
11 used the property. Did he stay there all the time? Or did  
12 he go back and forth to his medical practice in New York?

13 A. He did not stay there all the time. He came there for  
14 R and R. Relax and rest. He always would tell us the  
15 Hammocks means rest. And he would come out there just to do  
16 that.

17 And I guess that's why he always, always dressed  
18 down. You would always see him dressed down. It was his  
19 place of relaxation. And it is a very relaxing place. Until  
20 the storms come.

21 Q. When Dr. Sharpe was at the Hammocks, would he sometimes  
22 bring guests with him from up north?

23 A. Yes. As I foresaid, he would bring his associates who  
24 worked with him and the children. That's how I got to meet  
25 the children, Bill and Bill's children. He had some

1 approved. I have the treasurer, Modele Whirlly was present  
2 at the meeting but as procedure dictates. I will send her  
3 the bills and the designated payee and she will issue the  
4 checks. She has not received that information from me and I  
5 haven't transcribed it so I don't know exactly what that --

6 Q. Okay. Does The Hammocks Beach Corporation have any  
7 sources of revenues, as we sit here today?

8 A. Potential sources.

9 Q. What do you mean potential sources?

10 A. We are in the process of negotiating some transfer of  
11 land, one such with the state Wildlife Department. State  
12 Wild Life Department has requested the purchase of about five  
13 acres of land for the purpose of building a boat ramp on a  
14 designated site at the Hammocks. Their proposal has come to  
15 my office and gone back for refinement. And when they  
16 refined it, it will come to the Board of Directors, and they  
17 will pay an agreed amount in the neighborhood of \$600,000 for  
18 the property and that will give the association money to pay  
19 off its \$188,000 taxes maybe 200,000 by the time it's  
20 confirmed. But that's one source.

21 Another source that we are under review with State  
22 Parks. State Parks has requested the purchase of 40 acres of  
23 land which includes the Gertrude Hurst Assembly building. We  
24 have not negotiated the price and we -- and the state has  
25 said they're interested in it and probably Ms. Tinsley will

1 Thank you.

2 THE COURT: Okay. What about as to the last issue,  
3 about the failure -- about the state refusing to serve as  
4 successor trust -- there's no -- is there any evidence before  
5 the Court about that?

6 MR. EMORY: Your Honor, there's absolutely none, and  
7 that's -- this is a clear requirement in that paragraph.  
8 There's absolutely none. And it is a glaring omission that  
9 must be intentional. I mean, it is -- the attorney general  
10 was in the 1987 case, and so there's no question that the  
11 parties went through that process then. They sued the  
12 attorney general in this case to bring him in. The attorney  
13 general moved to dismiss on the ground that the 1987 Consent  
14 Judgment expunged the attorney general's interest. So  
15 they're out of the case on that basis.

16 But the -- but there's been no evidence, no inquiry,  
17 no discovery, not even an argument that there was a tender to  
18 the attorney general or a request to the attorney general  
19 that they come in to serve as a successor trustee and then  
20 what the response to such inquiry might have been. There's  
21 just none. And unless something happened without us being  
22 served or noticed of it, I don't think it actually happened  
23 at all. In fact, I would say as an officer of the court I  
24 have no -- there's been no information to us that such an act  
25 occurred. That's another requirement in this impossibility



1 issue or this impossibility analysis that has -- on which  
2 there's no evidence and about which there is a clear  
3 requirement, unambiguous in this document.

4 MR. FRANCIS: If I may respond, Your Honor?

5 MR. EMORY: I'm sorry. Did I --

6 THE COURT: Yes, Mr. Francis.

7 MR. FRANCIS: Again, this analysis is rooted in the  
8 deed, Your Honor, and the deed says that -- let me pull the  
9 language so I can read it.

10 The deed says that "the property conveyed herein may  
11 be transferred to the North Carolina State Board of Education  
12 to be held in trust for the purposes herein set forth, and if  
13 the North Carolina State Board shall refuse to accept such  
14 property for the purposes of continuing the trust herein  
15 declared, all of the property herein conveyed shall be deeded  
16 to," and then it goes on with that language.

17 So this is -- this is in the deed that I'm reading  
18 from, Your Honor, on the deed -- Recorder of Deeds, page 637  
19 -- Register of Deeds, page 637.

20 THE COURT: Yeah, but how -- I mean, there has to be  
21 some proof of that. There's no proof that -- there's no  
22 proof before this Court that the State of North Carolina has  
23 been served with anything that has been -- the State of North  
24 Carolina has declined anything. They would be deciding this  
25 issue with no evidence before them.

1 MR. FRANCIS: That's --

2 THE COURT: I mean, there's no evidence that -- I  
3 mean, I -- I mean, I -- I would be willing to bet tomorrow's  
4 pay that there is nothing in that record that says the State  
5 of North Carolina declined to stay as successor trustee in  
6 this case. Where is the evidence of that?

7 MR. FRANCIS: In the Consent Judgment on page 10 it  
8 says, "The Attorney General of the State of North Carolina  
9 has filed answer and, through Andrew A. Vanore, Chief Deputy  
10 Attorney General, appeared before the Court and asserted the  
11 public interest. The Attorney General has advised the Court  
12 that the State Board of Education has no interest in  
13 succeeding Hammocks Beach Corporation and would not" -- "as  
14 trustee and would not agree to do so, and otherwise takes no  
15 position in respect to this litigation."

16 Then in this case we sued the attorney general. The  
17 attorney general entered an appearance and filed a motion to  
18 dismiss reiterating this same position, which is a matter of  
19 record in this case, and was dismissed by Judge Baddour in  
20 August based on a reiteration of this very same position.

21 THE COURT: I'm -- I mean, I don't have any doubt  
22 about that. But I'm just saying does that mean -- when  
23 you're saying that, does that mean you don't have to put a  
24 witness on the witness stand from the Attorney General's  
25 Office to come in and testify that they have given up that

1 right and they have no successor interest so a jury can hear  
2 that out of someone's mouth?

3 MR. FRANCIS: It means -- it means that they already  
4 did it in 1987. They don't have to do it again.

5 THE COURT: I don't say they have to do it again,  
6 but you're trying to prove this to a jury, you know, by the  
7 greater weight of the evidence. I mean --

8 MR. EMORY: Your Honor, may I have --

9 MR. FRANCIS: If I could finish here.

10 THE COURT: Okay. Go ahead.

11 MR. FRANCIS: What I'm saying is there is no  
12 requirement in the deed for there to be a successive  
13 declination. They have already declined, and that is set  
14 forth clearly in two or three places in the Consent Judgment  
15 which was signed by The Hammocks Beach Corporation and  
16 entered by this court. That is the sufficient declination to  
17 serve as successor trustee.

18 Tom Ziko, the attorney for the state at this point  
19 in this case, filed a motion to dismiss, an answer and motion  
20 to dismiss on August 9th, 2007, and he then appeared -- in  
21 that answer he says, "Paragraphs 36 through 38 of the  
22 complaint allege that under the Consent Judgment the Court  
23 found that because of the impossible or impractical nature of  
24 the trust the State Board of Education could not serve as  
25 trustee, and the state disclaims any interest as contingent

1 trustee. The State Board of Education and attorney general  
2 admit these allegations."

3 That's the law of the case. I mean, we don't have  
4 to call a witness for the law of the case. It's -- that's  
5 like calling a witness to testify to Judge Blunt's ruling on  
6 the motion on necessary parties. That's the law of the case.  
7 They've already -- they have reiterated that declination in  
8 their response, and then based on that Judge Baddour  
9 dismissed them from the case with no explanation in the order  
10 on August the 23rd, I think it was.

11 THE COURT: Okay. What do you say about that, Mr.  
12 Emory?

13 MR. EMORY: Three things. First, they don't allege  
14 that in the complaint.

15 Second, the actual motion to dismiss is based on the  
16 fact that the Consent Judgment expunged any interest that the  
17 State Board may have.

18 But more importantly, in the pretrial order in this  
19 case, you don't have to go back any years or even any months,  
20 the plaintiffs in their issues lists the following: "Has the  
21 State of North Carolina declined to accept the trust property  
22 for the purposes specified by Dr. William Sharpe and refused  
23 to serve as successor trustee?"

24 Which is precisely the issue we're talking about,  
25 and that is -- this is an issue presented by the plaintiff in

1 the charitable trust statute, the attorney general comes in  
2 as a lawyer for the beneficiaries, not as a lawyer for a  
3 successor trustee. So it could come in and say, no, don't  
4 terminate this trust; the trust should continue. So they're  
5 acting as a lawyer in two different -- I mean, in your  
6 hypothetical they could act with either hat on.

7 THE COURT: But since they have notice of this  
8 action is going on, you'd agree that they can't really do  
9 that and with any credibility at this juncture, wouldn't you?

10 MR. EMORY: No, sir, I wouldn't. They -- I suppose  
11 one could argue -- well, remember now that the attorney  
12 general came in on behalf of the State Board of Education and  
13 made exactly the same motion we did; that this case should be  
14 barred because of collateral estoppel and res judicata. And  
15 Judge Baddour granted that motion and denied ours on the very  
16 same ground. We went up on that. And counsel sometimes  
17 forgets it's been going on for four years because the first  
18 year was our appeal to the Court of Appeals. And then the  
19 plaintiffs went up to the Supreme Court for a year, and then  
20 we came back down to start the case on discovery and the  
21 merits.

22 But we don't have to guess about the plaintiffs'  
23 view on these issues because the plaintiffs make the  
24 distinction between now and then. In paragraph 36 of their  
25 complaint, they allege in the 1986 action the State Board of

1 THE COURT: All right. Well, let me ask --

2 MR. FRANCIS: (Indicating.)

3 THE COURT: Yes.

4 MR. FRANCIS: May I respond briefly on that?

5 THE COURT: Briefly.

6 MR FRANCIS: Just briefly.

7 What counsel seems to forget in making his argument  
8 is that evidence comes in the form of witnesses and  
9 documents, and it says clearly in the Consent Judgment the  
10 attorney general has advised the Court that the State Board  
11 of Education has no interest in succeeding Hammocks Beach as  
12 trustee and would not agree to do so.

13 So there was no omission to call anybody. The  
14 stipulation -- stipulation 8 says, "In the '86 lawsuit  
15 leading to the Consent Judgment, the State of North Carolina  
16 and the State Board decline to serve as successor trustee  
17 under the terms of the original trust."

18 You don't need anything else. That satisfies it.  
19 There's no requirement in the deed for these serial  
20 declinations. That's -- that is -- we would argue -- and  
21 that's the reason why Tom Ziko and the state filed their  
22 motion to dismiss and were dismissed.

23 THE COURT: Okay. All right. Well, I still want to  
24 know about this whole board thing because that's a real  
25 stickler issue for me.

1 Honor, and I don't know that I have anything new to say.

2 THE COURT: Well, I think the Attorney General  
3 has -- I mean -- I mean, I think they've spoken their peace.  
4 I think that they -- they have basically said we're not  
5 interested in this, and I don't think that they can assert  
6 any right as a substitute trustee in this litigation, based  
7 on what I heard. So that's not something that I wanted to  
8 consider giving serious consideration. But I am interested  
9 in this board. I'm interested in what you're able to produce  
10 on that. And I'll work on these other instructions tonight  
11 and have them in the morning.

12 So we'll recess until 9:30 tomorrow morning.

13 MR. FRANCIS: Thank you, Your Honor.

14 (Whereupon, Court recesses at 5:11 p.m. until  
15 9:30 a.m., Thursday, September 30, 2010.)

16 PROCEEDINGS OF THURSDAY, SEPTEMBER 30, 2010

17 (At 11:31 a.m., the following proceedings are  
18 had:)

19 THE COURT: I'm giving you the first nine pages of  
20 these that includes the lion's share of these instructions to  
21 look over this issue.

22 MR. EMORY: All right.

23 THE COURT: The other pages are relatively short and  
24 I'll have those for you in just a few minutes.

25 MR. EMORY: Thank you, Your Honor.

1 THE COURT: All right I'm just going to strike that  
2 paragraph. I don't care. It's not that important to me.  
3 Okay. Next -- anything else, Mr. Francis?

4 MR. FRANCIS: Yes, Your Honor. The last comment,  
5 I -- I may have misheard the Court yesterday, but I thought  
6 that -- that the Court had indicated on -- page 12.

7 THE COURT: Okay.

8 MR. FRANCIS: Finally, as to this 4th issue, I  
9 thought I heard the Court to say that you were going to give  
10 them some instruction about the state and the Board of  
11 education having been sued and been dismissed from this case.  
12 But maybe I misheard you.

13 THE COURT: We talked that and I didn't include that  
14 language, and I'm trying to figure out why I didn't include  
15 that language. H'm. What do you say about that, Mr.  
16 Emory.

17 MR. EMORY: That you got it exactly right and that  
18 there's no evidence of that in the case at all. None  
19 presented in this tribunal about that issue.

20 MR. EMORY: If you put that in, then you would have  
21 to explain what the legal effect of that is, and then the  
22 jury would have to see the document it seems to me to  
23 understand what was said in the documents, what the court  
24 order said, and it raises more questions than its provides.  
25 That's something that could have been explicated in the --



1 trust that had race restriction and the state -- I mean the  
2 document is here, I'd be glad to hand it up. So the state's  
3 position was we can't have any part of a trust and serve as  
4 trustee of something that would have a race restriction in  
5 its.

6 So those findings are made in that case. Consent  
7 Judgment would have -- that case was over. A brand new case,  
8 the state attorney general was sued. They moved to dismiss  
9 alleging that one of the basics for their motion to dismiss  
10 was that the Consent Judgment expunged all their rights.  
11 Judge Baddour, without making any findings -- in fact, it was  
12 a consent -- I mean, the plaintiff agreed to the motion to  
13 not contest the motion and they left the state board of  
14 education out.

15 Those are the facts. But my point is there is no  
16 evidence in this case about that at all. Sp I don't know  
17 how -- well, let me suggest to you -- we take the position  
18 there's no way to put that issue in the case at this time  
19 without completely confusing the jury about the impact of  
20 this case and one as it relates to the findings 20 years ago  
21 by another judge. What the legal effect of that is, how they  
22 even related all without some witness here to talk about it.  
23 And both sides have rested.

24 THE COURT: What do you say about that Mr. Francis?

25 MR. FRANCIS: Two things, Your Honor. Other than

1 this comment, the instruction as it is, we agree with.  
2 Counsel was mistaken in saying that none of the pleadings are  
3 in evidence in this case. The defense introduced  
4 plaintiff's -- Defendant's Exhibit Number 32, the complaint,  
5 which very clearly indicates that we sued the State Board of  
6 Education and the attorney general. So that's in evidence  
7 and it's going to be commented upon.

8 The only question is whether you should instruct the  
9 jury as to what actually happened, which is the state filed a  
10 motion and answer to dismiss, and in response they were  
11 dismissed. I don't think you should -- I don't think you  
12 should comment upon the reasons because Emory and I have a  
13 disagreement upon -- about the reasons. His position is the  
14 reasons are because the Consent Judgment was res judicata.

15 My position is they reiterated their declination to  
16 serve as trustee. But I think the fact that they were  
17 dismissed is a fact in the file is the law in the case. And  
18 think it -- I think it's actually misleading not to tell the  
19 jury that because I'm certainly going to comment because they  
20 were brought in but are not here now.

21 THE COURT: Is this -- is this in the file an order  
22 dismissing them? Is it in the file?

23 MR. FRANCIS: Yes, Your Honor.

24 THE COURT: Why can't the Court take judicial  
25 notice?

1 your objection would be.

2 MR. FRANCIS: Why am I standing up? The only thing  
3 I would suggest -- I had a chance to think about it a little  
4 more -- and I think it would improve the language and go to  
5 the point of this if you would add after the word  
6 impractical, add for The Hammocks Beach Corporation. So in  
7 other words, it would say since 1987 has it become impossible  
8 or impractical for The Hammocks Beach Corporation or for this  
9 trustee to use the trust property and land for the purposes  
10 specified, and so forth and so on.

11 THE COURT: What do you say, Mr. Emory?

12 MR. EMORY: We object to that because that lowers  
13 the standard substantially. The definition as the Court has  
14 described later in the instructions that impossibility refers  
15 to the ability to carry out the purposes of the trust,  
16 period. If we were talking about changing trustees they  
17 might be different but the standard is whether or not the  
18 trust purposes can be accomplished at all, and so we would  
19 object to that.

20 THE COURT: Well, this language appears to be your  
21 language, Mr. Francis. I'll allow that with the change but  
22 since 1987 it has become impossible or impractical to use the  
23 trust property and land for the purposes specified by Dr.  
24 William Sharpe and his wife in the deed and agreement  
25 executed in 1950.

1 logical change.

2 MR. EMORY: Yes, sir.

3 THE COURT: Okay anything else?

4 MR. EMORY: Yes, sir, I'm looking here. I believe  
5 -- oh yeah. All right, Your Honor, and given the Court's  
6 ruling on the statement of the issue for impossibility, we  
7 turn then to page 8 and on the second paragraph in the  
8 Court's explanation of the issue.

9 THE COURT: Okay.

10 MR. EMORY: When you define impracticable.

11 THE COURT: Uh-huh.

12 MR. EMORY: We need the eliminate the words by the  
13 trustee The Hammocks Beach Corporation with the available  
14 means and resources.

15 THE COURT: Okay. What do you say about that, Mr.  
16 Francis?

17 MR. FRANCIS: No, that -- that language is  
18 absolutely essential to this instruction. Because that is --  
19 you know, that is the way the cases interpret  
20 impracticability and that is also the way the document refers  
21 to impracticability. I mean, I think one of the things that  
22 is the implicit suggestion is if it is practicable by anybody  
23 then it's not impossible or impractical. And we absolutely  
24 agree that it is practical by some trustee. It's just not  
25 this trustee. And that is what Dr. Sharpe contemplated by

1 the structure in the deed. You remember what he did was he  
2 said if it becomes impossible or impracticable then we go to  
3 the successor trustee. So he contemplated the interaction  
4 between the abilities of the trustee to fulfill the trust and  
5 the notion of impossibility and impracticability. So we need  
6 to retain this language in practice by this trustee and in  
7 order to stay true to the law and true to the intent of the  
8 document we're interpreting.

9 THE COURT: All right, let me consider that. What  
10 would you want to say anything further?

11 MR. EMORY: Simply, Your Honor, that we would ask  
12 then that the plaintiffs -- we don't -- we don't know the  
13 support and the position the plaintiff takes. I understand  
14 this is critical issue in the case and certainly understand  
15 why they wanted it that way and to be clear we're not  
16 implicitly saying that, we're explicitly saying that there  
17 should be the standard, and in fact, if you look at the deed  
18 itself the words -- those words don't appear. It doesn't say  
19 for Hammocks Beach or the trustee. It simply says impossible  
20 or impractical to use said property and land for the uses  
21 herein specified. And so to add this is to put -- to impose  
22 words as requirements that were not included. Similarly in  
23 this paragraph the word fulfillment for the reasons we  
24 described earlier we suggest needs to come out because it  
25 imposes requirements not in -- well, it imposes a condition

1 that is not in the -- in the original -- in the deed itself.

2 THE COURT: What are you saying it should be?

3 MR. EMORY: Yes, that -- that -- that it would be  
4 the use of the trust -- well, starting with impossible --  
5 impossible would mean that use of the trust -- of the land  
6 for trust purposes was not possible could not be done.  
7 Impractical on the other hand does not mean it is impossible  
8 to use the land for trust purposes but rather that such use  
9 is impossible in impracticable.

10 THE COURT: Is there a case that it says this  
11 specific instance a particular trustee in place, Mr. -- Mr.  
12 Francis?

13 MR. FRANCIS: I do not have one to offer to the  
14 Court right now but can look over the lunch break, Your  
15 Honor.

16 THE COURT: You'll look over the lunch break because  
17 it seems to me that it says impossible in practice it means  
18 in general. If you can find a case that says the language  
19 should be -- it should be specific then I'm certainly willing  
20 to give it --

21 MR. FRANCIS: We will look for that case, Your  
22 Honor. If I could comment on this point. If you consider  
23 that, I would ask you to look at the alternative disposition  
24 clause in the deed which is, as I said, has this concept that  
25 once there's impossibility and impracticability you can go to

1 Board of Directors.

2 MR. FRANCIS: I have two comments. The first  
3 comment is, it is true that Judge Baddour's order in  
4 hindsight could be more detailed as to the reasons why the  
5 state would was dismissed. But what I can tell you, as an  
6 officer of the Court, is I have spoken both before and after  
7 the dismissal with Tom Ziko, and it is his firm belief that  
8 the state cannot and is not going to serve as successor  
9 trustee under the present circumstances, not just 1987. And  
10 so that was the basis of him filing the motion to dismiss and  
11 that's alluded to in the answer.

12 So I think what we're doing is just collapsing it  
13 all into one phase so that we can then move on. If there's a  
14 yes, yes, yes, yes, yes for the plaintiff, then the next step  
15 would be the settlor is directed to distribute. That's what  
16 would happen afterward. So I think, you know, if we do it  
17 the way the Court is proposing now, then what would happen is  
18 Mr. Ziko on behalf of the state would have to reiterate in, I  
19 suppose, in this proceeding that that is still the state's  
20 intention to decline, and I don't have a large problem with  
21 that because he's -- they're going to do it. They've already  
22 indicated they're going to do it. I know that as a fact.  
23 And number two, I think they are bound by what they've  
24 already done in this case. So I don't have a large issue  
25 with it but I think that, you know, it's -- it's already been

1 really -- we're actually doing that part of it incorrectly.

2 So I'm going to delete that Issue Number 4.

3 And I note the defendant's objection.

4 MR. FRANCIS: We're doing that, then it would be all  
5 the corresponding part of Issue Number 4 out.

6 THE COURT: Right.

7 MR. FRANCIS: So I can say for the record, Judge,  
8 you know, I think it's not absolutely clear whether all this  
9 would be collapsed or whether it would be in the manner that  
10 you have ruled and going to do it, which is why I sued them  
11 all in the first place. I didn't want to leave anybody out.

12 THE COURT: Sure.

13 MR. FRANCIS: But they'll come back when we have a  
14 hearing or response to the Court's direction and we can sort  
15 that out then.

16 THE COURT: All right. Okay.

17 MR. FRANCIS: If the jury returns for the plaintiffs  
18 on other issues.

19 THE COURT: Right. And there's one more issue and  
20 that's about whether or not the Hammocks Beach trust language  
21 should be in that -- instruction and you were -- And I'm  
22 going to give you time to look at that and see whether or not  
23 that should be -- that language should remain in there about  
24 the reasonable -- the reasonable means and the sources. Did  
25 you have any cases -- did you find anything that indicates



1 that that needs to remain or that -- it does look like it  
2 should be impossible in practice, but it should be general.  
3 What do you say about that? Did you find any cases on issue?

4 MR. FRANCIS: No, I didn't find any authority that  
5 would be helpful to the Court. Just to quickly restate it,  
6 our argument would be based on the way that the trust  
7 document works -- the deed document works. We think this is  
8 the appropriate instruction. But I don't have any authority  
9 to offer that would be helpful to the Court.

10 THE COURT: All right. I'm going to strike that  
11 last -- that last sentence -- part of the sentence The  
12 Hammocks Beach Corporation would be available means and  
13 resources. Anything else before you argue to the jury?

14 MR. FRANCIS: I think there are -- I mean, I had a  
15 chance to read this quickly --

16 THE COURT: Yes.

17 MR. FRANCIS: -- if it's helpful I think there is a  
18 couple of typos on page one, the first -- second full  
19 paragraph, As you know, we are trying a case in which the  
20 plaintiffs --

21 THE COURT: Right.

22 MR. FRANCIS: -- and then change the next word to  
23 conform.

24 THE COURT: Okay.

25 MR. FRANCIS: And I think there was one other. On

1 fulfillment," -- take out the words "fulfillment" so just a  
2 period would be after the word "impracticable."

3 On this second issue.

4 THE COURT: Right.

5 MR. EMORY: The fifth line.

6 THE COURT: Okay. Right, right, right.

7 MR. EMORY: Yes, sir. Yes, sir.

8 THE COURT: What do you say about that, Mr. Francis?

9 MR. FRANCIS: No objection, Your Honor.

10 THE COURT: Okay. All right. Go ahead.

11 MR. EMORY: All right. And then --

12 THE COURT: Hold on a second.

13 (Discussion off the record between the Court and the  
14 clerk.)

15 THE COURT: All right. Go ahead.

16 MR. EMORY: Yes, sir. And then in the paragraph  
17 that begins "Impossible," again, I realize there's one other.  
18 I think the same sort of thing. We would end that paragraph  
19 with the words "being put into practice," rather than "by the  
20 trustee."

21 THE COURT: Yes.

22 MR. EMORY: Yes, sir. The last line -- or the last  
23 full line in that paragraph has the words "that the use of  
24 the land for trust purposes are incapable of being put into  
25 practice."

1 THE COURT: So it makes it generic.

2 MR. EMORY: Yes, sir.

3 THE COURT: All right.

4 MR. FRANCIS: We would object to that, Your Honor.

5 THE COURT: Okay. What's your objection?

6 MR. FRANCIS: There's no -- that there's nobody else  
7 that could put it into practice but the trustee, and what the  
8 document contemplates is performance by this trustee. That's  
9 why you have a scheme for moving on to the next trustee. So,  
10 I mean, it's just stating the obvious, is because that's what  
11 we're focused on in this case of being capable of being put  
12 into practice by this trustee, or you could say by Hammocks  
13 Beach Corporation..

14 THE COURT: It could say a trustee.

15 MR. EMORY: We would have no objection to a trustee.

16 THE COURT: A trustee is nonspecific. What do you  
17 say about that?

18 MR. FRANCIS: No. I would suggest that you leave it  
19 as is, or if you're not going to do that, to do what Mr.  
20 Emory had suggested and just put into practice, period."

21 THE COURT: Okay. I'll put -- all right. That's  
22 what I'll do.

23 MR. EMORY: Yes, sir.

24 THE COURT: All right.

25 MR. EMORY: And then I believe --

1 any further -- so that if the State of North Carolina, by and  
2 through the State Board of Education, declines or refuses to  
3 serve as trustee for The Hammocks Beach Corporation, Inc then  
4 a hearing shall be conducted and notice shall be given to all  
5 heirs of -- all living heirs of the Dr. William Sharpe and  
6 the descendants thereof, and to John and -- the descendants  
7 and heirs of John Hurst and Gertrude Hurst for disposition  
8 and disbursement of the trust proceeds -- the trust property  
9 and land. That seems --

10 What do you say that, Mr. Francis?

11 MR. FRANCIS: I agree with that, Your Honor.

12 THE COURT: Okay.

13 MR. FRANCIS: It seems to me -- if I could just  
14 follow up on what you were saying?

15 THE COURT: Yes.

16 MR. FRANCIS: It seems to me that you just said the  
17 next step is to ascertain whether the State the Board of  
18 Education is going to serve as successor trustee or is going  
19 to, and as I understood may be the case, reiterate their  
20 declination to serve.

21 THE COURT: Absolutely.

22 MR. FRANCIS: And it seems to me that it's really  
23 not necessary for the Court to have a hearing just on that  
24 issue. They can just make that known to me and Mr. Emory and  
25 then submit that as a motion in the cause in this case

1 simple title to the trust res in the contingent beneficiary  
2 to the trust, the heirs and descendants of the late Gertrude  
3 Hurst and the late John Hurst as provided in the deed and  
4 agreement.

5 All right. That was the operative paragraph where  
6 we called them out to get involved in the case. All right.  
7 And this is the critical response that leads --

8 THE COURT: Let me stop you there. You can sue,  
9 you know, jack rabbit as you choose to but just 'cause you  
10 sue them doesn't mean they had an interest in that at that  
11 point, they didn't have an interest in the property from a  
12 legal standpoint until they become trustee, I mean,  
13 everything else is imaginary. When that document says that  
14 they may be, they don't have -- may be doesn't create the  
15 interest, the interest isn't created until the trustee  
16 that's in the position is no longer the trustee. They don't  
17 have an interest that you can sue them based upon at that  
18 point.

19 That's where I think there's a problem with your  
20 argument is that when you say you sued them, that's fine,  
21 but if they don't have an interest and they didn't have an  
22 interest until the jury in this case actually entered  
23 judgment, its verdict removing that trustee, creating their  
24 interest, it was -- that issue was not ripe for judgment at  
25 that time.

1 difficulty with it, the Court's position is, they didn't  
2 decline what they are not legally able to accept. That's a  
3 different concept. I'm not talking in hypotheticals. It's  
4 no different than if someone offers to sell you property and  
5 they don't have title to it to sell it to you, any offer to  
6 sell it to you means nothing. It's not until they have the  
7 legal authority to accept that they can decline it.  
8 Anything else is just an indication of what their position  
9 will be in -- at that time or is at that time. And if they  
10 change their position, that's the situation. And this  
11 decision about impossibility or impracticability didn't  
12 occur till the jury decided that issue in the trial of this  
13 case. No one else did -- you know, you may have talked  
14 about it, and -- but that trustee wasn't removed at that  
15 point, that trustee continued on with the agreement of  
16 everybody involved and that determination wasn't made -- do  
17 you agree that determination wasn't made until a jury spoke  
18 and addressed that issue in its verdict?

19 MR. FRANCIS: I agree that a second, it was made  
20 for a second time in the jury verdict, but it was made for  
21 the first time in the '87 consent judgment and that refusal  
22 at that time was sufficient to satisfy this requirement.

23 The Supreme Court -- two points in response.

24 THE COURT: All right.

25 MR. FRANCIS: The first thing is the dichotomy of

1           So this contention is entirely misplaced, it's  
2 based on Mr. Francis' own reading of newspaper articles and  
3 his extrapolation from them. That is not the case. If this  
4 Court tenders, in fact, as we believe it directed us to be  
5 here to do that, it would be the State Board of Education  
6 that would be the trustee of this matter. Now, whether they  
7 chose -- I will indicate to you, the North Carolina General  
8 Statutes, and this can be found at tab 18, does indicate  
9 that a trustee can delegate certain duties to an agent.  
10 That is -- and the trustee, this is GS 36C-8-807, it is, in  
11 fact, the case that there's contemplation that the State  
12 Board of Education might enter into a memorandum of  
13 agreement appointing as an agent of the Board of Education,  
14 the Division of Parks and Recreation, to assist in the  
15 management of the trust property. That would make perfect  
16 sense, the trust property is actually right next to a  
17 component of the state park system, where they've got  
18 rangers and got other people and they have an education  
19 program.

20           So the State Board of Education might, in fact,  
21 assist the trustee as its agent under this statute but, make  
22 no mistake, it would be the Board of Education that would be  
23 the trustee. We're not mistaken of that and there would be  
24 no mistake about who in fact was the trustee.

25           Your Honor, we believe -- there was an effort to

1 on 10 days of Rule 59, but because what we are arguing  
2 against is the second order that the Court directed me to  
3 prepare and I did prepare and that you entered on  
4 October 26th, which set up this tender process. This is not  
5 an appeal from this judgment, this is an appeal from  
6 their -- this is an attack on their reversal of their  
7 position and a request that you reconsider the tender  
8 process or in the alternative that you reject their  
9 purported acceptance and so there's no kind of 10-days'  
10 requirement that applies to anything.

11 THE COURT: What allows you to attack their ability  
12 to -- under what theory are you allowed to attack their  
13 change of position on whether or not they wish to be  
14 substitute trustee?

15 MR. FRANCIS: Because it's contrary to what's in  
16 the answer and motion to dismiss and contrary to the case  
17 law.

18 THE COURT: I mean, procedurally, where does that  
19 come from? I mean, I'm just curious. Where does this -- I  
20 mean, I'm trying to -- see, I have trouble with a couple of  
21 these things. I'm trying to look at it from the standpoint  
22 of when you were saying about they should have been in the  
23 litigation and I'm thinking that, what would they have done,  
24 just sat there and just sat there at the table while  
25 testimony was being offered because you really couldn't



1 was, you were -- it seemed to us that it was your view that  
2 there needed to be a formal declination on the record post  
3 judgment, but as I read the colloquy that we had --

4 THE COURT: That wasn't my position. My position  
5 was to bring them in here to see whether they accept or  
6 decline, I mean.

7 MR. FRANCIS: Well, but if I could just come back  
8 to, during the charge conference, and it was a long one, I  
9 read this for several hours last night 'cause I couldn't  
10 remember everything that we said. But in that charge  
11 conference the Court said, the Court said that, well, I  
12 think the attorney general has -- I think they've spoken  
13 their piece, I think that they have -- this is on page 73 in  
14 the excerpt 8 that we have in the notebook. You said, I  
15 think they have spoken their piece, I think that they have  
16 basically said that we're not interested in this and I don't  
17 think they can assert any rights as substitute trustee in  
18 this litigation based on what I heard. This was your words  
19 from the bench. So that's not something that I wanted to  
20 consider giving serious consideration, and then you  
21 similarly said, post verdict, you said, I expect that the  
22 state will reiterate its declination and you said several  
23 times through the proceedings that you didn't expect that  
24 they could come in and change their position.

25 THE COURT: I didn't say that they couldn't, I just

1 said that that's probably the decision that they indicated  
2 previously. I mean, otherwise -- I used to post these terms  
3 on my door, Latin terms on my door when I was in law school,  
4 and one of them I posted years ago was the term that de  
5 minimis non curat lex. Do you know what that terms means,  
6 Mr. Francis?

7 MR. FRANCIS: No, Your Honor.

8 THE COURT: The law does not deal with  
9 trivialities. And I wouldn't engage, I don't believe in  
10 engaging in mental -- in rhetorical exercises and I  
11 wouldn't, I mean, yeah, I'm sure I said that if it reads in  
12 there that that would be their position but, once again, I  
13 also indicated earlier when they indicated in 1987 what they  
14 indicated, that that was an indication of their position at  
15 that time because there was no legal authority for them to  
16 accept any trusteeship at that time. And that's the reason  
17 why that was not an issue to submit to a jury because until  
18 a jury ruled on the impracticality or impracticability or  
19 impossibility of the trusteeship, then there was nothing to  
20 accept or decline.

21 And that's why I have -- I have a problem with this  
22 because, I mean, yeah, it says, may that, but everything  
23 that came in this -- on this testimony in this courtroom was  
24 that from the inception, that the whole point of this  
25 property and the property that was previously deeded to the

1 State of North Carolina was to provide this recreational  
2 facility for students and that that was -- and that was all  
3 the heirs, that all these folks agreed to, that's why it was  
4 created. And what we're talking about here is in  
5 furtherance of that and I just have a real problem with why,  
6 given that situation, yeah, I know that the State, what the  
7 State said previously but, you know, I just, you know, why  
8 that would be binding today, is sort of lost on me, but go  
9 ahead.

10 MR. FRANCIS: May I -- thank you, Judge. The  
11 judgment and order that the Court entered do not in any way  
12 compel the outcome that Mr. Gulick described. The Court  
13 says in the order, although the record indicates that the  
14 State's previously declined to serve as successor trustee,  
15 pursuant the aforementioned deed creating the trust, it  
16 appears that following entry of judgment upon the verdict,  
17 the North Carolina State Board of Education may now be  
18 entitled to tender of appointment as successor. So the  
19 Court did not say in your order that they were entitled to  
20 appointment, they were entitled to tender of appointment.  
21 And as you just said, I presume that you chose those words  
22 for a reason.

23 If you meant that they could be appointed, you  
24 could have simply appointed them in the order but the tender  
25 of appointment contemplates two things. One is they could

1 those things, the question is plain and simply, do you  
2 accept or do you decline. That's not something you get to  
3 object to, it's not something you get to put on evidence and  
4 show why they shouldn't be, it's a question of whether they  
5 accept or decline.

6           When I say, tender, doesn't mean that the Court  
7 intends to say, if they say yes, I say no. It says, tender  
8 says, you accept or you decline, that's what tender is  
9 about, that's why I used the term, tender, that's the term,  
10 I think, you use in this situation. But I don't see this as  
11 a situation in where, I mean, respectfully, where there  
12 would be discovery and there'd be deposition and there'd be  
13 evidence offered as to why they should or should not be in  
14 the appointment of a trustee. I don't see this as a normal  
15 proceeding in the appointment of a trustee in a case, the  
16 question is, whether or not they accept or decline. I mean,  
17 that's what plain and simply this -- or this Court sees it.

18           Now, if you show me something that says that  
19 there's a case that says there's a hearing after a jury  
20 verdict to determine their fitness to become the trustee or  
21 whether or not the Court should, in fact, do that, I'm  
22 certainly willing to consider that. But -- but what I see,  
23 a lot of this stuff you're talking about is pre-verdict  
24 stuff, pre-verdict. Now that a verdict's been entered, the  
25 question is whether or not they accept or decline. How is

1 only issue. And I see that only based upon their inability  
2 or their -- somehow they're not competent or not capable or  
3 there's some other reason why, as with any trustee, they're  
4 not a proper party to serve as the trustee. The instrument  
5 provides them to be the substitute trustee and unless you  
6 can show me -- show me a case that shows otherwise, I don't  
7 see a basis for why otherwise the plaintiff has any standing  
8 to object to the appointment of the State Board of Education  
9 as the substitute trustee. I just don't see a basis for, I  
10 mean, for the -- for you to object when the only issue  
11 otherwise before this Court is the tender of this  
12 trusteeship to the State Board of Education and their  
13 indications whether they accept or decline.

14 MR. FRANCIS: Let me go on to that issue. As I go  
15 on to that issue, let me say reasons number one and two,  
16 which I've been talking about for over an hour now, are that  
17 they already declined in '87 and they declined again in this  
18 case. And those declinations in this case are judicial  
19 admission which would preclude them from changing their  
20 position.

21 Those cases that support that proposition are pages  
22 20 through 23 of our brief and they are the Patrick case,  
23 the Accelerated Framing case, and Tate case.

24 THE COURT: But let me ask you this, don't those  
25 cases -- any of those cases deal with the proceeding of the

1 has gone on for four years. They want to come in at the end  
2 and grab something that they have no entitlement to, not  
3 just for the reasons that I've been arguing on this judicial  
4 admissions but because the jury has said it's impossible and  
5 impracticable. If you step back to that just for a minute,  
6 Judge, remember the whole context of this case was, this was  
7 something that was --

8 THE COURT: Well, how do we change the way you  
9 phrased that? I don't like the way you said, want to come  
10 in and grab something, I mean, they want to -- I mean,  
11 you're looking at a document that says that that's -- they  
12 didn't write that document, the document written by someone  
13 else said that they're to be appointed substitute trustee  
14 and it's not like they're -- you're talking about the State  
15 Board of Education coming in and just sort of jumping in  
16 something and taking it, the documents were prepared with  
17 them in mind as a substitute trustee.

18 MR. FRANCIS: On this point that I'm arguing right  
19 now, if they had answered the complaint differently, if the  
20 jury had found differently, then I would concede merit to  
21 that argument, but once they have disclaimed any interest in  
22 serving as successor trustee, not once but twice, including  
23 in this case, and once the jury has said it's impossible and  
24 impractical to serve for trust purposes, necessarily all  
25 that the State can be doing is trying to get their hands on

1 the land for whatever purposes they want. That is clear  
2 from the documents that we have submitted attached to my  
3 affidavit, the memorandum from Louis Ledford that is  
4 reflected there, the letter from Louis Ledford to the  
5 Hammocks Beach director while the case was pending, and what  
6 I'm saying is that the -- this says --

7 THE COURT: So if this property goes to the heirs,  
8 are they going to establish a -- redo the camps and put the  
9 camps up and make it so children can go visit there in  
10 conformity with the original intent of the testator and  
11 drawn up this trust so that it can be used for the benefit  
12 of school children and the children of the State of North  
13 Carolina to go there and visit and play and enjoy the  
14 property?

15 MR. FRANCIS: Point in fact, my client Harriett  
16 Hurst Turner plans to do exactly that and I plan to stay in  
17 there with her until the glorious end to help her to  
18 accomplish this on a portion of the property. So the answer  
19 is, yes, and I think she testified to that under oath. But  
20 the legal response to that is, they're not required to.

21 THE COURT: Well, I just said that because you said  
22 for whatever purpose the State of North Carolina had in mind  
23 and so I sort of just wondered what you thought the State  
24 has a sinister purpose that they intend to do something  
25 that's other than in conformity with what the intent of the

1 didn't get to go up to the Supreme Court, they didn't have  
2 to go through the extensive motions and sanctions practice  
3 that I had to go through with Hammocks Beach to get basic  
4 discovery responses.

5 THE COURT: So? So? What's that mean?

6 MR. FRANCIS: What that means is they obtained an  
7 advantage by that representation in the answer, which is  
8 inconsistent with the position they're taking now, and so  
9 under the second criteria of judicial estoppel, they're  
10 precluded from doing it.

11 The third criteria of judicial estoppel is the  
12 courts consider whether the party seeking to assert an  
13 inconsistent position derives an unfair advantage or imposes  
14 an unfair detriment on the opposing party if not estopped.  
15 And the unfair detriment, obviously, is obvious and  
16 egregious to my party. The unfair detriment is, that if it  
17 were clear that the State could do what they are now  
18 attempting to do, and I will say this in all candor to the  
19 Court as an officer of the Court, the case would have never  
20 been brought. Hammocks Beach would still be serving as an  
21 incompetent, self-serving, feckless trustee down there  
22 running the property into the ground.

23 If we had thought that we could litigate this case  
24 for four years, be successful, and I'll say as an aside,  
25 Judge, this case was not like most of the cases I take where



1 impracticability. So it's really only at that time that the  
2 State was even in a position to learn that its interest had  
3 not been expunged by the consent judgment of 2007, which is  
4 what their -- I mean, excuse me, of 1987.

5           So the other part of it is this, Your Honor, and  
6 that is, Mr. Francis may well have elected to argue to you  
7 that the proper thing to do was simply to direct a verdict  
8 on the State, and that may -- I'm certain he did argue that,  
9 but he then elected to represent to the jury that there was  
10 a tender to the Board, he didn't have to make that  
11 representation to them. And I think you have to assume that  
12 the jury was then of the view that the Board was going, just  
13 as the trust document said, since he was referring to the  
14 trustees, that the jury would have to believe that at least  
15 it was going to be tendered to the State Board of Education  
16 and the State Board of Education would have an opportunity  
17 to say yes or no.

18           And then it was Mr. -- it was Mr. Francis' own  
19 presentation to this Court subsequent to that, it was the  
20 order he drafted that said the Board may be entitled to  
21 accept -- to a tender of this trusteeship. So the -- so I'm  
22 setting that as the stage.

23           There's a larger issue and that's the issue of what  
24 is the settlors' intent, the settlors' intent was to have  
25 charitable purposes of recreation and education for an

1 recognized that in argument to Judge Baddour in 2007, it was  
2 true then and it's true now.

3 THE COURT: Let me ask you this, let me stop you  
4 there. So, I mean, in your brief, your memorandum you just  
5 referred to under, serve African-American population. But  
6 that was at that time, what about now when there's not  
7 separate facilities, I mean, why isn't that purpose served  
8 by opening it up to the North Carolina Association of  
9 Educators or the many different groups now that don't  
10 distinguish themselves by any type of being Black or White  
11 or Indian or anything of that nature but have membership  
12 which constitutes the general population in North Carolina's  
13 reflection?

14 MR. FRANCIS: Because to do that in the teeth of  
15 this very specific limiting language in the deed and the  
16 articles at that time, which are the ones that govern,  
17 cy-pres this trust, and as we understand the case law and as  
18 Mr. Ziko understood it in '07, this trust cannot be  
19 cy-pressed because it has an alternative disposition.  
20 Cy-pres is an important feature of trust law that exists so  
21 trusts will not fail when there is not an alternative  
22 disposition but the whole idea is to give effect to the  
23 wishes of the settlor.

24 And I think it's clear from all the evidence in  
25 this case that what Dr. Sharpe was going to do is give the

1 whatever they want to do, that's not permitted by the law of  
2 trust, it's not permitted by the documents, and it's not  
3 permitted by the jury verdict.

4           So in addition to the arguments we made to the  
5 Court about why they're precluded from doing this, we would  
6 argue to the Court that their purpose does not fit with the  
7 settlors' specific requirements or to the requirements of  
8 the law of trust.

9           THE COURT: You do realize, Mr. Francis, if I  
10 followed your logic, the first amendment of the U.S.  
11 Constitution would have to read, have read back in the 1700s  
12 that the freedom of the media shall not be abridged, rather  
13 than the freedom of the press because they wouldn't have had  
14 any idea there was going to be cable and all that kind of  
15 TV, and all that other kind of media, radio, and other kind  
16 of media that would be invented after that document was  
17 drafted and signed.

18           MR. FRANCIS: I agree with that, Your Honor, but I  
19 think that the rules of Constitutional interpretation are  
20 necessarily different and broader than the rules of  
21 statutory interpretation. What we're trying to do, there's  
22 a specific statute that governs cy-pres, and I read to you  
23 before lunch, and what we're trying to in statutory  
24 interpretation is give effect to the intent of the general  
25 assembly and the cases all say that you can't cy-pres a

1 Sharpes and the Hursts, in this particular case, and with  
2 regard to this trust, that it be used for this purpose for  
3 the benefit of citizens. It was at that time of  
4 African-American citizens, but the charter has since been  
5 amended and the document says, pursuant to use of the North  
6 Carolina -- what is it -- Teacher's Association, Association  
7 of Teachers, or whatever the language was, to and any others  
8 as named -- are named in the charter.

9           And this Court sees that the refusal of the State  
10 Board of Education to serve as a trustee as a condition  
11 preceding to the -- this property being distributed to the  
12 heirs, and in this particular case, the -- there's no  
13 evidence before this Court as to why, lawfully, other than  
14 prior answers or admissions in this lawsuit or on other  
15 occasions in 1987, as to why they would not serve prior to  
16 the removal of the trustee in this case and, therefore, this  
17 Court denies the motion for reconsideration. I think it  
18 flies in the face of the jury's verdict, everything that was  
19 presented in the evidence, and I think it flies in the face  
20 of the trust documents as well and the whole intent with  
21 regard to the 1987 consent judgment.

22           Now, I'll note your exception to the Court's ruling  
23 in this matter.

24           What says the State with regard to the State Board  
25 of Education in becoming trustee, substitute trustee in this

1 appointed trustee, that that would have been -- that is more  
2 likely the situation than the situation to have them named  
3 as a named defendant in the case.

4 MR. FRANCIS: Well, to the extent --

5 THE COURT: I mean, as far as their interest lie.

6 MR. FRANCIS: I yield gracefully to the Court's  
7 ruling but to the extent that the Court has found that the  
8 timing sequence you have laid out undid their judicial  
9 admission, we most certainly do disagree with that. Yes, we  
10 do.

11 THE COURT: I mean, I wouldn't disagree with you if  
12 you're talking about in a trial, we're not talking about a  
13 trial before a jury or before a judge, we're talking about,  
14 you know, the disposition of the property once those issues  
15 have already been litigated and I still don't see that --  
16 that they had an interest, they could be -- formally refuse  
17 anything until they were actually named and someone actually  
18 said, here it is, you know, do you wish to have that.

19 MR. FRANCIS: Yes, we did name them and they said  
20 in their answer in this same case, we refuse appointment as  
21 successor trustee, and so, respectfully, understanding that  
22 you have ruled, respectfully, we just say for the record  
23 that the dichotomy that you're making in not applying what  
24 we see as the clear law on judicial admissions is -- is not  
25 the way that we read the cases applying to this situation.

1                   So I was prepared to proceed. I now  
2 understand that Mr. Ziko and Mr. Francis may have  
3 reached some accommodation they want to tell you.

4                   THE COURT: That's what I understand, too,  
5 that's why I asked that.

6                   MR. FRANCIS: If I may, your Honor. There  
7 actually were three matters that were noticed for  
8 hearing today.

9                   The first matter that was noticed for  
10 hearing was the defendant's motion to dismiss, as  
11 Mr. Emory said.

12                   I agreed to that -- the calendaring of  
13 that matter today, contingent upon the defendants  
14 providing full discovery prior to the hearing, which  
15 they have not done.

16                   The second matter that was noticed for  
17 hearing today was the plaintiff's motion for  
18 sanctions. So those are the matters that are on --  
19 that were noticed for the Court today.

20                   But as I alluded to in the service of my  
21 brief, the State has filed a motion to dismiss, and we  
22 have been unable to agree upon the language of a  
23 stipulation of dismissal.

24                   I have no objection to the motion to  
25

1 dismiss, and I don't think Hammocks Beach has an  
2 objection to them being dismissed. So if the court is  
3 inclined to do so, you know, we can dispose of that  
4 matter very quickly.

5 THE COURT: All right. I'm not sure I  
6 understand how you're not agreeing but you're  
7 agreeing, but anyway.

8 MR. FRANCIS: We couldn't agree on the  
9 language of the stipulation, that's the reason, but I  
10 have no issue with them being dismissed.

11 MR. ZIKO: Your Honor, on behalf of my  
12 clients, the State Board of Education and the Attorney  
13 General, we filed a motion to dismiss on the grounds  
14 that the State Board of Education, which is contingent  
15 trustee to the instrument, has no interest in the  
16 underlying property.

17 And back in 1987, the Attorney General  
18 disavowed any interest the State Board of Education  
19 becoming contingent trustee to this trust. And so the  
20 consent order that was entered back in '87, disposed  
21 of the State Board of Education's interest in this  
22 matter. They disclaimed their interest as a  
23 contingent trustee, and will not become a contingent  
24 trustee, and told the Court back then that they would  
25

1 not. And based upon that, the Court entered the  
2 consent order. That disposes of the State Board of  
3 Education's interest in this matter.

4 The Attorney General does not have an  
5 interest in this matter, because the only interest the  
6 Attorney General has is the same general interest it  
7 would -- that he would have to enforce any charitable  
8 trust, along with the District Attorney and any other  
9 -- and any other interested party. There's not a  
10 specific interest of the attorney general in this  
11 trust.

12 Furthermore, this is not an appropriate  
13 trust for a \*\*\* sigh pray action, because, in fact,  
14 the trust provided for distribution of the -- of the  
15 trust assets to -- to residual beneficiaries. There  
16 was an alternative process set up if the trust should  
17 fail.

18 Even in the event -- and I don't want to  
19 get involved in the merits of either parties' position  
20 -- the Court should find that the trust is impossible  
21 or should no longer continue and dissolve the trust,  
22 it's not appropriate for the Attorney General to be  
23 involved in, because the Court cannot sigh pray to  
24 this trust and direct it to another charitable  
25



1 purpose, because there were contingent residual  
2 individuals identified in the trust.

3 so my clients, although named as  
4 defendants, have no interest in how the parties  
5 resolve this dispute.

6 THE COURT: Do you have a proposed order?

7 MR. ZIKO: I do, your Honor. It's a take  
8 your pick, depending upon how you saw things evolved.  
9 I've got one that grants the motion to dismiss, and  
10 I've got one that notes that the other parties have no  
11 objections. So if you want to sign the one without  
12 objection, you can sign that one. It's just the last  
13 paragraphs that are different.

14 THE COURT: Anyone wish to be heard?

15 MR. EMORY: On that matter, I'd just like  
16 to see it. I haven't seen the proposed order, if  
17 that's all right.

18 THE COURT: Do you have any objection to  
19 their motion?

20 MR. EMORY: Oh, no, your Honor. In fact,  
21 we join.

22 MR. FRANCIS: No objection, your Honor.

23 THE COURT: All right. Can we agree on  
24 the manner in which we are going to proceed in this

25

BOGERT  
TRUSTS & TRUSTEES  
—  
SECOND EDITION REVISED

Ch. 20 ADMINISTRATION OF CHARITABLE TRUSTS § 393

§ 393. Powers of Settlor and Trustees as to Purposes and Methods<sup>1</sup>

It is well settled that the creator of a charitable trust, unless he reserved to himself such a power, has no authority to alter the terms of the trust.<sup>2</sup> For example, having set up a neighborhood school without restriction, he cannot exclude children of one race or religion thereafter.<sup>3</sup>

As shown later<sup>4</sup> the trustee has no power to change the purpose of a charitable trust, for example, to convert a trust to aid education into one for the relief of the poor.<sup>5</sup> If he believes that

Appellant alleged that a public park was the subject of a charitable trust administered by appellee city as trustee and that appellee's proposed lease of a part of the park to a corporation to erect and operate a restaurant would be a breach of trust. The court held that where the Attorney General had chosen to support appellee and thereby abandoned possible rights of the public as the beneficiary of the charitable trust, appellant, a nonprofit corporation whose members included persons living adjacent to the park, had standing to object to the lease transaction. After examining the relevant statutes, the court found that the park was a public charitable trust and that if a subsequent statute had the effect of giving appellee a power to lease it was invalid because it impaired the obligations of contract under which the public trust was created. The court further found that the subsequent statute did not give appellee as trustee the power to lease or deed all or any portion of the park. *Kapiolani Park Preservation Society v. City and County of Honolulu*, 1988, 751 P.2d 1022, 69 Hawaii 569.

In donating land to the city for a reservoir site the donor had provided that if the city attempted to sell or dispose of the land the land would revert to the donor and her heirs. Donor's sole heir alleged the city's lease of oil and gas rights of the land violated the reverter clause. The court held that the restraint on alienation was not impermissible but remanded the case for determination of whether the mineral lease was a violation of the agreement between the city and the donor

and whether the donor intended the city would lose the land only if it was not used for a reservoir. *Smedley v. City of Waldron*, C.A.8, 1984, 739 F.2d 399, appeal after remand C.A.8, 1985, 774 F.2d 299.

§ 393

1. For related materials, see sections 396 (deviation as to method of administration), 400 (termination or modification pursuant to compromise agreement of interested parties), 438-439 (cy pres application as to purpose).

2. *Attorney General v. Dulwich College*, 4 Beav. 255; *St. Paul's Church v. Attorney General*, 1895, 41 N.E. 231, 184 Mass. 188.

An agreement among members of the testator's family to change the provisions of the will with regard to a gift, which might on certain contingencies have gone to charity, is not valid where the Attorney General did not join in the agreement. *In re Little's Estate*, 1961, 170 A.2d 106, 403 Pa. 534.

See section 992, post, as to the settlor's powers in this regard.

A settlor of a voluntary charitable trust has been held to have the power to change the trust to obviate the effects of a mistake, although no power of alteration was expressly reserved. *In re Scholler's Estate*, 1961, 169 A.2d 554, 403 Pa. 97.

3. *Price v. School Directors*, 1871, 58 Ill. 452.

4. See section 435, post.

5. *Healy v. Loomis Institute*, 1925, 128 A. 774, 102 Conn. 410; *Bailey v.*

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the charitable objective laid down by the donor is impractical or impossible of fulfillment, he should apply to the court for a change in purpose under the *cy pres* power.<sup>6</sup> In some cases the settlor expressly grants to the trustee power to alter the trust with regard to its purposes,<sup>7</sup> as in the case of community trusts<sup>8</sup> and charita-

Lewis, 1809, 3 Day (Conn.) 450 (attempted transfer from education to religion); Webster v. Sughrow, 1900, 45 A. 139, 69 N.H. 380; Hullman v. Honcomp, 1856, 5 Ohio St. 237; Clinton County Nat. Bank & Trust Co. of Wilmington v. Todhunter, 1932, 183 N.E. 83, 43 Ohio App. 289 (trustee cannot change trust to erect chapel in cemetery); State v. Toney, 1933, 17 P.2d 1105, 141 Or. 406 (lodge cannot divert educational and home endowment funds to home maintenance fund).

A corporation to which property has been conveyed for named charitable purposes has no power to change the purposes of the trust by an amendment of its charter or by-laws. Brown v. Memorial Nat. Home Foundation, 1953, 329 P.2d 118, 162 Cal.App.2d 513, 75 A.L.R.2d 427, certiorari denied 1959, 79 S.Ct. 353, 358 U.S. 943, 3 L.Ed.2d 352.

Trustees of school held authorized to change school to co-educational basis and to set up reserve for depreciation and obsolescence of school buildings. Collins v. Tavares, 1945, 37 Hawaii 109.

Where land is left to a city for use in establishing a park, by means of selling the land, the city may not use the proceeds to establish several playgrounds in various parts of the city. Mayor and Council of City of Baltimore v. Peabody Institute of Baltimore, 1938, 200 A. 375, 175 Md. 186.

A cemetery corporation has no power to alter the terms of the trust under which it holds property for charity, although it may frame rules for carrying into effect the original trust purpose. Frank v. Clover Leaf Park Cemetery Ass'n, 1959, 148 A.2d 488, 29 N.J. 193.

A corporation organized to run a school for the destitute could not enlarge its purpose, without amending its charter, by opening a pay pupil department. Rankine v. The DeVeaux College, 1904, 85 N.Y.S. 239, 41 Misc. 655,

affirmed 88 N.Y.S. 1114, 94 App.Div. 611, affirmed 1906, 76 N.E. 1106, 184 N.Y. 518.

Trust for care and maintenance of cemetery. Deviation by spending part of trust principal for constructing of a road in cemetery not allowed. Petition of Evangelical Lutheran Church of Old Goschenhoppen, 1945, 54 Pa.D. & C. 47, 61 Montg. 226.

Where there was a gift for a Lutheran church and school, the trustees might not dispose of any of their property for education of a non-Lutheran character. Busby v. Mitchell, 1885, 23 S.C. 472.

Where trustees for charity have made commitments to spend funds for charitable purposes not within the scope of the intent of the settlor, they may be enjoined by the court at the instance of the Attorney General from fulfilling those commitments. William Buchanan Foundation v. Shepperd, Tex.Civ. App.1955, 283 S.W.2d 325, reversed 1956, 289 S.W.2d 553, 155 Tex. 406, to permit the trial court to enter orders to carry out a settlement agreement.

6. See section 439, post.

A trustee for charity may maintain a suit to have *cy pres* applied or to secure permission to deviate from the terms of the trust. Concord Nat. Bank v. Town of Haverhill, 1958, 145 A.2d 61, 101 N.H. 416.

7. Where deed to trustees gives them power to amend the trust they may do so by a deed. Ross v. Freeman, 1935, 180 A. 527, 21 Del.Ch. 44.

A provision in a will creating a charitable trust that the provisions express the wishes of the settlor only and "not as a condition or limitation which might affect the validity of the bequest" does not invalidate the gift. It merely

8. See footnote 8 on page 255.

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ble foundations,<sup>9</sup> but such clauses are not usual as to most charitable gifts.

Nor has the trustee power to alter the trust with respect to the methods of administration prescribed by the settlor,<sup>10</sup> unless this authority is set forth in the trust instrument. For example, if the purpose is the aid of a certain church and the method is the establishment of a pension fund for retired ministers, the trustee may not divert the income to pay current operating expenses of the church. If the trustee concludes that the plan of administration laid down by the settlor is disadvantageous, he should apply to the court for permission to change it.<sup>11</sup>

What the trustee cannot do alone, by way of changing the administration of the charitable trust, he cannot accomplish in conjunction with persons in the community who expect to receive benefits from the trust,<sup>12</sup> although such a change has sometimes

gives the trustees power to vary the administration of the trust as to details. In *re Porter's Estate*, 1947, 187 P.2d 520, 164 Kan. 92.

8. See section 329, ante.

9. See section 330, ante.

10. Where a remainder interest is given to a non-profit cemetery association in trust to use the income to maintain family graves, the cemetery association has no power to modify the gift by accepting part of the value of the property in return for a perpetual upkeep contract and turning over the rest of the property to a relative of the settlor. *Bogges v. Inabnit*, 1940, 145 S.W.2d 838, 284 Ky. 673.

A power granted to a trustee for charity in his absolute discretion upon his finding that a certain condition exists does not give him power to exercise the power without regard to the happening of the determining event. Such conduct is an abuse of the discretion which will cause a court to set aside the decision. *Conway v. Emeny*, 1953, 96 A.2d 221, 139 Conn. 612, citing text, § 543.

Where the testatrix left the residue of her estate to a town to establish a hospital to be managed solely by its board of trustees, the acceptance of the gift by the town created a contract which could not be varied by the action of the town or its officials. The trustees had the

sole power to control the extent and time of any study or investigation of the hospital by the town. *Mahoney v. Attorney General*, 1954, 195 N.E.2d 540, 346 Mass. 709.

Statutes enacted after passage of the federal Tax Reform Act of 1969 authorized the trustees to amend dispositive or administrative provisions of the governing instrument to conform to the Act's requirements. For example, see Ala.Code § 19-3-301; Colo.R.S. 15-1-1002; Ill.Rev.Stat. c. 148, ¶ 51; Md. E.T.Law § 14-304; Miss.Code 1972, 91-9-407; Tenn.Code Ann. 35-9-106; V.Tex.C.A., Prop.Code § 112.056 (with consent of settlor).

For a discussion of the requirements of the Internal Revenue Code for federal tax exemption purposes, see section 270.5, ante.

11. See section 396, post.

12. *Pierce v. Weaver*, 1835, 65 Tex. 44 (trustees and inhabitants of town sought to change trust regarding a school).

Where a remainder interest in realty is directed to be sold and the proceeds invested in government bonds, to be held by a cemetery association which is a non-profit organization, the income to be used to keep up the family graves in that cemetery, the cemetery association and the preceding life tenant cannot

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been approved by the court where the Attorney General has joined in the trustee's petition for modification.<sup>13</sup>

However, if the trustee is not bound by instructions as to a plan of operation given by the settlor or a court, he may choose a method which is reasonably adapted to accomplish the purposes of the charity.<sup>14</sup> For example, he may secure the incorporation of

alter the trust by paying to the cemetery association \$500 in return for a perpetual upkeep contract, and giving the balance to the life tenant. A statute (Ky.R.S. 273.030) prohibited a charitable corporation from disposing of property received for a special purpose. *Bogges v. Inabnit*, 1940, 145 S.W.2d 838, 284 Ky. 673.

Where a trust is created to provide a public library in a city, the amount of the gift cannot be reduced by an agreement between the city and the successors of the settlor, even though the county court approves such agreement. *In re Mead's Estate*, 1938, 277 N.W. 694, 227 Wis. 311, rehearing denied 279 N.W. 18, 227 Wis. 311, 116 A.L.R. 1127.

13. *Burbank v. Burbank*, 1890, 25 N.E. 427, 152 Mass. 254, where the heirs of the settlor and the Attorney General joined in making a change in the trust and the court held their action legal.

The Attorney General may consent to the revocation of a trust which provided contingent interests in favor of charity, in return for the creation of a new trust which provides vested interests, under his power to compromise claims for or against charities. *Application of Schlusel*, 1949, 89 N.Y.S.2d 47, 195 Misc. 1008.

*Attorney General v. Margaret and Regius Professors*, 1 Vern. 55 (court will not permit change, even if there is no opposition).

14. In carrying out a charitable trust the trustee may join with another in administering the trust or may transfer trust assets to an independent instrumentality to facilitate accomplishing the purpose of the trust. However, neither action relieves the trustee of restrictions placed on trust funds by the donor. Where the gift is merely for the

support of the charity's programs the charity may exercise discretion as to the appropriate means of carrying out its activities and programs. *Petition of United States on Behalf and for Benefit of Smithsonian Institution*, D.D.C.1980, 485 F.Supp. 1222, citing text, §§ 50, 393.

The trustees of a hospital trust may obtain aid for the operation of the hospital from a city, county and state, so long as they do not give up control of its management. *Noble v. First Nat. Bank of Anniston*, 1941, 1 So.2d 289, 241 Ala. 85.

Where there is an absolute gift to a charitable corporation for some of its purposes, with directions as to methods to be used, and a change in conditions as to diseases and methods of treatment makes the use as contemplated by the donor unsatisfactory and uneconomical, the corporation may change the methods of administration, so long as it accomplishes the general objectives of the donor, and no application to court is necessary. *Gray v. Harriet Lane Home for Invalid Children*, 1949, 64 A.2d 102, 192 Md. 251.

Where a testator leaves a share of his residuary estate to a charitable corporation, and later the executor and heirs agree with the corporation on the payment to the corporation of a specific sum in lieu of the residuary gift, the agreement is valid, but the terms of the charitable gift are not changed. *Rohlf v. German Old People's Home*, 1943, 10 N.W.2d 686, 143 Neb. 636, quoting text, § 418, and citing § 432.

A charitable foundation may administer its funds by giving some of them to a corporation organized by itself to propagate charitable objects. *Mills v. Montclair Trust Co.*, 1946, 49 A.2d 889, 139 N.J.Eq. 56.

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Trustees of a trust to preserve and develop natural resources such as the Hudson River Palisades may perform their trust by conveying part of the land owned by them to an interstate agency of a governmental type which has the same objectives as the trust. *City of Englewood v. Allison Land Co.*, 1953, 96 A.2d 702, 25 N.J.Super. 466.

It has been held that a Board of Foreign Missions, which was a charitable corporation, might establish schools and colleges and give funds to them out of its absolute corporate property. *Boardman v. Hitchcock*, 1910, 120 N.Y.S. 1039, 136 App.Div. 253, affirmed 1911, 96 N.E. 1110, 202 N.Y. 622.

Trustees were to use income of a trust fund by paying it to a public library, or applying it to the support of a library and its general purposes, or applying it to the purchase of books. The word "or" did not restrict the trustees to a choice between the three methods, but allowed them to use any or all three. *Industrial Trust Co. v. Nolan*, 1948, 59 A.2d 542, 74 R.I. 178.

Trustees were directed to found a school to educate children in agriculture. When this proved impractical, they were held empowered to use other means to accomplish the same end, namely, to aid public schools in giving agricultural education. *Mars v. Gibert*, 1913, 77 S.E. 131, 93 S.C. 455.

A trustee for public park purposes, under a direction from the settlor not to cut any trees except dead trees or where necessary to repair roads, may cut trees and sell the wood when the trees are infested by insects and the cutting is needed in order to prevent spread of the insects into other trees. There seems to be a power in the trustee to deviate, without court approval in advance, in case of an emergency. *President & Fellows of Middlebury College v. Town of Hancock*, 1947, 55 A.2d 194, 115 Vt. 157, citing text, §§ 395, 581.

Speaking of the means which may be used by trustees of a charitable trust to accomplish the purposes of the trust, the court in *Ross v. Freeman*, 1935, 180

A. 527, 534, 21 Del.Ch. 44, said: "The true test for the guidance of the court in passing upon the sort of permissible conduct in which the trustees of a charity may engage in the course of administering the trust, is first, the objects sought to be promoted and the reasonableness of the means adopted for their most efficacious accomplishment. \* \* \* After all, the rule for the trustees' guidance and for the court's is expressed in the question—what is most beneficial to the trust?"

Under the doctrine of deviation the trustees could sell trust real estate and add the proceeds to the corpus of a testamentary trust for educational purposes, even though the will directed the maintenance of the real estate "as an adjunct to" the educational purposes, since the will did not state how the property was to be used for such purposes. *Baily v. McElroy*, 1963, 195 N.E.2d 559, 120 Ohio App. 85.

Testator provided for the establishment of a charitable trust and directed that the trust income be accumulated for 20 years and added to principal. The trustee was given power to select a charitable organization or trust operating a hospital in the community as the beneficiary to receive the trust funds 21 years after testator's death. The court held that under the state charitable trust statute the trustee could amend the terms of the trust to avoid private foundation status and could select a charitable organization as the income and principal beneficiary in order to qualify the trust as a supporting organization under § 509(a)(3) I.R.C. *Flanagan State Bank v. Bromenn Healthcare*, 1986, 94 Ill.Dec. 303, 487 N.E.2d 1180, 140 Ill.App.3d 137.

The will provided that the remainder of the estate was to be distributed to such qualified charitable organizations as the co-trustees selected. The decision of a majority of the trustees was to control, except that the corporate trustee should be one of such majority. The court held that the corporate trustee must be one of the majority rather than a mere tie-breaker. The two individual trustees and the corporate trustee pro-



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the trust,<sup>15</sup> or make a contract the performance of which will

posed different beneficiaries to receive the remainder of the estate and could not settle their differences. The court held that adoption of the corporate trustee's plan of distribution by the trial court was not against the manifest weight of the evidence as to testator's intent. *Stuart v. Continental Illinois Nat. Bank and Trust Co. of Chicago*, 1977, 12 Ill.Dec. 248, 68 Ill.2d 502, 369 N.E.2d 1262, certiorari denied 1979, 100 S.Ct. 86, 444 U.S. 844, 62 L.Ed.2d 56, citing text, § 442.

15. Trustees for the purpose of running a school might lawfully become incorporated, the court saying: "With these large powers, and with this object in view, if the trustees named considered that an act of incorporation of themselves, and such persons of their nomination as they thought suitable, the best mode of securing a regular succession of trustees, a secure and faithful investment and administration of the funds, and a perpetual accomplishment of the design of the donor, they were authorized to ask for and accept such an act of incorporation, provided the provisions of such act were calculated to promote and carry into effect, and not in form or substance to defeat, the objects of the testator." *Sanderson v. White*, 1836; 18 Pick. (Mass.) 328, 337.

Property was given to a municipal corporation for a hospital charity. It was held lawful for the city to apply to the legislature for incorporation of a hospital to run the hospital in question, the title to remain in the city as trustee. The court said, by way of dictum, that it would be unconstitutional for the legislature to remove the city as trustee, since this would be the exercise of judicial powers by the legislature, and possibly, the impairment of the obligation of contracts. *Ware v. Fitchburg*, 1908, 85 N.E. 951, 200 Mass. 61.

The City of Boston was trustee under the will of Benjamin Franklin, with a board of managers of selectmen and clergy. This board was later changed to a board of managers appointed by

the court. It was held that the City of Boston had power to apply for and obtain an incorporation by act of the legislature, of the managers of this trust under the name of "Franklin Foundation." This did not change the title to the property which remained in the City of Boston, but merely involved the form of management, making the former individual managers now managers as a corporation. The Foundation, acting as managers of investments, could direct the treasurer of the City of Boston, who had custody of the funds, to invest in a specific way, but could not delegate to him discretion as to investments by making a general direction that he invest in securities legal for trusts in Massachusetts. *City of Boston v. Curley*, 1931, 177 N.E. 557, 276 Mass. 549.

*Contra*, see the following:

Trustees of a charitable trust incorporated the trust and conveyed to the corporation property which they had purchased in satisfaction of mortgages. An Oklahoma statute required a corporation buying on foreclosure or in satisfaction of a debt to dispose of land so purchased within a limited time, except in the case of trust companies. The court held that the charitable corporation was a "trust company" within the meaning of this exception. *Goss & Hamlyn Home v. State*, Okl.1955, 285 P.2d 423.

Where executors are directed to deliver residue to such charitable, benevolent, religious, or educational institutions as they might select, the executors were not authorized to organize a corporation to administer the fund over a period of years, but were intended to distribute it soon to institutions existing when the testator died. *Cochran v. McLaughlin*, 1942, 24 A.2d 836, 128 Conn. 638.

Trustees for a charitable school have no implied power to organize a charitable corporation to run the school and to convey to it, and when they attempt to do so, the deed is void and a subsequent mortgage given by the incorporated



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produce the prescribed charitable benefits,<sup>16</sup> or lease the property

school is also void. *Jordan v. Landis*, 1937, 175 So. 241, 128 Fla. 604.

See Mich.C.L.A. §§ 450.167, 450.158 (trustees for hospital or home for indigent, aged or sick may incorporate as a "trustee corporation").

16. Where the managers of a charitable hospital are given wide discretionary powers of management, they may enter into an affiliation agreement with another hospital which will involve the relocation of the first hospital but will be advantageous in accomplishing its fundamental objectives. *Taylor v. Baldwin*, 1952, 247 S.W.2d 741, 362 Mo. 1224.

A charitable corporation, founded for general charitable purposes, may contract with an educational institution of a charitable nature to pay its net income to that institution on certain conditions. *Z. Smith Reynolds Foundation v. Trustees of Wake Forest College*, 1947, 42 S.E.2d 910, 227 N.C. 500.

Trustees of a trust to educate poor children may not contract with public school authorities to permit the latter to manage or occupy trust property for the benefit of all children of the city, since this would be a perversion of the intent of the settlor. *Dornette v. Allais*, 1945, 63 N.E.2d 805, 76 Ohio App. 345.

A charitable school may properly administer its property through the making of a contract with another school for the joint use of school facilities. *Spring Garden Institute v. Wanamaker Institute*, 1942, 56 Pa.D. & C. 406.

Three trustees were given property to spend in the distribution of bibles. They made a contract with the Presbyterian Board of Publications, whereby the charitable trustees delivered to that Board about \$10,000 to be invested in plates for printing the bible and in printing bibles. The Board contracted to distribute annually, free bibles valued at 6% of the amount turned over to the Board, and the Board agreed to use the plates in printing bibles for sale or distribution free. The Board lived up to its contract for about fifty years, at which time the plates wore out, and the

trustees brought an action to recover the \$10,000 from the Board. It was held that the action of the trustees in employing the Board as an agency was lawful and that the intent was that the money should be exhausted by wearing out the plates and distributing bibles. Hence the trustees could not recover the \$10,000. *Atchison v. United Presbyterian Board of Publication*, 1920, 109 A. 597, 266 Pa. 47.

Trustees of a fund for hospital purposes might organize an agency to operate a hospital, whether a society, association or corporation. *Harter v. Johnson*, 1923, 115 S.E. 217, 122 S.C. 96.

Official Code Ga. Ann., §§ 108-213 to 108-216, authorizes the trustees of charitable trusts providing hospital services for the aged, sick, and poor to contract with a hospital authority in Georgia for hospital care, and with the written consent of the donor to contribute to such hospital authority towards the cost of equipment and construction. Contracts are to be recorded in the recording office in the county where the hospital authority is located.

Contract illegal

An individual to whom realty and other property is given to establish an old people's home has no authority to enter into a contract with a corporation to promote and manage a large residential project on the property which would be in part for the benefit of the well-to-do. *Kerner v. George*, 1943, 52 N.E.2d 300, 321 Ill.App. 150.

There were trustees to maintain a museum of archaeology at Harvard University and a professorship in that subject, and also to accumulate money to build a building to house that department. The trustees agreed with Harvard to turn over the principal of the trust fund to Harvard, the fund to become a part of the general funds of Harvard and the trustees of the charity to take from Harvard two-thirds of the income of the fund which they turned over, and to use it for museum maintenance purposes and the professorship, with Harvard to retain the remaining

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for the purpose of securing the charitable objectives through the lessee.<sup>17</sup>

one-third of the income and accumulate it for the purposes of constructing a building. The court held that this agreement would not be sanctioned by it. It was not necessary to accomplish the trust purposes. It was a change in the plan of management prescribed by the settlor. *Winthrop v. Attorney General*, 1880, 128 Mass. 258.

Funds were given to Harvard College to be used for education in applied sciences. Harvard made a contract with the Massachusetts Institute of Technology, whereby Harvard paid over to the Institute three-fifths of the income of this trust fund, to be used for education in applied sciences by the Institute. Harvard was, under the contract, to maintain its investment duties and merely delegate to the Institute the management of the education in applied sciences. It was held that this contract was not legal, that the intent of the settlor was that education of that type be carried out at Harvard. The court stated the donor "intended that not only the investment of the endowment funds, but the education which his endowment was to make possible should be under the control and direction of the University, its government and administration." *Harvard College v. Attorney General*, 1918, 117 N.E. 903, 228 Mass. 396, 410.

The contract of a nonprofit athletic association designating a private company as exclusive promoter of the association's marathon was void as involving improper delegation of authority to the association's president. However the promoting company was entitled to recover the reasonable value of its services on a quantum meruit basis. The board of the association was not empowered to delegate to its president the right to make an extraordinary contract which encumbered substantially all of its assets. *Boston Athletic Associ-*

*ation v. International Marathons, Inc.*, 1984, 467 N.E.2d 58, 392 Mass. 356.

17. *City of Richmond v. Davis*, 1886, 3 N.E. 130, 103 Ind. 449.

Trustees for educational purposes could lease land which they owned to a city for the purpose of having it carry on a school. *City of Richmond v. Davis*, 1886, 3 N.E. 130, 103 Ind. 449.

Where buildings held in trust for charity are dilapidated and the trustees have no funds for repairs or maintenance of the charity, a lease of the property to persons who agree to erect new buildings and use the property for the purposes of the trust will be upheld. *Trustees of Madison Academy v. Board of Education*, Ky.1894, 26 S.W. 187.

Where property is given to a city in trust to furnish educational and entertainment benefits to its citizens, the trustee has power to lease part of its real estate to a moving picture operator in order to perform part of its functions. *John Wright & Associates, Inc. v. City of Red Wing*, 1960, 106 N.W.2d 205, 269 Minn. 111.

Trustees of land to operate a school for inhabitants of the town were held entitled to lease the land to the Methodist church for a school, or employ that church to run a school, but it was stated that the trustees could not convey the fee to the church for school purposes. *Pierce v. Weaver*, 1912, 65 Tex. 44.

But, in another case, it was held that where land was conveyed to trustees to provide a site for a schoolhouse to educate children, a lease of the premises, in consideration of a nominal rent and on the agreement of the lessee that a church should be there erected, to be used to educate colored youth, was void, as not impliedly authorized by the deed of trust. *Thornton v. Harris*, 1906, 53 S.E. 341, 140 N.C. 498.