No. 450A08-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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HARRIETT HURST TURNER and JOHN HENRY HURST	)	
v	)	
THE HAMMOCKS BEACH CORPORATION, INC., 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	)	From Wake County No. 06CVS18173 No. COA11-1420

****

PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Defendant Hammock Beach Corp., Inc.)
(Filed 22 January 2013)
and
PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Defendant N.C. State Board of Education)
(Filed 23 January 2013)
and
CONDITIONAL PETITION FOR DISCRETIONARY
REVIEW UNDER G.S. 7A-31
(Plaintiffs)
and
CONDITIONAL PETITION FOR WRIT OF CERTIORARI
TO REVIEW ORDER OF SUPERIOR COURT OF WAKE COUNTY
(Plaintiffs)
(Filed 4 February 2013)

****

No. 450A08-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HARRIETT HURST TURNER and JOHN HENRY HURST,

Plaintiffs,

v.

THE HAMMOCKS BEACH CORPORATION, INC., 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.

From Wake County
No. 11-1420

****

THE HAMMOCK'S BEACH CORPORATION'S
PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. 7A-31

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant Hammocks Beach Corporation, Inc. ("HBC"), through counsel and pursuant to Rule 28(f) of the North Carolina Rules of Appellate Procedure, hereby adopts by reference the Petition for Discretionary Review of Defendant the

State Board of Education (the "Board"), in its entirety, and respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals filed 17 January 2013 in this case. For all the reasons stated in the Board's Petition, and for the additional arguments included below, the Supreme Court should hear the case on the merits.

REASONS WHY CERTIFICATION SHOULD ISSUE

Based on the jury's verdict, there is no question that HBC will not remain as trustee over the 289 acre tract (the "Trust Property") that remains in the charitable trust that Dr. and Mrs. Sharpe created in 1950 (the "Sharpe Trust" or the "Trust"). For that reason, HBC has no pecuniary or other self-interest in the result of this litigation. But the trial court was right to tender the trusteeship to the Board, and the Court of Appeals disregarded the public interest and the jurisprudence of this state when it summarily barred the Board from assuming the role of trustee.

I. THE PUBLIC INTEREST DEMANDS THAT A CHARITABLE TRUST BE PRESERVED WHERE IT IS POSSIBLE FOR IT TO CONTINUE AS PLANNED BY THE SETTLORS.

The decision of the Court of Appeals to bar the Board from serving as trustee disregards the fact that the Board, which Dr. and Mrs. Sharpe specifically selected as successor trustee, is ready, willing, and able to accept the role of trustee and fulfill the Trust's purposes. The Sharpes chose the Board as successor trustee, and preferred that the Trust be continued with a new trustee rather than having the

property pass free of the Trust. (Doc. Ex. p. 2) The Board passed a resolution expressing its intention to serve. (R at 538) Plaintiffs readily admit that the Trust purposes outlined by the Sharpes can be achieved by some trustee other than HBC. (*See* Tr. Vol. VI at 1078 ("[W]e absolutely agree that [fulfillment of the Trust purposes] is practical by some trustee . . . ." (emphasis added); R at 795 ("[T]here's any number of way that this thing [the Trust] could have been successful since 1987."); R at 796 (naming beneficiary groups, "who could be achieving the trust purposes, and Harriet and John would never [have] had to file this lawsuit.")) No barrier remains to the Sharpe Trust continuing with a new trustee, as intended by the settlors, and so the Trust should be preserved.

II. THE FAIRNESS OF THE LEGAL SYSTEM WILL BE JEOPARDIZED IF COUNSEL IS PERMITTED TO SECURE JURY VERDICT BY MISLEADING THE JURY AS TO THE CONSEQUENCE OF ITS VERDICT.

Plaintiffs got exactly what they asked for and have no basis to contest the Board's acceptance of its role as trustee. Plaintiffs represented to the jury, immediately before deliberations, that the Board had the choice to step-in as trustee. (T VII p1215, R at 803) The decision of the Court of Appeals fails even to mention the fact that Plaintiffs secured a jury verdict by representing that the Trust could continue with the Board as trustee. Following a favorable verdict, the trial court gave the Plaintiffs exactly the order they sought. It removed HBC and

substituted the Board as Trustee. Plaintiffs should not be permitted to profit from intentionally misleading the jury.

III. PRESERVATION OF THIS IMPORTANT CHARITABLE TRUST ADVANCES THE PUBLIC INTEREST AND THE TRUST BENEFICIARIES SHOULD NOT BE PUNISHED BECAUSE OF A CHANGE IN TRUSTEE.

The province of a charitable trust is to serve the interests of the public. In this instance, the Sharpe family established the Trust to ensure that marginalized people, who otherwise were excluded by law, would have access to preserved, beautiful beachfront property. Although race no longer is the fulcrum on which such exclusions turn, income and wealth still are. Without the access rights provided by Dr. Sharpe's prescience, most of the citizens of this great state will be excluded from the land and the Trust purposes thwarted . This Court should protect charitable trusts.

Moreover, Plaintiffs should not be permitted to terminate a charitable trust, and seize the Trust Property for themselves, because of some perceived error by a trustee. By barring the Board from serving as trustee, the Court of Appeals subjects much more than only that state agency to harm. Its decision harms the many groups that have used the Trust Property over the years and the even greater number of groups that would benefit from the property once the Board assumes its role as trustee.

And the court's decision shows indifference for the express desires of the Sharpes, instead preferring to dissolve the trust for what only can be understood as a technicality—that the Board must be bound by the opinion it offered in 2007 as to the effect of the Consent Judgment. Until this Supreme Court ruled in Turner II that the mutual releases and property relinquishments by the parties to the 1987 Consent Judgment were ineffective, the Board's 2007 position—that it did not have any interest in the HBC land—was completely consistent with the 1987 intent of the parties. This Supreme Court's ruling in Turner II was a watershed moment that changed the law of the case and rendered the parties' prior positions moot. But even assuming that the Board's statements in 2007 could be interpreted as a refusal to serve as trustee, that result still is no basis to terminate the trust. The Board made those statements long before the trusteeship actually was tendered to it, and the Board's statements did not prevent Plaintiffs from obtaining a favorable jury verdict. Moreover, Plaintiffs' assertion to the jury that Board would be tendered and could accept the trusteeship demonstrate that Plaintiffs did not rely to their detriment on any opinions made by the Board.

IV. CONCLUSION

The Court of Appeal's decision was unfounded in law, against the public interest, and should be reversed. For all the reasons above, we respectfully ask that this Court hear the case on the merits.

Respectfully submitted this the 22nd day of January 2013.

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N.C. App. R. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **PETITION FOR DISCRETIONARY REVIEW** has been served upon the parties in this lawsuit by United States mail, first class, postage prepaid and addressed as follows:

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/s/ Frank E. Emory, Jr.

NO. 450A08-2

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

HARRIETT HURST TURNER and JOHN HENRY HURST,

Plaintiffs-Appellants,

v.

THE HAMMOCKS BEACH CORPORATION, INC., 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. COA11-1420

****

STATE BOARD OF EDUCATION'S
PETITION FOR DISCRETIONARY REVIEW

****

SUBJECT INDEX

TABLE OF AUTHORITIES iii

FACTS 4

REASONS WHY CERTIFICATION SHOULD ISSUE ... 11

I. THE SUBJECT MATTER OF THIS APPEAL HAS SIGNIFICANT PUBLIC INTEREST 11

II. THIS CASE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE 13

A. Nothing in the Board's 2007 Answer or Motion to Dismiss Constitutes a Judicial Admission Precluding the Court from Tendering and the Board from Accepting the Property as Successor Trustee 13

B. Plaintiffs Are Themselves Estopped from Challenging the Trial Court's Tender to the Board and the Board's Appointment as Trustee 18

C. Appointment of the State Board of Education as Successor Trustee and Maintenance of the Trust is Consistent with the Sharpes' Intent and Public Policy. 23

III. THE DECISION OF THE COURT OF APPEALS APPEARS TO BE IN CONFLICT WITH DECISIONS OF THIS COURT 24

ISSUES TO BE BRIEFED 24

CERTIFICATE OF SERVICE 27

APPENDIX:

Turner v. Hammocks Beach Corp.,
No. COA11-1420
(N.C. App. Ct. Dec. 18, 2012) ..... App. 1-14

"Resolution Supporting State Acceptance of
Successor Trustee Responsibilities for
the "The Hammocks" Property Board of
Commissioners, County of Onslow,
State of North Carolina" ..... App. 15-16

"Resolution Urging State Acceptance of Successor
Trustee Responsibilities for 'The Hammocks'
Property," Carteret County
Board of Commissioners ..... App. 17-18

"Resolution 2010-21 A Resolution Urging State
Acceptance of Successor Trustee Responsibilities
for 'The Hammocks' Property,"
Swansboro Board of Commissioners ..... App. 19-20

TABLE OF AUTHORITIES

CASES

Anderson v. Assimos, 356 N.C. 415,
572 S.E.2d 101 (2002) 22

Edmisten v. Sands, 307 N.C. 670,
300 S.E.2d 387 (1983) 23

Estrada v. Burnham, 316 N.C. 318,
341 S.E.2d 538 (1986) 14, 24

Frugard v. Pritchard, 338 N.C. 508,
450 S.E.2d 744 (1994) 20

Jones v. Durham Anesthesia Associates, P.A.,
185 N.C. App. 504, 648 S.E.2d 531 (2007) 14

New Amsterdam Casualty v. Waller,
323 F.2d 20 (4th Cir. 1963) 14

Outer Banks Contractors, Inc. v. Forbes,
302 N.C. 599, 276 S.E.2d 375 (1981) 14, 24

Powell v. City of Newton, 364 N.C. 562,
703 S.E.2d 723 (2010) 22

State ex rel. Carringer v. Alverson,
254 N.C. 204, 118 S.E.2d 408 (1961) 14, 24

State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993) 20

Turner v. Hammocks Beach Corp., 192 N.C. App. 50,
664 S.E.2d 634 (2008) ("*Turner I*") 7

Turner v. Hammocks Beach Corp., 363 N.C. 555, 681 S.E.2d 770 (2009) ("*Turner II*") 7, 8, 15, 16

Weil v. Herring, 207 N.C. 6, 175 S.E. 836 (1934) 22

Whitacre Partnership v. BioSignia, Inc., 358 N.C. 1, 591 S.E.2d 870 (2004) 22

STATUTES AND RULES

N.C.G.S. § 1A-1, Rule 8 cmt. sec. (*b*). (2011) 18

N.C.G.S. § 7A-31(c) (2011) 2

N.C.G.S. § 146-26 (2011) 10

N.C. R. Civ. P. 12(b)(6) (2013) 7

SECONDARY SOURCES

2 K. Broun, Brandis and Broun on North Carolina Evidence § 198 (6th ed. 2004) 14

29A *Am. Jur.* 2d Evidence § 783 (2008) 14

30B Michael H. Graham, Federal Practice & Procedure Evid. § 7026 (Interim Edition 2001) ... 15

Black's Law Dictionary 146 (8th ed. 2004) 18

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HARRIETT HURST TURNER and JOHN HENRY HURST, Plaintiffs-Appellants, v. THE HAMMOCKS BEACH CORPORATION, INC., 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. COA11-1420

****

STATE BOARD OF EDUCATION'S
PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 15(b) of the North Carolina Rules of Appellate Procedure, Defendant-Appellee North Carolina State Board of Education (the "Board") respectfully petitions the Supreme Court of North Carolina to certify the decision of

the Court of Appeals, *Turner v. Hammocks Beach Corp.*, No. COA11-1420 (N.C. Ct. App. Dec. 18, 2012) (hereinafter "Slip op.") (attached as Appendix ("App.") 1-14), for discretionary review[1] on the grounds that the subject matter of this appeal has significant public interest, the cause involves legal principles of major significance to the jurisprudence of the State, and the decision of the Court of Appeals appears likely to be in conflict with a decision of this Court. *See* N.C.G.S. § 7A-31(c) (2011).

Over 60 years ago, Dr. and Mrs. William and Josephine Sharpe executed a trust instrument that preserved for educational and recreational purposes a unique natural resource – a large tract of undeveloped coastal property in Onslow County, North Carolina. The decision of the Court of Appeals allows the Trust to be terminated in disregard of the Sharpes' intent and results in the trust property being turned over to private individuals, thereby ensuring that sooner or later the land that Dr. Sharpe sought to preserve will be bulldozed to make way for private homes, condominiums, or motels.

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[1] The Board originally attempted to file this Petition for Discretionary Review yesterday, 22 January 2013, but mistakenly transmitted its electronic filing to the Court of Appeals rather than this Court. Meanwhile, however, the Board's co-defendant, Hammocks Beach Corporation, Inc., successfully filed its own Petition for Discretionary Review in this Court on 22 January 2013. The Board therefore is re-filing its Petition pursuant to N.C. R. App. P. 15(b), which states that "[i]f a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed."

The uniqueness of this property cannot be exaggerated. The property is one of the few remaining examples of a pristine coastal ecosystem. At 289 acres, this tract is one of the largest privately held coastal waterfront maritime forests along the mid-Atlantic coast. The decision of the Court of Appeals deprives the people of this State of the educational and recreational benefits of this natural property that Dr. Sharpe sought to preserve in perpetuity.

Consequently, the outcome of this Petition is of great public importance. The importance of this case is reflected by resolutions filed by several local governments urging the State to exercise the power granted under the trust instrument to serve as a substitute trustee. It is the established public policy of this State to preserve charitable trusts if at all possible. The decision of the Court of Appeals has erroneously taken that power away from the State, thereby resulting in substantial harm to all North Carolina residents.

The case also is vitally important because the decision below threatens to undermine the integrity of our judicial system. Here, Plaintiffs' counsel emphasized to the jury that before the trust could be terminated and this property placed in private hands, the Board would first have the option to serve as the successor trustee. Thus, unless the Court of Appeals' decision is reversed, the jury will have been misled into believing that its verdict could result in the fulfillment of Dr. Sharpe's intent.

Although the Board is ready and willing to do so, the Court of Appeals' decision now would bar the Board from becoming the successor trustee and preserving this critical ecosystem for recreational and educational benefit to the public.

The importance of this case merits this Court granting review.

FACTS

The 289 acres of undeveloped coastal property at issue in this litigation (the "Trust Property") was originally part of a nearly 10,000-acre grant of land to the Hammocks Beach Corporation, Inc. ("HBC"), as trustee of a charitable trust (the "Trust"), through a deed dated 10 August 1950 and a written agreement dated 6 September 1950 (hereinafter the "Deed" and "Agreement"), by Dr. William Sharpe and his wife, Josephine W. Sharpe. The Deed provided in relevant part that the property 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 [HBC]."[2] (Doc. Ex. p. 1) The Trust Agreement was of similar import and noted that in formulating their plan for the Trust, the Sharpes and Hursts "realized the benefit that might accrue to *all the teachers of the State* and others as provided in the Charter." (Doc. Ex. p. 4 (emphasis added)) The original charter of HBC noted that, although the Trust was intended to

[2] Remarkably, the Court of Appeals' opinion incorrectly states that HBC served "as trustees to the Hursts." Slip op. at 3.

"safeguard" its benefits especially to black teachers, that fact was "not to be interpreted as undue discrimination against any other group." (Doc. Ex. p. 37) The Deed further provided:

> [I]f at any time in the future it becomes impossible or impractical to use said property 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 [HBC], 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 [HBC] to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants . . . .

(Doc. Ex. p. 2)

Subsequently, 2,000 oceanfront acres were conveyed by HBC as trustee, with the consent of all then-interested parties, to the State of North Carolina. Those 2,000 acres now comprise Hammocks Beach State Park. Also, HBC acquiesced in the claim by the State of North Carolina to superior title as sovereign to approximately 7,000 acres of coastal marshland. Thus, as of 1986, approximately 1,000 acres remained in the Trust.

In 1986, the Sharpe and Hurst heirs sought to terminate the Trust, and HBC filed a declaratory judgment action to quiet title to the Trust Property. That action was settled by a 1987 Consent Judgment (the "Consent Judgment"), under which the

property was divided into three shares. HBC, with additional authority, retained title as trustee to the 289 acres now at issue "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." (Doc. Ex. p. 21) The Sharpe and Hurst heirs were granted clear title to the remaining several hundred acres of property. (Doc. Ex. p. 22)

As reflected in the 1987 Consent Judgment, the Attorney General at that time advised the superior court that the "the Board could not, and will not, spend tax revenues for the purpose of administering or improving a racially segregated facility," and thus that the Board "has no interest in succeeding Hammocks Beach Corporation as trustee and would not agree to do so, and otherwise takes no position with respect to this litigation." (Doc. Ex. pp. 272, 274)

The signers of the Consent Judgment – including the two individual Plaintiffs in this case – accepted that because of the desegregation that followed passage of the Civil Rights Act of 1964, there had been a change of circumstances since the Trust was created. Nevertheless, all parties to the Consent Judgment agreed that the Trust should continue, as modified, with respect to the 289 acres now at issue. (R p 25 (acknowledging the "virtual disintegration of the organizations for black people which were contemplated by Dr. Sharpe as primary beneficiaries" of the Trust)) On the heels of the Consent Judgment, HBC amended its charter in 1989 to remove all

references to race and to conform it to requirements of the Internal Revenue Code for tax-exempt charities. The 1950 Deed and Agreement themselves made no mention of race.

In December 2006, two of the Hurst heirs, Plaintiffs Harriett Hurst Turner and John H. Hurst, filed the underlying action against HBC, the heirs of Dr. and Mrs. Sharpe, and the Board and Attorney General Roy Cooper in his official capacity (the "State Defendants"), seeking termination of the Trust and other, related relief. HBC moved to dismiss the action under Rule 12(b)(6), arguing that the Consent Judgment entirely expunged Plaintiffs' interests in the Trust Property. (R p 42) The State Defendants answered separately and also moved to dismiss based on their similar (but mistaken) belief that the Consent Judgment expunged the Board's interest. (R p 92) The trial court denied HBC's motion but granted the State Defendants' motion "in light of the absence of any objection from the plaintiffs or other defendants." (R p 97).

Upon interlocutory appeal by HBC, the North Carolina Court of Appeals reversed the trial court as to the dismissal of HBC, finding that the Consent Judgment had expunged the Plaintiffs' interest in the property. *Turner v. Hammocks Beach Corp.*, 192 N.C. App. 50, 664 S.E.2d 634 (2008) ("*Turner I*"). However, in *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 681 S.E.2d 770 (2009) ("*Turner II*"), this Court disagreed. The Court noted that the Consent Judgment declared that the

remaining property is "subject to the trust terms," and held that the Consent Judgment does not "contain language that clearly supersedes the terms of the original trust in the event of impossibility or impracticability." *Turner II*, 363 N.C. at 560-61, 681 S.E.2d at 775. Consequently, this Court held that the trial court had properly denied HBC's motion to dismiss and remanded the case for trial.

The case was tried to a jury in September and October, 2010. At the close of their argument to the jury, Plaintiffs told the jury that if it ruled for Plaintiffs on all three issues and caused the removal of HBC as trustee, there would be a tender to the Board to see if it wished to serve as successor trustee:

> [MR. FRANCIS:] Now, so you won't be confused about it, *there is language in the deed*, Exhibit Number 1, that talks about *the state's role in being successor trustee* and declining that and what's going to happen. That issue is not before you, and so you haven't heard any evidence about it . . . .
>
> . . . .
>
> . . . *If you vote yes, yes, yes*, then the next step in this process for the court to undertake is that there *will be a tender* to the state *to see whether they wish to serve as a successor trustee. So that you're not confused* about that from the language in the deed, I wanted you to know *that is what's going to happen.*

(TVII p 1215, ln 14 – p 1216, ln 4 (emphasis added))

Thereafter, the jury returned a verdict for Plaintiffs on the three issues submitted to it, finding that (1) the 1987 Consent Judgment did not expunge Plaintiffs'

contingent, future interest in the property; (2) it had become "impossible or impracticable" to use the Trust Property for the Trust purposes; and (3) HBC's Board had acted improperly by not making this determination.

Following the verdict, Plaintiffs, consistent with their statements to the jury, agreed with the trial court that tender to the Board was the appropriate next step:

> MR. FRANCIS: It seems to me that you just said the next step is to ascertain whether the State Board of Education is going to serve as successor trustee or is going to, and as I understood *may* be the case, reiterate their declination to serve.
>
> THE COURT: Absolutely.
>
> MR. FRANCIS: And it seems to me that it's really not necessary for the Court to have a hearing just on that issue. They can just make that known to me and Mr. Emory and then submit that as a motion in the cause in this case without having a hearing on it. *And then if they choose to be the successor trustee, then we don't need to get to the next issue because they take it over.*

(TVII p 1276, ln 16 – p 1277, ln 3 (emphasis added))

The trial court then entered both its Judgment and a separate Order (the "26 October Order"). The Judgment recounted the jury's verdict on the three issues and ruled, *inter alia*,

> that [HBC] shall be removed as Trustee . . . upon the formal appointment of the [Board] as successor trustee . . . or, in the event that the [Board] refuses to accept appointment to administer the trust . . , upon entry of an order distributing the trust property . . . .

(R p 120) The 26 October Order set a hearing at which the successor trusteeship would be formally tendered to the Board and directed the Board to indicate "whether it wishes to accept appointment as successor trustee." (R pp 122-23)

On 4 November 2010, the Board, in response to the 26 October Order and Judgment, adopted a resolution indicating its decision to accept appointment as substitute trustee, subject to the approval of the Council of State per N.C.G.S. § 146-26. (Doc. Ex. pp. 424-26) The resolution was communicated in writing to the Court and all parties.

On or about 6 December 2010, Plaintiffs filed and served their Motion for Reconsideration of the 26 October Order. On 3 January 2011, a hearing was held by the trial court "for the purpose of formally tendering to the [Board] the appointment as successor trustee." (R p 236) At the end of the hearing, the court rejected the Motion for Reconsideration and appointed the Board as successor trustee subject only to the statutorily required approval of the Council of State. Its rulings were reduced to writing in an Order filed on 12 January 2011 (the "12 January Order"). (R pp 236-42) On 26 January 2011, Plaintiffs filed their Notice of Appeal from both the 12 January Order and the 26 October Order. (R p 254)

The case was heard in the Court of Appeals on 23 April 2012, and on 18 December 2012 the Court of Appeals filed its decision reversing the trial court and remanding the case.

REASONS WHY CERTIFICATION SHOULD ISSUE

I. THE SUBJECT MATTER OF THIS APPEAL HAS SIGNIFICANT PUBLIC INTEREST.

As discussed above, there is enormous public interest in preserving the unique, undeveloped, and large coastal property at issue in this case in charitable trust for recreational and educational purposes, as intended by the Sharpes. The property encompasses an important variety of natural coastal habitat, including wetlands, marshes and maritime forest, along with the native bird and animal species that thrive there. Although the few man-made structures on the property have deteriorated, the natural resources have been managed in an "excellent way." "The forest is healthy, the wetlands are intact, and [there is] abundant wildlife." (TVI p 956) This is one of the few remaining natural coastal areas of such size on the East Coast of the United States.

The public interest in this matter has been expressed not only in numerous newspaper articles and letters, but also in formal resolutions adopted by the local governments of communities that include or are close to the property. For example, a resolution adopted by the Onslow County Board of Commissioners in December

2010 urged support for appointment of the Board as successor trustee, noting that "the remaining 289 acres of 'The Hammocks' trust property constitute a unique and irreplaceable natural resource of enormous educational, recreation[al], and environmental value that should be conserved for use within the objectives of the trust." App. 15-16. Similar resolutions adopted by the Carteret County Board of Commissioners and the Swansboro Board of Commissioners also are appended. App. 17-18, 19-20. These resolutions reflect the widespread local public interest in and support for the continued preservation of this property in trust for educational and recreational purposes.

If the Court of Appeals' decision stands and the trial court's appointment of the Board as successor trustee is overturned, the Trust will be dissolved and the property will be divided among various heirs of the Hurst family. The likely fate of the property is development as residential subdivisions, as happened to adjacent portions of the original mainland trust property that were distributed to the Hurst heirs in the 1987 Consent Judgment. (TIII p 475, ln 1-19) This not only would be contrary to the public's interest in preserving the property in its natural state, a condition that would best serve the intent of the settlors that the property be used for recreational and educational purposes, but also would violate the public policy of this State to preserve charitable trusts if at all possible.

II. THIS CASE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.

The Court of Appeals decided this case on just one of the issues raised by Plaintiffs. It held: "Where the North Carolina State Board of Education is judicially bound by admissions made in its answer and motion to dismiss, the trial court erred by appointing the North Carolina State Board of Education as successor trustee of the Trust property.'" Slip op. at 2. The Court of Appeals also said that "based on the disposition of plaintiffs' first argument, we need not reach plaintiffs' remaining arguments." *Id.* at 14. The Court of Appeals' failure to recognize and distinguish between binding factual admissions and non-binding legal conclusions or stipulations is of significant consequence to the jurisprudence of this State, as is its failure to address other important issues at stake in this litigation.

A. Nothing in the Board's 2007 Answer or Motion to Dismiss Constitutes a Judicial Admission Precluding the Court from Tendering and the Board from Accepting the Property as Successor Trustee.

The Board stated in its motion to dismiss that "[t]he Consent Judgment expunged any interest that the [Board] may have had in the Trust." (R p 94) The Board made consistent and nearly identical statements in its answer and before the trial court in 2007. These statements were not factual admissions, but legal conclusions as to the effect of the Consent Judgment. The Board's honest assertion

in 2007 as to the legal effect of the 1987 Consent Judgment, though now determined to be mistaken, does not constitute a judicial admission.

"A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of *withdrawing a particular fact* from the realm of dispute. Such an admission is not evidence, but it, instead, serves to remove *the admitted fact* from the trial by formally conceding its existence." *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981) (citations omitted; emphasis supplied); *Estrada v. Burnham*, 316 N.C. 318, 324-25, 341 S.E.2d 538 (1986); 2 K. Broun, § 198 at 112 (6th ed. 2004). A judicial admission "is a deliberate, clear, unequivocal statement" about a "concrete *fact*" within that party's knowledge, not a matter of law. *See* 29A *Am. Jur.* 2d Evidence § 783 (2008) (emphasis added); *see also Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 509, 648 S.E.2d 531, 535 (2007) (stating that a judicial admission is a formal concession of a particular *fact*).

In contrast, a stipulation that "involves a question of law [is] not binding on the courts." *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 208, 118 S.E.2d 408, 411 (1961); *accord New Amsterdam Cas. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963) ("When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would

prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them."); 30B Michael H. Graham, Federal Practice & Procedure Evid. § 7026 (Interim Edition 2011) (counsel's recitation of his legal conclusion concerning a matter at issue in the case is not a judicial admission).

The Board's statement in its 2007 motion to dismiss that "[t]he Consent Judgment expunged any interest that the [Board] may have had in the Trust" (R p 94) was a legal conclusion as to the effect of the 1987 Consent Judgment on the Board's future interest as contingent successor trustee.[3] That it cannot be a judicial admission of a fact is evidenced by this Court's later determination in *Turner II*. There, this Court noted that the Consent Judgment declared that the remaining property held by HBC remains "subject to the trust terms," and held that the Consent Judgment does not "contain language that clearly supersedes the terms of the original trust in the event of impossibility or impracticability." *Turner II*, 363 N.C. at 560-61, 681 S.E.2d at 775. Of course, the terms of the original trust in the event of impossibility or impracticability were that

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[3] The Court of Appeals, without evidentiary foundation, interprets the Board's statements in 2007 as expressing a lack of desire to be trustee. But the trusteeship had not yet been offered for the Board to accept or reject in 2007, because there had been no determination that it was impossible or impracticable for HBC to fulfill the Trust's purposes – a triggering event that was a condition precedent to the trusteeship being tendered.

> 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 Hammocks Beach Corporation [to the Sharpe and Hurst heirs].

(Doc. Ex. p. 2) However, because the Consent Judgment expressly provided that the "real property so vested in [HBC] as trustee shall be free and clear of any rights of the heirs" (R p 31), this Court held in *Turner II* that whether Plaintiffs' contingent interest as beneficiaries survived the Consent Judgment was ambiguous and an issue to be determined at trial.[4]

The effect of the jury verdict in October 2010 was that the Consent Judgment did not eliminate the Plaintiffs' interest as contingent beneficiaries. Upon the jury's simultaneous determination of the two issues relating to impossibility and impracticability, tender of successor trusteeship to the Board was the next step in the Sharpes' original Trust plan. That is precisely what Plaintiffs themselves told the jury would happen if it found for Plaintiffs, and it is also exactly what the trial court ordered.

The only admission *of fact* by the Board in 2007 was in paragraph 5 of the Board's Answer. The Board stated:

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[4] No such provision purported to eliminate the original terms requiring tender to the Board in response to a determination of impossibility or impracticability.

> 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.

(R p 93 ¶5 (emphasis added)) These admissions are, by their terms, expressly limited to the facts as they existed at the time of the 1987 Consent Judgment, when HBC's charter still contained language which could be interpreted as containing a preference for certain beneficiaries on the basis of race. In 1989, on the heels of the Consent Judgment, and consistent with the Consent Judgment's recognition of segregation's illegality, HBC amended its charter to remove all references to race. By 2007 – and by the time the Superior Court appointed the Board of Education as Trustee in 2011 – the Sharpe Trust had long since ceased to include any preference based on race. Therefore, the fact that the Board asserted *in 1987* that it would not expend public funds to operate a racially discriminatory trust was irrelevant in 2007 and is irrelevant to the Board's willingness to accept the trusteeship now. The terms of the Consent Judgment *did not* limit the Board's ability – going forward – to accept trusteeship of a non-discriminatory Trust in the future if it became impossible or impracticable for HBC to fulfill the terms of the reconstituted Trust.

Contrary to the opinion of the Court of Appeals, the remaining allegations of Paragraph 38 of the Complaint consist not of facts, but of Plaintiffs' legal conclusions.

As legal conclusions, they are not admitted in an answer even if they are not expressly denied. The requirement of Rule 8 of the Rules of Civil Procedure to admit or deny factual averments[5] in the complaint does not require that legal conclusions be admitted or denied. The official comment to Rule 8 finds the requirement of either denials or admissions of allegations to be confirmation that Rule 8(a) "contemplates *factual* pleadings, else the directive to admit or deny averments is meaningless." N.C.G.S. § 1A-1, Rule 8 cmt. sec. (*b*). (2011) (emphasis added).

The Court of Appeals' failure to recognize and distinguish between binding factual admissions and non-binding legal conclusions or stipulations involves principles of major significance to the jurisprudence of the State.

B. Plaintiffs Are Themselves Estopped from Challenging the Trial Court's Tender to the Board and the Board's Appointment as Trustee.

The question of whether Plaintiffs themselves are estopped also involves legal principles of significance to the jurisprudence of this State, which the Court of Appeals failed to consider.

Plaintiffs clearly and without any qualification told the jury that if it ruled for them on all three issues and caused the removal of HBC as trustee, there would be a tender to Board to see if it wished to serve as successor trustee:

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[5] An "averment" is "[a] positive declaration or affirmation of *fact*." Black's Law Dictionary 146 (8th ed. 2004) (emphasis added).

> [MR. FRANCIS:] Now, so you won't be confused about it, *there is language in the deed*, Exhibit Number 1, that talks about the state's role in being successor trustee and declining that and what's going to happen. That issue is not before you, and so you haven't heard any evidence about it . . . .
>
> . . . .
>
> . . . *If you vote yes, yes, yes*, then the next step in this process for the court to undertake is that there *will be a tender* to the state *to see whether they wish to serve as a successor trustee. So that you're not confused* about that from the language in the deed, I wanted you to know *that is what's going to happen.*

(TVII p 1215, ln 14 – p 1216, ln 4 (emphasis added)).

Following the verdict, Plaintiffs represented to the trial court that tender to the Board was the appropriate next step required under the Trust's terms.

> MR. FRANCIS: It seems to me that you just said the next step is to ascertain whether the State Board of Education is going to serve as successor trustee or is going to, and as I understood *may* be the case, reiterate their declination to serve.
>
> THE COURT: Absolutely.
>
> MR. FRANCIS: And it seems to me that it's really not necessary for the Court to have a hearing just on that issue. They can just make that known to me and Mr. Emory and then submit that as a motion in the cause in this case without having a hearing on it. *And then if they choose to be the successor trustee, then we don't need to get to the next issue because they take it over.*

(TVII p 1276, ln 16 – p 1277, ln 3 (emphasis added))

Consistent with the foregoing statements made by Plaintiffs, the trial court entered its Judgment and Order of 26 October 2010. The 26 October Judgment recounted the jury's verdict and ruled, *inter alia*,

> that [HBC] shall be removed as Trustee . . . upon the formal appointment of the [Board] as successor trustee . . . or, in the event that the [Board] refuses to accept appointment to administer the trust . . , upon entry of an order distributing the trust property . . . .

(R p 120)

Plaintiffs are bound by their statements to the trial court and should be estopped from adopting one position for their own benefit at trial and then subsequently taking an inconsistent position once the verdict and judgment had been entered and their earlier stance had become inconvenient to their interests. "A party may not complain of action which he induced." *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). A court will not grant a party relief from claimed prejudice where it results from that party's own conduct. *State v. Gay*, 334 N.C. 467, 485, 434 S.E.2d 840, 850 (1993). In *Gay*, the defendant appealed a verdict based on the admission of certain expert testimony and use of that testimony in closing arguments. The court rejected the defendant's assignment of error, finding that she was not permitted to challenge a verdict based on testimony that she introduced and incorporated into her closing argument. *Id.*

In this case, Plaintiffs' counsel directed the jurors to specific language in the Trust Agreement and explained to them – so they would not be "confused" as to what was going to happen if they voted in Plaintiff's favor – that the next step was for the property to be tendered to the Board. Plaintiffs never suggested to the jury that the Board was precluded from accepting the tender. The jury subsequently voted "yes" on all issues subject to the express instruction that the trusteeship would be tendered to the Board.

Plaintiffs' assertion to the jury at the conclusion of their closing argument was not an oversight or slip of the tongue on the part of their counsel – it served a strategic purpose. By implying that the Trust might continue if the Board accepted the trusteeship, Plaintiffs' argument effectively eliminated any traction that HBC may have gained by arguing that if Plaintiffs prevailed in having the trust terminated, the trust property likely would be developed into residential subdivisions, just as had occurred with the acreage the Hurst heirs had received in the Consent Judgment. (TVII p 1181, ln 12 – p 1182, ln 8; TIII p 475, ln 1-19)

Having expressly represented to the jury (if it voted "yes" on all three issues) and then to the trial court that the Trust Property would be tendered to the Board as successor trustee, Plaintiffs are judicially and equitably estopped from complaining about the precise procedure they urged the jury to vote for.

"[J]udicial estoppel prevents a party from acting in a way that is inconsistent with its earlier position before the court." *Powell v. City of Newton*, 364 N.C. 562, 569, 703 S.E.2d 723, 728 (2010). The doctrine requires a weighing of factors, most commonly whether:

> (1) the party's subsequent position is "clearly inconsistent with its earlier position"; (2) judicial acceptance of a party's position might threaten judicial integrity because a court has previously accepted that party's earlier inconsistent position; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party" as a result.

Id. (quoting *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 28-29, 591 S.E.2d 870, 888-89 (2004)).

It would threaten judicial integrity for this Court to allow Plaintiffs to take a position in stark contrast to the one they argued to the jury to secure a favorable verdict. Here, Plaintiffs' counsel – of his own initiative so the jury would not be "confused" – explained to the jury how it should interpret the language in the deed describing the necessary steps following a verdict for Plaintiffs. Plaintiffs should not now be permitted to assert a contradictory position and "swap horses . . . in order to get a better mount." *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 103 (2002) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

C. Appointment of the State Board of Education as Successor Trustee and Maintenance of the Trust is Consistent with the Sharpes' Intent and Public Policy.

As a matter of public policy there is no reason that the Board should be precluded from accepting the trusteeship. It is the public policy of North Carolina to preserve, to the fullest extent possible, the manifest intent of the grantor to bestow a gift for charitable purposes. *Edmisten v. Sands*, 307 N.C. 670, 300 S.E.2d 387 (1983). The end result of the Board succeeding as trustee will be that the charitable intent of the Trust settlors, Dr. and Mrs. Sharpe, will be accomplished and maintained. The Court of Appeals gave this public policy no consideration at all. This Court should consider this matter afresh.

There is no question that the Sharpes intended to create a charitable trust. They transferred specific real property to a nonprofit corporation as trustee to hold and use the same for "recreational and educational purposes." (Doc. Ex. p. 1) They provided that if HBC determined that it is impossible or impracticable for the trust property to be used for the stated purpose, the property may then be transferred to the Board to be held "in trust" for the stated recreational and educational purposes. It is completely in keeping with the Deed and Agreement – express writings of the Sharpes' intentions – that the Board succeed as trustee.

III. THE DECISION OF THE COURT OF APPEALS APPEARS TO BE IN CONFLICT WITH DECISIONS OF THIS COURT.

As specified more fully in section II.A. above, the decision of the Court of Appeals appears to be in conflict with decisions of this Court relating to binding judicial admissions of factual matters and statements, as opposed to stipulations or assertions as to questions of law, which are not binding on the courts. These decisions include *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 276 S.E.2d 375 (1981), *Estrada v. Burnham*, 316 N.C. 318, 341 S.E.2d 538 (1986), and *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 118 S.E.2d 408 (1961).

ISSUES TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Petitioner intends to present the following issues to be briefed.

1. Whether the Court of Appeals erred in reversing the Orders of the trial court tendering successor trusteeship to the State Board of Education.

2. Whether the Court of Appeals erred in reversing the trial court's appointment of the Board of Education as successor trustee, subject to Council of State approval.

3. Whether the Court of Appeals erred in ruling that the State Board of Education was judicially bound by admissions made in its answer and motion to dismiss.

4. Whether Plaintiffs were equitably and judicially estopped from challenging the tender of successor trusteeship to the Board of Education and the appointment of the Board of Education as successor trustee by Plaintiffs' own representations to the jury before verdict and to the trial court after the verdict concerning tender of the trusteeship to the Board of Education.

5. Whether the Trial Court properly appointed the State Board of Education as successor Trustee.

Respectfully submitted this 23rd day of January, 2013.

ROY COOPER
ATTORNEY GENERAL

Electronically submitted
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N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this motion as if they had personally signed.

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ATTORNEYS FOR NORTH CAROLINA
STATE BOARD OF EDUCATION

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Document in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal;

[X] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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This the 23rd day of January, 2013.

Electronic Submitted
James C. Gulick
Senior Deputy Attorney General

APPENDIX

Turner v. Hammocks Beach Corp.,
No. COA11-1420
(N.C. App. Ct. Dec. 18, 2012) . . . . . App. 1-14

"Resolution Supporting State Acceptance of
Successor Trustee Responsibilities for
the "The Hammocks" Property Board of
Commissioners, County of Onslow,
State of North Carolina" . . . . . App. 15-16

"Resolution Urging State Acceptance of Successor
Trustee Responsibilities for 'The Hammocks'
Property," Carteret County
Board of Commissioners . . . . . App. 17-18

"Resolution 2010-21 A Resolution Urging State
Acceptance of Successor Trustee Responsibilities
for 'The Hammocks' Property,"
Swansboro Board of Commissioners . . . . . App. 19-20

NO. COA11-1420
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

HARRIETT HURST TURNER and
JOHN HENRY HURST,
Plaintiffs,

v.

Wake County
No. 06 CVS 18173

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.

Appeal by plaintiffs from orders entered 26 October 2010 and 12 January 2011 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 23 April 2012.

The Francis Law Firm, PLLC, by Charles T. Francis and Alan Woodlief, Jr., and Bailey & Dixon, L.L.P. by Michael L. Weisel and Adam N. Olls, for plaintiffs-appellants.

Hunton & Williams LLP, by Frank E. Emory, Jr., Brent A. Rosser, and Ryan G. Rich, for defendant-appellee, The Hammocks Beach Corporation, Inc.

Attorney General Roy A. Cooper, by Special Deputy Attorney Generals James C. Gulick and Thomas J. Ziko, for defendant-appellee, the North Carolina State Board of Education.

BRYANT, Judge.

Where the North Carolina State Board of Education is judicially bound by admissions made in its answer and motion to dismiss, the trial court erred by appointing the North Carolina State Board of Education as successor trustee of the Trust property.

Facts and Procedural History

On 15 December 2006, plaintiffs Harriett Hurst Turner and John Henry Hurst filed a complaint against defendants The Hammocks Beach Corporation ("Corporation"), Nancy Sharpe Caird, Seth Dickman Sharpe, Susan Spear Sharpe, the North Carolina State Board of Education ("SBE"), and Roy A. Cooper, III, in his capacity as Attorney General of the State of North Carolina.

The complaint alleged the following: During the 1920's and 1930's, Doctor William Sharpe ("Dr. Sharpe") purchased 810 acres of high land on the mainland adjacent to Queens Creek and Foster's Bay in Onslow County, North Carolina. The highland portion was known as "the Hammocks." He also purchased adjacent property consisting of 2,000 acres of sandy beach outer banks and approximately 7,000 acres of marshland. Dr. Sharpe became closely acquainted with John and Gertrude Hurst ("Hursts"), who

moved onto the Hammocks, serving as managers and caretakers of the highland. Eventually, Dr. Sharpe communicated to the Hursts his desire to devise the Hammocks to them.

On 6 September 1950, Dr. Sharpe and Mrs. Hurst signed an agreement whereby Mrs. Hurst requested that Dr. Sharpe instead make a gift of the property in such a manner that African-American teachers and their then existing organizations could enjoy the Hammocks ("Agreement"). In 1950, by deed of gift ("Deed"), Dr. Sharpe deeded certain real property to the Corporation, as trustee to the Hursts. (The Agreement and Deed are collectively referred to as "the Trust").

The Corporation's charter stated that its purpose was "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 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 Corporation]."

A consent judgment was entered in 1987 stating that the Trust property originally consisted of approximately 10,000

acres. The 2,000 oceanfront acres, now known as Hammocks Beach State Park, were conveyed by the Corporation as trustee, to the State of North Carolina and now comprise Hammocks Beach State Park. The Corporation acquiesced in the claim by the State of North Carolina of title to approximately 7,000 acres of marshland. The deed provided the following:

> 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 [SBE], to be held in trust for the purpose herein set forth, and if the [SBE] 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 Corporation] 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.

In 1986, the Sharpe and Hurst heirs argued, through an action filed by the Corporation, that fulfillment of the terms of the Trust had become impossible or impracticable, that the Corporation had acted capriciously and contrary to the intent of the settlor of the Trust, that the Trust should be terminated, and that either a conveyance of all the property or an adjudication of title should be made to the Sharpe and Hurst families. Prior to trial, the parties reached a settlement that

was approved by the court in a consent judgment ("Consent judgment").

In the Consent judgment, the Corporation retained title as trustee to a portion of the land, with additional powers of administration given to the Corporation aimed at enabling it to improve the property to the extent reasonably necessary. The Consent judgment also vested in the Sharpe and Hurst families a portion of the real property in exchange for the relinquishment of certain rights, such as raising livestock, fishing, residency, recreation, etc., to be held solely by the Corporation as trustee.

The trial court found that the fulfillment of the terms of the Trust had become impossible or impracticable because

> [t]he 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 Consent judgment also stated that Dr. Sharpe's alternative plan of having the SBE serve as trustee in the event the terms of the Trust were impossible or impracticable failed for the

same reasons. Therefore, the Consent judgment provided that the Corporation, as trustee, was no longer under a prohibition against the mortgaging or sale of the property, as long as it received court approval, and as long as it furthered the purposes of the Trust.

Based on the foregoing, plaintiffs alleged that the Corporation had taken no steps since entry of the consent judgment in 1987 to improve the Trust property or to fulfill the purposes of the Trust, had failed to account for Trust funds, and had negligently mismanaged said funds. In their 2006 complaint, plaintiffs prayed that the court: enter an order requiring the Corporation to account for its administration of the Trust; enter an order terminating the Trust and vesting fee simple title to the Trust res in the contingent beneficiaries of the trust; award judgment in excess of $10,000.00 as compensatory damages; award judgment in excess of $10,000.00 for punitive damages; award interest on any judgment; and, award attorney's fees.

The Corporation moved to dismiss the action under Rules 12(b)(1) and 12(b)(3) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction and lack of proper venue. The trial court denied the Corporation's motion

in an order entered 15 June 2007. Thereafter, the Corporation filed a motion to dismiss and for a protective order pending resolution of the motion pursuant to Rules 12(b)(6) and 26(c). The SBE and the North Carolina Attorney General also filed a motion to dismiss, arguing that they were not proper defendants to the proceeding because the Consent Judgment had extinguished any interest that the SBE would have had in the trust and because the Attorney General had no intention of maintaining any action to enforce the trust.

On 24 August 2007, the trial court denied the Corporation's motion to dismiss and allowed SBE's motion; the trial court therefore dismissed all claims against SBE and the Attorney General with prejudice. Our Court heard an interlocutory appeal by the Corporation in *Turner v. Hammocks Beach Corp.*, 192 N.C. App. 50, 664 S.E.2d 634 (2008) ("Turner I"). In Turner I, we reversed and remanded with instructions to the trial court to grant the Corporation's motion to dismiss. *Id.* at 61, 664 S.E.2d at 642. The North Carolina Supreme Court then reversed our Court's holding that the trial court erred in denying the Corporation's motion to dismiss and remanded the matter for

further proceedings in the trial court.[1] *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 681 S.E.2d 770 (2009) ("Turner II").

Following a jury trial and jury verdict in favor of plaintiffs on all issues, the trial court thereafter entered a judgment and order on 26 October 2010. The 26 October 2010 judgment stated that the "Corporation shall be removed as Trustee of the Trust," upon the formal appointment of the SBE as successor trustee. The judgment also provided that in the event that the SBE refused to accept tender of appointment, the trust property would be distributed pursuant to the terms of the 1950 deed. A separate order also entered on 26 October 2010 acknowledged that SBE had previously declined to serve as successor trustee but stated that SBE was now entitled to tender of appointment as successor trustee to administer the Trust for the purposes set forth in the 1950 Deed and Agreement. The trial court then set a hearing date for a formal tender to SBE.

On 6 December 2010, plaintiffs filed a motion for reconsideration of the 26 October 2010 order and objected to the tender of appointment to SBE as successor trustee. Plaintiffs' motion for reconsideration was denied and their objection to the appointment of the SBE as successor trustee was overruled in an

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[1] There was no appeal from the trial court's dismissal with prejudice of all claims against SBE and the Attorney General.

order entered 12 January 2011. The trial court made procedural findings regarding deficiencies in plaintiffs' motion and made substantive findings regarding the merits of this case.[2] The 12 January 2011 order also formally appointed the SBE as successor trustee to administer the trust. From the 26 October 2010 and 12 January 2011 orders, plaintiffs gave notice of appeal.

Plaintiffs present the following issues on appeal: whether the trial court erred (I) in appointing the SBE as trustee based on (a) judicial admissions made by the SBE, (b) the doctrines of judicial and equitable estoppel, and/or (c) the principles of res judicata; and (II) in refusing to allow plaintiffs to pursue post-judgment discovery regarding the SBE's representation that

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[2] The 12 January 2011 order, included the following findings and conclusions: 1. The Plaintiffs' Motion does not specify the Rule of Civil Procedure under which Plaintiffs are applying for relief. The Motion seeks to alter or amend the Judgment and companion Order entered in this case to remedy alleged errors of law. Therefore, the Court deems it to be a motion under Rule 59 of the Rules of Civil Procedure. 2. Rule 59(e) requires that a motion to alter or amend a judgment "shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(e). The Plaintiffs served their Motion for Reconsideration on or about December 6, 2010, more than 10 days after the entry of judgment on October 26, 2010. 3. Even if Plaintiffs' Motion had been timely filed, motions to alter or amend judgments are limited to the grounds listed in Rule 59(a). Plaintiffs' Motion fails to specify a ground for relief recognized under Rule 59(a).

it would not and could not accept tender of appointment as trustee to the trust.

Standard of Review

Because these determinations each involve the application of legal principles and are properly classified as conclusions of law, we apply a *de novo* review. *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 516, 565 S.E.2d 716, 719 (2002) ("We review questions of law *de novo*.").

I

Plaintiffs first argue that the trial court erred in appointing the SBE as trustee where the SBE had made judicial admissions disclaiming any interest in the Trust and admitting that it "may not serve as successor trustee." We agree.

This Court has found that

> A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence.

Outer Banks Contractors, Inc. v. Forbes, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981) (citation omitted). It is "ordinarily made by a pleading (or lack thereof), or by a response (or failure to respond) to a pretrial demand for admissions, or by

stipulation entered into before or at the trial." Brandis & Broun on North Carolina Evidence Ch. no. 8 § 198 (7th ed. LexisNexis Matthew Bender). "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. Ronald Williams, Prof'l Ass'n*, 102 N.C. App. 355, 362, 402 S.E.2d 452, 456 (1991). Specifically, "[f]acts alleged in the complaint and admitted in the answer are conclusively established by the admission." *Harris v. Pembaur*, 84 N.C. App. 666, 670, 353 S.E.2d 673, 677 (1987) (citation omitted).

In the present case, paragraph 38 of plaintiffs' complaint stated the following:

> Because the trust purposes have become impossible or impracticable because the [SBE] may not serve as successor trustee, and in any event the substitution of the [SBE] 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 Corporation] to the heirs and descendents [sic] 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 descendents [sic] of the late Gertrude Hurst and the late John Hurst, as provided in the Deed and Agreement.

The SBE's Answer admitted the allegations set forth in paragraph 38 of plaintiffs' complaint by stating the following:

> 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.

On 9 August 2007, the SBE had filed a motion to dismiss as to their involvement in the case, stating that "[t]he Consent Judgment expunged any interest that the [SBE] may have had in the Trust[.]" Relying on the SBE's admissions and lack of interest in the trust, on 24 August 2007, the trial court granted the SBE's motion to dismiss and they were dismissed as a party to the action.

Defendants now claim that the SBE's statements made in their Answer and Motion to Dismiss were legal conclusions rather than factual admissions and that they should not be bound to those statements. Defendants rely on *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 14, 437 S.E.2d 519, 527 (1993) ("A stipulation as to the law is not binding on the parties or the court."), and *New Amsterdam Cas. v. Waller*, 323 F.2d 20, 24 (4th

Cir. 1963) ("When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them."). We are not persuaded.

The contents of paragraph 38 of plaintiffs' complaint, to which defendants admitted in their Answer, appear to be a concession that is "binding in every sense." *Patrick*, 102 N.C. App. at 362, 402 S.E.2d at 456. There is no allegation or indication of fraud, misrepresentation, undue influence or mutual mistake. On the contrary, defendants clearly and forcefully asserted to the court in their motion to dismiss that they had no more interest in the litigation. The trial court granted their motion and allowed them to be dismissed.

SBE's Answer admitting their lack of interest in the Trust and the impracticability of fulfilling the Trust purposes qualify as judicial admissions, thus, SBE should be bound to their admissions and the facts admitted conclusively established. Based on the foregoing, we reverse the orders of the trial court appointing the SBE as successor trustee of the

Trust property and instruct the trial court to enter an order consistent with this opinion.

Furthermore, based on the disposition of plaintiffs' first argument, we need not reach plaintiffs' remaining arguments.

Reversed and remanded.

Chief Judge MARTIN and Judge MCCULLOUGH concur.

Report per Rule 30(e).

RESOLUTION

SUPPORTING STATE ACCEPTANCE OF SUCCESSOR TRUSTEE RESPONSIBILITIES FOR THE "THE HAMMOCKS" PROPERTY BOARD OF COMMISSIONERS COUNTY OF ONSLOW, STATE OF NORTH CAROLINA

WHEREAS, in 1950 Dr. William Sharpe placed in trust an 810-acre property known as "The Hammocks" for a variety of educational and recreational purposes, which property was located along the coast of Onslow County; and

WHEREAS, the Wake County Superior Court has recently entered a judgment (06 CVS 18173) removing The Hammocks Beach Corporation as trustee of the property, and setting a hearing to formally tender to the North Carolina State Board of Education appointment as successor trustee, as provided in the terms of the trust; and

WHEREAS, a significant part of "The Hammocks" property was previously acquired by the State to create Hammocks Beach State Park; and

WHEREAS, the remaining 289 acres of "The Hammocks" trust property constitute a unique and irreplaceable natural resource of enormous educational, recreation, and environmental value that should be conserved for use within the objectives of the trust; and

WHEREAS, the primary purposes of Hammocks Beach State Park – education, recreation, and conservation – are consistent with the purposes and intentions of the trust; and

WHEREAS, Hammocks Beach State Park is a very valuable recreational and educational asset that serves the recreational and educational needs of county, regional, and statewide residents as well as numerous visitors from other states; and

WHEREAS, management of the trust property by the North Carolina Division of Parks and Recreation, on behalf of the State Board of Education, would fulfill the purposes of the trust and significantly enhance the value and potential of the state park; and

WHEREAS, Onslow County government would have input in the State Parks and Recreation Master Plan for the property; and

WHEREAS, the State Board of Education has, by resolution of November 4, 2010, indicated its willingness to be appointed as successor trustee of the property;

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the County of Onslow that:

1. The Governor and Council of State are strongly urged to approve, ratify, and support the State Board of Education's resolution to accept appointment as successor trustee and to accept stewardship of the property on behalf of the State of North Carolina.

2. The Governor and Council of State are urged to direct that the property, if assigned to the State Board of Education as successor trustee, be placed under the management of the North Carolina

Division of Parks and Recreation to insure fulfillment of the trust requirements and for administration of the property as an adjunct to the operations of Hammocks Beach State Park.

ADOPTED this the 6th day of December, 2010.

COUNTY OF ONSLOW

By: W. C. Jarman
Chairman, Board of Commissioners

ATTEST:

Jeffrey Lee Hudson
Clerk to the Board

RESOLUTION
URGING STATE ACCEPTANCE OF SUCCESSOR TRUSTEE RESPONSIBILITIES FOR "THE HAMMOCKS" PROPERTY

WHEREAS, in 1950, Dr. William Sharpe placed in trust an 810-acre property known as "The Hammocks" which was located along the coast of Onslow County, for a variety of educational and recreational purposes; and

WHEREAS, the Wake County Superior Court recently entered a judgment removing The Hammocks Beach Corporation as trustee of the property; and they set a hearing to formally tender the North Carolina State Board of Education appointment as successor trustee, as provided in the terms of the trust; and

WHEREAS, a significant part of "The Hammocks" property was previously acquired by the State to create Hammocks Beach State Park; and

WHEREAS, the remaining 289 acres of "The Hammocks" trust property constitute a unique and irreplaceable natural resource of enormous educational, recreation, and environmental value that should be conserved for use within the objectives of the trust; and

WHEREAS, the primary purposes of Hammocks Beach State Park are education, recreation, and conservation and are consistent with the purposes and intentions of the trust; and

WHEREAS, Hammocks Beach State Park is a very valuable recreational and educational asset that serves the needs of county, regional, and statewide residents, as well as numerous visitors from other states; and

WHEREAS, management of the trust property by the North Carolina Division of Parks & Recreation, on behalf of the State Board of Education, would fulfill the purposes of the trust and significantly enhance the value and potential of the State Park; and

WHEREAS, the State Board of Education has, by resolution dated November 4, 2010, indicated its willingness to be appointed as successor trustee of the property.

NOW, THEREFORE, BE IT RESOLVED by the Carteret County Board of Commissioners that:

1. The Governor and Council of State are strongly urged to approve, ratify, and support the State Board of Education's resolution to accept appointment as successor trustee, and to accept stewardship of the property on behalf of the State of North Carolina.

2. The Governor and Council of State are urged to direct that property, if assigned to the Board of Education as successor trustee, be placed under the management of the Division of Parks and Recreation to insure fulfillment of the trust requirements and for administration of the property as an adjunct to the operations of Hammocks Beach State Park.

ADOPTED, this the 12th day of January 2011.

Douglas W. Harris, Chairman
Carteret County Board of Commissioners

ATTEST:

Jeanette Deese, NCCCC
Clerk to the Board

RESOLUTION 2010-21
A RESOLUTION URGING STATE ACCEPTANCE OF SUCCESSOR TRUSTEE RESPONSIBILITIES FOR THE "THE HAMMOCKS" PROPERTY

WHEREAS in 1950 Dr. William Sharpe placed in trust an 810-acre property known as "The Hammocks" for a variety of educational and recreational purposes, which property was located along the coast of Onslow County; and

WHEREAS the Wake County Superior Court has recently entered a judgment removing The Hammocks Beach Corporation as trustee of the property; and setting a hearing to formally tender to the North Carolina State Board of Education appointment as successor trustee, as provided in the terms of the trust; and

WHEREAS a significant part of "The Hammocks" property was previously acquired by the State to create Hammocks Beach State Park; and

WHEREAS the remaining 289 acres of "The Hammocks" trust property constitute a unique and irreplaceable natural resource of enormous educational, recreation, and environmental value that should be conserved for use within the objectives of the trust; and

WHEREAS, the primary purposes of Hammocks Beach State Park – education, recreation, and conservation – are consistent with the purposes and intentions of the trust; and

WHEREAS, Hammocks Beach State Park is a very valuable recreational and educational asset that serves the recreational and educational needs of county, regional, and statewide residents as well as numerous visitors from other states; and

WHEREAS, management of the trust property by the North Carolina Division of Parks and Recreation, on behalf of the State Board of Education, would fulfill the purposes of the trust and significantly enhance the value and potential of the state park; and

WHEREAS the State Board of Education has, by resolution of November 4, 2010, indicated its willingness to be appointed as successor trustee of the property;

NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the Town of Swansboro that:

1. The Governor and Council of State are strongly urged to approve, ratify, and support the State Board of Education's resolution to accept appointment as successor trustee, and to accept stewardship of the property on behalf of the State of North Carolina.

2. The Governor and Council of State are urged to direct that the property, if assigned to the Board of Education as successor trustee, be placed under the management of the Division of Parks and Recreation to insure fulfillment of the trust requirements and for administration of the property as an adjunct to the operations of Hammocks Beach State Park.

Adopted by the Swansboro Board of Commissioners in special session, December 2, 2010.

Attest: Paula W. Webb
Paula W. Webb, Town Clerk

Scott Chadwick
Scott Chadwick, Mayor

TOWN OF SWANSBORO ★ CORPORATE SEAL ★ NORTH CAROLINA

J.B

Town of Swansboro
502 Church Street Swansboro NC 28584
(910) 326-4428 Phone (910) 326-3101 Fax

FAX COVER SHEET

Date: 1/5/11

Company: COUNCIL OF STATE

Attention: ROY A COOPER, III – ATTORNEY GENERAL

Fax #: (919) 716-6750

Person Sending Fax:

☑ Pat Thomas ☐ Paula Webb ☐ Marina Williams ☐ Jennifer Holland

☐ Mabel Odum ☐ Diane Scarborough ☐ Lea Mills ☐ Beth Aldrich

☐ Other _____

# of Pages Including this Cover Sheet: 2

Comments: Urgent Attention

RESOLUTION 2010-21 ATTACHED

No. 450A08-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

HARRIETT HURST TURNER and JOHN HENRY HURST, Plaintiffs-Respondents, 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-Petitioners.	)	From Wake County No. 06 CVS 18173 No. COA 11-1420

****

RESPONSE TO PETITIONS FOR DISCRETIONARY REVIEW
UNDER N.C. GEN. STAT. § 7A-31 AND
CONDITIONAL PETITION FOR WRIT OF CERTIORARI

****

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HARRIETT HURST TURNER and JOHN HENRY HURST, Plaintiffs-Respondents, 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-Petitioners.	)	From Wake County No. 06 CVS 18173 No. COA 11-1420

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INDEX

Page(s)

TABLE OF CASES AND AUTHORITIES.....ii

INTRODUCTION.....3

STATEMENT OF THE CASE AND FACTS.....7

REASONS WHY CERTIFICATION SHOULD NOT ISSUE.....17

I. THE UNANIMOUS, UNPUBLISHED DECISION OF THE COURT OF APPEALS DOES NOT INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFIGANCE TO THE JURISPRUDENCE OF THIS STATE.....17

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.....28

III. THE SUBJECT MATTER OF THIS APPEAL DOES NOT HAVE SIGNIFICANT PUBLIC INTEREST.....30

ADDITIONAL ISSUES TO BE BRIEFED.....34

CONDITIONAL PETITION FOR WRIT OF CERTIORARI.....35

CONCLUSION.....38

VERIFICATION.....40

CERTIFICATE OF SERVICE.....41

TABLE OF CASES AND AUTHORITIES

Cases — Page(s)

Bailey v. State, 351 N.C. 440, 445, 526 S.E.2d 657, 661 (2000) 19

Brown v. Mem'l Nat'l Home Found., 329 P.2d 118 (Cal. Dist. Ct. App. 1958) 32

Bumpers v. Cmty. Bank of N. Va., 718 S.E.2d 408 (N.C. Ct. App. 2011) 38

Bumpers v. Cmty. Bank of N. Va., 364 N.C. 195, 204–205, 695 S.E.2d 442, 449 (2010) 36, 37

Callaham v. Newsom, 251 N.C. 146, 149, 110 S.E.2d 802, 804 (1959) 31

Champs Convenience Stores, Inc. v. United Chem. Co., 329 N.C. 446, 451, 406 S.E.2d 856, 859 (1991) 36

Coletrane v. Lamb, 42 N.C. App. 654, 657, 257 S.E.2d 445, 447 (1979) 21

Garrett v. Rose, 236 N.C. 299, 307, 72 S.E. 2d 843, 848 (1952) 18

Mims v. Mims, 305 N.C. 41, 60, 286 S.E.2d 779, 792 (1982) 21

Misenheimer v. Burris, 360 N.C. 620, 620, 637 S.E.2d 173, 174 (2006) 36

Outer Banks Contractors, 302 N.C. 599, 604, 276 S.E.2d 375, 375 (1981) 21, 28

The Hammocks Beach Corporation v. The Fresh Air Fund, et al., 86-CVS-1466 (Onslow Co. Sup. Ct) 10

Turner v. Hammocks Beach Corp. (Turner II), 363 N.C. 555, 557, 681 S.E.2d 770, 772 (2009).....13, 20

Turner v. Hammocks Beach Corp. (Turner I), 192 N.C. App. 50, 664 S.E.2d 634 (2008).....13, 20

Va. Elec. & Power Co. v. Tillett, 316 N.C. 73, 76, 340 S.E.2d 62, 64–65 (1986).....36

Wall v. Sneed, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972).....18

Statutes

N.C. Gen. Stat. § 7A-31.....3, 24

N.C. Gen. Stat. § 36C-1-103(22).....18, 22

N.C. Gen. Stat. § 36C-4-410(b).....18, 19, 20, 22, 29

N.C. Gen. Stat. § 146-26 16

Other Authorities

George G. Bogert, The Law of Trusts and Trustees, § 393 n.5 (2010).....32

G. Gray Wilson, North Carolina Civil Procedure, 19-4 (3d ed. 2007).....18

Rule 15(b) of the North Carolina Rules of Appellate Procedure 17

Rule 15(d) of the North Carolina Rules of Appellate Procedure.....36, 37

Rule 16(a) of the North Carolina Rules of Appellate Procedure 36

Rule 21 of the North Carolina Rules of Appellate Procedure 38

Rule 30(e)(1) of the North Carolina Rules of Appellate Procedure 17

Rule 30(e)(4) of the North Carolina Rules of Appellate Procedure 18

No. 450A08-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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HARRIETT HURST TURNER and JOHN HENRY HURST, Plaintiffs-Respondents, 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-Petitioners.	)	From Wake County No. 06 CVS 18173 No. COA 11-1420

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RESPONSE TO PETITIONS FOR DISCRETIONARY REVIEW
UNDER N.C. GEN. STAT. § 7A-31 AND
CONDITIONAL PETITION FOR WRIT OF CERTIORARI

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs Harriett Hurst Turner and John Henry Hurst respectfully urge this Court to deny the Petitions for Discretionary Review filed by the State Board of

Education (the "Board") and The Hammocks Beach Corporation ("HBC"). The Petitions fail to establish any of the requirements for discretionary review under N.C. Gen. Stat. § 7A-31, as the unanimous, unpublished decision of the North Carolina Court of Appeals does not involve legal principles of major significance to the jurisprudence of this State, is not in conflict with decisions from this Court, and does not have significant public interest. The Court of Appeals' decision correctly applied well-settled principles of law, consistent with this Court's prior decisions, in an exceedingly narrow manner. Accordingly, this Court should deny the Petitions for Discretionary Review filed in this case.

INTRODUCTION

Contrary to the Board's self-serving assertions, the Court of Appeals' decision in this case preserved the intent of the settlors, Dr. and Mrs. Sharpe, that the trust property would pass to the heirs of John and Gertrude Hurst, the Plaintiffs in this action, upon a finding that the trust purposes had become impossible or impracticable and unequivocal refusal of the Board to be appointed successor trustee.

Plaintiffs, 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. They filed this lawsuit in 2006, seeking to terminate the trust because its purposes were impossible or impracticable, and

because the trustee, HBC, had breached its fiduciary duties and grossly mismanaged the property. The settlors included specific language in the trust calling for its termination upon a finding that its purposes had become impossible or impracticable.

Plaintiffs alone shouldered the expense and burden of this protracted litigation to terminate the trust. In bringing suit, Plaintiffs joined the North Carolina Attorney General and 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 an answer and motion to dismiss, admitting that a prior consent judgment expunged any interest it had in the trust, and that it had no interest in and would not serve as successor trustee. On this basis, Plaintiffs did not object to the Board's dismissal with prejudice from the case in its earliest stages, and the trial court granted this motion.

In the protracted time from filing to verdict, Plaintiffs engaged in hotly contested litigation against HBC, generating a published opinion from the Court of Appeals and this Court, and culminating in a verdict for Plaintiffs following a two-week jury trial. After a trial on the merits, a jury declared the trust purposes to be impossible or impracticable for any trustee, whether it be the prior trustee, HBC, or the putative successor trustee, the Board. The Board had previously recognized this fact when it filed its answer and motion to dismiss in the action, disavowing

any interest in the trust and admitting that it "may not serve as successor trustee." Only after Plaintiffs had prosecuted their action to a jury verdict removing HBC as trustee did the Board indicate any interest in this trust property and attempt an uncompensated taking of the property in contravention of the jury verdict and its own admissions and representations in this case.

Following the verdict in favor of Plaintiffs, 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 Plaintiffs. 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 Board. As late as 30 September 2010—during the trial—the Board's attorney had reiterated to Plaintiffs' counsel that the Board could not and would not serve as successor trustee. Unfortunately, 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 admissions disclaiming any interest in the trust and admitting that it "may not serve as successor trustee," 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 Plaintiffs' objections,

nevertheless permitted the Board's post-trial reversal and appointed the Board successor trustee.

The Court of Appeals had before it a number of bases to reverse the trial court's erroneous decision. It chose the narrowest. The Court of Appeals applied well settled law providing that when a party makes an admission in its answer, that admission is "binding in every sense." In applying this basic tenet of civil procedure to particularized facts before it, the Court's decision also preserved the express intent of the settlor—that Plaintiffs receive the property upon a finding of impossibility or impracticability and the Board's refusal and inability to serve as trustee.

In sum, the Court of Appeals correctly applied well established law in deciding this case and reversing the trial court. The unanimous, unpublished decision of the North Carolina Court of Appeals does not involve legal principles of major significance to the jurisprudence of this State, is not in conflict with decisions from this Court, and does not have significant public interest. Accordingly, this case does not warrant this Court's discretionary review.

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).[1] 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[II] 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[II] 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).

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[1] The citations to the Record, Exhibit and Transcript are to the documents submitted in the Court of Appeals.

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."[2] (R p 27).

Plaintiffs 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). Plaintiffs therefore sought Trust termination and conveyance of the Trust property, and vesting of fee simple title thereof, to the contingent beneficiaries, Plaintiffs. (R p 12). In addition to naming HBC, the current trustee, as a defendant, Plaintiffs properly joined and obtained jurisdiction

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

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).

In answering the allegations of paragraph 38 of Plaintiffs' Complaint, the State Defendants admitted all of the following allegations, either affirmatively or by failing to deny them:

> 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 pleading, the Board moved to dismiss, 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). Unlike Plaintiffs, the Board never suggested that it had not intended to waive any interest it might have had in the trust by virtue of the Consent Judgment, that it took the position that it could ever serve as successor trustee under any circumstances, or that it had any interest in serving as successor trustee. Thus, based upon the clear judicial admissions by the State Defendants in disclaiming any interest in the Trust, Plaintiffs 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, Plaintiffs litigated the case to trial 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 this Court 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, Plaintiffs prevailed on all issues submitted to the jury. The jury found that: (i) Plaintiffs 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. . .**"[3]

(R p 122–23) (emphasis added).

[3] 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. Plaintiffs' counsel repeatedly 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). It was only when the trial court refused to accept his argument that Plaintiffs' counsel acquiesced to the trial court's plan.

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

On 6 December 2010, Plaintiffs 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, Plaintiffs 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 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).

[4] When informed by the trial court of its intended plan, Plaintiffs' 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). Still, the trial court insisted on pursuing this erroneous course of action.

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 Plaintiffs' 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).

Plaintiffs gave timely notice of appeal of the October and January Orders on 26 January 2011. (R pp 254–56). After full briefing by both sides, the Court of Appeals heard oral arguments on 23 April 2012. The decision of the Court of Appeals, with Judge Wanda Bryant writing for the unanimous panel consisting also of Chief Judge John Martin and Judge Douglas McCullough, was issued on 18 December 2012. The mandate for this decision issued on 8 January 2013. HBC filed a Petition for Discretionary Review with this Court on 22 January 2013.[5] The Board filed a Petition for Discretionary Review with this Court on 23 January 2013.[6]

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[5] Plaintiffs note that HBC had no interest at stake in the appeal to the Court of Appeals and no interest impacted by that Court's decision. Indeed, HBC begins its petition by admitting that "it has no pecuniary or other self-interest in the result of this litigation." HBC Pet. at 2. HBC was removed as trustee by the jury's verdict and entry of judgment by the trial court, and it did not appeal this judgment to the Court of Appeals. In fact, HBC acknowledged as much in a 29 January 2013 filing to the Court of Appeals seeking to avoid paying costs: "None of the issues presented to this Court for consideration concern the ongoing role of HBC with regard to the Trust. Accordingly, the appeal in this case does not involve any issues concerning HBC's status or authority as trustee, now or in the future. HBC neither initiated this appeal nor has any opportunity to recover any property or authority as a result of this appeal." Because HBC no longer has any interest in this matter, its Petition for Discretionary Review should be disregarded as a nullity.

[6] The Board has acknowledged that its Petition for Discretionary Review filed on 22 January 2013 was ineffective, as it was filed incorrectly in the Court of Appeals. Recognizing that its subsequent filing of a second Petition for Discretionary Review on 23 January 2013 was

REASONS WHY CERTIFICATION SHOULD NOT ISSUE

I. THE UNANIMOUS, UNPUBLISHED DECISION OF THE COURT OF APPEALS DOES NOT INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFIGANCE TO THE JURISPRUDENCE OF THIS STATE.

The legal principles at issue in this case, including the binding effect of judicial admissions, are well settled. No complicated or novel principles of law are involved. Further, as explained below, the Court of Appeals correctly decided the legal issues involved in this case. Accordingly, this Court should conclude that the legal principles applied by the Court of Appeals do not involve principles of major legal significance to the jurisprudence of this State.

The unanimous panel of the Court of Appeals confirmed as much when it decided that its decision would be unpublished. Pursuant to Rule 30(e)(1) of the North Carolina Rules of Appellate Procedure, the panel hearing a case may direct that no opinion be published where it "determines that **the appeal involves no new legal principles** and that an opinion, if published, would **have no value as a precedent.**" (emphasis added). In this case, the panel consisting of Chief Judge Martin, Judge McCullough, and Judge Bryant, who authored the opinion, determined that the appeal involved no new legal principles and that a published

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untimely, it seeks refuge within the provision of N.C. R. App. P. 15(b), which provides that a party may file its own petition for review within 10 days after the first timely petition is filed. Because HBC is not actually a party to this appeal, as discussed in footnote 5, the Board should not be allowed to bootstrap its Petition on that of the Petition filed by HBC. As such, the Board's Petition should be denied on the grounds that it was not timely filed.

opinion would have no value as precedent.[7] By extension, the panel's determination indicates that the case involves no legal principles of major significance to the jurisprudence of North Carolina. Thus, this Court should deny the Petitions for Discretionary Review filed in this case.

A. The Court of Appeals Correctly Concluded that the State Board of Education Was Precluded from Appointment as Successor Trustee by the Judicial Admissions In Its Answer and Motion to Dismiss.

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

[7] Plaintiffs note that, if the Board or HBC disagreed with this determination, they could have filed a motion within 10 days of the filing of the opinion, pursuant to Rule 30(e)(4) of the North Carolina Rules of Appellate Procedure, requesting that the decision be published. They failed to do so.

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, Plaintiffs joined the Board as a defendant. However, the Board filed an answer and motion to dismiss, disavowing any interest in serving as successor trustee and, in fact, admitting its inability to do so. 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). 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).

The Board's rights in the Trust therefore were judicially determined with entry of the order granting its motion to dismiss: 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.[8] The Court of Appeals' decision corrected this egregious error.

The Court of Appeals' decision properly focused on various admissions in the Board's answer. The Board answered, admitting several allegations in the complaint, including paragraph 38, which alleged in pertinent part that "the trust purposes have become impossible or impracticable," "the North Carolina State Board of Education may not serve as successor trustee," "in any event the substitution of the Board of Education would not cure the impossibility or impracticability," and " 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).

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[8] In fact, the Court of Appeals previously recognized the Board's unambiguous disavowal of its interest in the Trust on the initial interlocutory appeal in this action: "The State expressly renounced its interest in 1987 and again in this action, wherein the State sought and secured dismissal with prejudice." Turner, 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, 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).

While this Court concluded, in Turner, that "collateral estoppel does not bar litigation of the question whether the consent judgment was intended to foreclose all of [Plaintiffs'] rights in the land," it reached no such conclusion with regard to the Board's interest. Turner II, 363 N.C. at 562, 681 S.E.2d at 775. In fact, it could not, because in contrast to Plaintiffs, prior to January 2011, the Board never asserted to the trial or appellate courts that it did not intend to relinquish its interest or that it believed its interest continued after the Consent Judgment. To the contrary, from 1987 through the conclusion of trial, the Board repeatedly declined to serve as trustee and admitted that it had no right or ability to do so.

These admissions (and failures to deny) in the Board's answer and motion to dismiss were not stipulations as to the law, as suggested by the Board, but were admissions of fact binding on the Board. Paragraph 38 alleged that, as a factual matter, the Trust purposes had "become impossible or impracticable,"[9] that the "[Board] may not serve as successor trustee," and "in any event, the substitution of the [Board] would not cure the impossibility or impracticability." (R p 12) In its answer and motion to dismiss, the Board affirmatively admitted and failed to deny that these facts existed in 2006. The Board is bound by these admissions. See Outer Banks Contractors, 302 N.C. 599, 604, 276 S.E.2d 375, 375 (1981) (explaining that judicial admissions are formal concessions made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute, which serves to remove the admitted fact from the trial by formally conceding its existence). The Court of Appeals correctly considered and rejected the Board's tortured attempt to evade the impact of its judicial admissions by falsely claiming that its factual admissions were somehow legal stipulations.[10]

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[9] Indeed, the jury was called upon to answer the question of whether the Trust purposes had "become impossible or impracticable," further demonstrating the factual nature of the issue. (*See* R p 120). After all, "it is the province of the jury to . . . determine questions of fact." *Coletrane v. Lamb*, 42 N.C. App. 654, 657, 257 S.E.2d 445, 447 (1979).

[10] This incredible position, even if somehow true, would not explain why the Board did not assert, as Plaintiffs did, that it had not intended to relinquish its rights through the Consent Judgment. It is axiomatic that "mere ignorance of the law, unless there be some fraud or circumvention, is not ground . . . [to] avoid the legal effect of acts which have been done." Mims v. Mims, 305 N.C. 41, 60, 286 S.E.2d 779, 792 (1982). It also does not excuse the Board's failure to present the issue of the legal effect of the Consent Judgment on its interests to the court

In addition, beyond its admission of the factual allegations in the complaint, the Board's failure to contest or deny the relief sought by Plaintiffs acts as a judicial admission. For instance, in Paragraph 38 and the prayer for relief of the Complaint, Plaintiffs alleged that, under the Trust documents and the facts alleged, they were entitled to have the Trust terminated and an order entered "vesting fee simple title to the trust res in the contingent beneficiaries of the trust [Plaintiffs]." (R pp 12, 14) The Board failed to deny or contest Plaintiffs' right to this relief and instead sought to be dismissed, stating that "the remaining allegations [of the Complaint] do not relate to either the [Board] or the Attorney General." (R p 93) By seeking dismissal and not pursuing a determination of the legal effect of the Consent Judgment on its interests (or conditionally asserting an interest if Plaintiffs prevailed), the Board admitted that it had intended by its execution of the Consent Judgment to relinquish its rights under the Trust and that it claimed no right to serve (and had no interest in serving) as successor trustee. The Court of Appeals correctly held the Board to these judicial admissions.

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for resolution. If the Board had ever believed that it did not intend to relinquish its interest in 1987 or that its interest somehow depended on the status of Plaintiffs' interest, as a necessary party, see N.C. Gen. Stat. § 36C-4-410(b); N.C. Gen. Stat. § 36C-1-103(22), it should have remained a party to this action, asserted this position and had the courts determine whether the Consent Judgment had the legal effect of terminating its interest.

The Court of Appeals' decision correctly recognized that the Board's answer and motion to dismiss, as well as its conduct throughout this litigation, constituted judicial admissions that the Board had disclaimed any interest in the Trust and had admitted that it "may not serve as successor trustee." The Court of Appeals' decision correctly recognizes that, to allow the Board to emerge and seize the Trust property, after having sought dismissal from the action and consistently claiming no interest in serving as successor Trustee, would severely prejudice Plaintiffs and would pervert the well-established jurisprudence of this State regarding the impact of judicial admissions.

As shown above, the Court of Appeals' decision was correct and supported by well-established law and the record in this case. Accordingly, this Court should deny the Petitions for Discretionary Review.

B. NOTHING PLAINTIFFS' COUNSEL STATED TO THE JURY OR TRIAL COURT ESTOPPED PLAINTIFFS FROM CHALLENGING THE BOARD'S APPOINTMENT AS TRUSTEE.

The Board and HBC presented this argument to the Court of Appeals, and the argument was fully briefed and argued by the parties. The Court of Appeals correctly rejected the argument and concluded that it was neither necessary nor pertinent to the issues raised on appeal, as evidenced by the lack of discussion of

the argument in the Court's decision.[11] To the extent the Board and HBC ask this Court to render discretionary review over issues not even discussed in the decision of Court of Appeals, their request fails to meet any of the criteria for review under N.C. Gen. Stat. § 7A-31.

In any event, there is absolutely no merit to the Board's and HBC's suggestion that Plaintiffs are precluded from challenging the Board's appointment as trustee by their counsel's statement during closing argument briefly informing the jury that the trial court planned to tender the trusteeship to the Board upon the removal of HBC as trustee. While Plaintiffs had repeatedly objected to this tender plan (T[VI] 1030:2–1032:10, 1052:7–22; 1054:2–11; 1064:8–16; 1066:25–1067:23), when the trial court overruled Plaintiffs' objections, their counsel was required to yield to the trial court's decision.[12] It was appropriate for Plaintiffs' counsel to explain accurately the process chosen by the court.[13] This explanation

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[11] It is customary and proper for an appellate court to only discuss in its opinion those legal arguments necessary for a determination of the issues. For instance, Plaintiffs raised several additional bases for the Court of Appeals' reversal of the trial court Order appointing the Board as successor trustee, beyond the judicial admissions made by the Board, but the Court only discussed that basis in reaching its decision.

[12] The Board and HBC should not be heard to complain on this point, because they did not preserve this issue for appeal pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure. In fact, no objection was made to the jury argument by the actual participants at trial.

[13] Plaintiffs object to the defamatory and specious argument submitted by HBC and the Board suggesting that Plaintiffs' counsel intentionally misled the jury in his arguments. As explained throughout this section, Plaintiffs' counsel did not make any misleading statements to the trial court or the jury. Instead, he consistently advocated his client's position that the Board should not be appointed as successor trustee, a position that was clear to the court, the parties and the jury. When this position was rebuffed by the trial court, Plaintiffs' counsel then acquiesced to the trial court's erroneous decision and accurately reported the court's plan for proceeding to

did not negate the relief sought in the Complaint (R pp 11–12, 14), which was received into evidence (T[VI] 974:4–8), or counsel's position throughout the opening statements and closing argument. (T[I] 31:24–32:1; 36:17–23; 128:24–129:2; 160:12–14; 184:5; 192:7–12) It was clear to the jury and everyone in the courtroom that Plaintiffs sought termination of the Trust and the distribution of the Trust property to them, not the succession of the Trust to the Board.[14] The jury was informed of Plaintiffs' position numerous times by the parties and the trial court:

> *Plaintiffs' Opening*: "Because the evidence will show by their actions in managing this property, that it has become clearly impossible and impracticable in the last 23 years to use the property and land for the purposes specified. The trust should be terminated." (T[I] 192:4–8. See also T[I] 160:12–14)
>
> *HBC closing*: "They want to terminate the trust and get the land for themselves even to the exclusion of Dr. Sharpe's heirs." (T[VII] 1180:21–1181:1. See also T[I] 197:10–11; T[VII] 1182:18–21)
>
> *Judge to Jury Venire:* "And the plaintiff in this case seeks to have the trust in this case terminated and have

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the jury. Plaintiffs' counsel conducted himself appropriately throughout the trial, and Plaintiff urges this Court to reject and strike this argument.

[14] Contrary to the Board's argument, counsel's brief reference to the trial court's planned tender process was not contradictory to his argument to the trial court that the Board was foreclosed from appointment as trustee. Plaintiffs' counsel did not argue to the jury that the Board would accept the tender or that the trial court would ultimately (and erroneously) appoint the Board as successor trustee.

> the land revert to the beneficiaries, to the makers of the trust or their heirs," T[I] 111:1–4[15]

Furthermore, despite the Board's suggestion that these statements somehow affected the jury verdict, these statements by Plaintiffs' counsel had no impact on the outcome of the trial, as the tender process was not dispositive of, or even relevant to, the three issues presented to the jury.[16] Accordingly, a critical element of judicial estoppel—an alleged inconsistent position resulting in an unfair advantage to Plaintiffs—is lacking.

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[15] Like the jury, the trial court also understood the primary objective of Plaintiffs, remarking to Plaintiffs' counsel:

> You're not seeking to enforce a trust, you're seeking to dissolve the trust. You're seeking to end the trust and have the proceeds distributed by a reversion.

(T[V] 849:13–16) In fact, the trial court explained that its decision to dismiss Plaintiffs' claim for breach of fiduciary duty rested on the fact that Plaintiffs were seeking to terminate the Trust (See T[V] 849:8–855:12; 858:19–860:12; 861:2–17), observing that:

> What I've heard throughout this trial is your clients want this trust declared -- the wishes of the grantor are – are not being followed and that its impossible or impractical for the trust to comply with that, and therefore, that this should be dissolved. That's what I've heard in the prayer for relief.

(T[VI] 882:10–15)

[16] These statements were not evidence and could not be considered by the jury in resolving the three issues before it, as the judge explicitly instructed. (See T[I] 156:20–24)

The statements made by Plaintiffs' counsel did not impact the jury's verdict and certainly had no negative impact on the integrity of the proceeding.[17] The Court of Appeals correctly discerned this argument for what it was—a diversion from the Board and HBC designed to divert attention away from the Board's judicial admissions and its disavowal of any interest in serving, or ability to serve, as successor trustee long before the trial of this case. This Court should also reject this argument and deny the Petitions for Discretionary Review.

C. The Court of Appeals' Decision is Consistent with the Settlors' Intent and Public Policy.

As explained above, the Board disavowed any interest in serving as the successor trustee to the Trust. Furthermore, since the jury found the Trust's purposes to be impossible or impracticable generally, 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. When the Trust purposes were declared impossible or impracticable for any Trustee, including the Board, the alternative disposition intended by the settlors was triggered—the Sharpes intended for the Trust property to pass to the Hurst heirs in such a situation. Contrary to the Board's suggestion, it is the Plaintiffs, not the Board,

[17] It is, of course, ironic that the State, which is attempting to benefit opportunistically from Plaintiffs' lone pursuit of this suit and retreat from its consistent actions and representations between the filing of this suit and January 2011, would attempt to comment on the integrity of another party's trial statements.

who are advancing the settlors' intent by advocating for the alternative distribution the settlors provided for in the Trust.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

In section III of its Petition for Discretionary Review, the Board simply lists three cases decided by this Court and states in a conclusory fashion that the Court of Appeals' decision appears to be in conflict with decisions of this Court. Contrary to the Board's suggestion, the decision of the Court of Appeals correctly applied the law regarding judicial admissions, recognizing that the Board had in fact made binding admissions of fact, as opposed to stipulations of law, in its answer and motion to dismiss. The Court of Appeals, in fact, correctly quoted and applied one of the cases relied upon by the Board, Outer Banks Contractors, Inc. v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981) (explaining that a judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute and serves to remove the admitted fact from the trial by formally conceding its existence."). Slip. Op. 10.

In rebuffing the Board's argument regarding legal versus factual admissions, the Court of Appeals correctly focused on Paragraph 38 of the Plaintiffs' complaint and the Board's response thereto. Contrary to the Board's argument that this paragraph focused on legal conclusions drawn from the Consent Judgment, the

allegations of Paragraph 38 focused on the existing facts as of the time of the filing of the Complaint. As quoted by the Court of Appeals, the factual allegations of Paragraph 38 included: (1) "the trust purposes have become impossible or impracticable"; (2) "the [SBE] may not serve as successor trustee"; (3) "in any event the substitution of the [SBE] would not cure the impossibility or impracticability"; and (4) "the trust [and N.C. Gen. Stat. § 36C–4–410] mandate that the trust property be deeded by [the Corporation] to the heirs and descendents [sic] of John Hurst and Gertrude Hurst." The Board's answer admitted the allegations of this paragraph. While this admission added the phrase "under the Consent Judgment," which did not appear in the Plaintiffs' allegations in Paragraph 38, this addition did not, as the Board suggests now, limit the Board's admission to the legal effect of the Consent Judgment. In fact, when the Board did not deny the factual allegations in Paragraph 38 enumerated above, they were deemed admitted. Furthermore, the Court of Appeals correctly recognized that, in addition to the admissions in its Answer, the Board also made admissions of fact in its motion to dismiss.[18]

[18] In addition, while not noted by the Court of Appeals, counsel for the Board did not just argue that the Consent Judgment had the legal effect of expunging its interest but went further in disavowing any interest in the Trust. At the hearing on its Motion to Dismiss, the Board's counsel, Thomas Ziko, explained that his clients had "no interest in the underlying property" and that the Board had "disclaimed their interest as a contingent trustee." (R S p 493–95) Mr. Ziko explained that his "clients, although named as defendants, have no interest in how the parties resolve this dispute." (R S p 495)

Furthermore, even if the Board were somehow correct that its admissions were related to legal conclusions rather than facts, this would not explain or excuse its failure to present the issue of the legal effect of the Consent Judgment on its interests to the court for resolution as Plaintiffs did. See Section I.A. above.

The Court of Appeals' decision relied on well established principles of law, and it was consistent with prior decisions from this Court. Accordingly, this Court should deny the Petitions for Discretionary Review filed by HBC and the Board.

III. THE SUBJECT MATTER OF THE APPEAL DOES NOT HAVE SIGNIFICANT PUBLIC INTEREST.

The Board's desire to overturn the Court of Appeals' decision and its quest to seize the Trust property in contravention of the jury's verdict in this action and the settlors' intent does not amount to a matter of significant public interest. Likewise, the fact that HBC, Onslow County, Cartaret County, or the Town of Swansboro urged the Board to accept appointment as trustee does not make the matter one of significant public interest. HBC's concern for the public interest lacks credibility given its long-term, gross mismanagement of the Trust property and its breaches of its duties as trustee. Furthermore, these government entities have no specific interest in the Trust property and no right to claim the property,

absent an effort to purchase it.[19] The public interest is best served by effectuating the settlors' intent that the Trust property pass to the Hurst heirs in this situation.

Given that the Trust purposes have been found to be impossible and impracticable of fulfillment, it is clear that the Board covets the Trust property for its own purposes and the purposes of various other government entities, rather than the purpose established by the settlors. 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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[19] The Board and HBC seem to suggest that the fact that these government entities and the State of North Carolina would like to have the Trust property available to them should control the decision of the case, predominating over well-established North Carolina law, the law of the case, and the intent of the Trust's settlors. Obviously, the Board is only entitled to serve as trustee if appropriate under the trust documents, the law of the case, and the laws of North Carolina. The Court of Appeals correctly focused on these factors in deciding the case and resisted the Board's attempt to shift the focus from the law to the public sentiment and desires surrounding the action. This Court should do the same and reject the Petitions for Discretionary Review.

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 is actually trying to substitute another purpose for that of the Sharpes. (T[Appt] p 83:22–25). In direct contravention of the settlors' intent, the State now plans, over Plaintiffs' 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").

The settlor's intent was to provide a recreational area for underserved African-Americans. Contrary to the Board's suggestion, 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 were authorized to alter the Trust purposes to further their own 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.[20] Because the settlors did not manifest a general charitable intent and provided for an alternate disposition if the trust failed, the *cy pres* doctrine cannot be applied. The Court of Appeals' decision correctly rejected this erroneous notion.

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

[20] 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, the Court of Appeals correctly reversed the trial court's Order.

dispute." (R S p 495). The Court of Appeals correctly held the Board to its admissions and its consistently stated position.

Given the admissions and statements in the State Defendants' Answer and Motion to Dismiss, amplified by statements such as those above, this Court should reject the Board's continuing attempt to seize the property now. The public interest favors effectuating the settlors' expressed intent that the Trust property be conveyed to the heirs under these circumstances. There is certainly no public interest served by the Board being allowed to reverse course and unfairly escape from years of judicial admissions to seize the property at this point.

ADDITIONAL ISSUES TO BE BRIEFED

In the event the Court allows the Board's and HBC's Petitions for Discretionary Review over Plaintiffs' objections, Plaintiffs intend to present the following additional issues to be briefed:

1. Whether the trial court erred in appointing the Board as trustee based on the doctrines of judicial and equitable estoppel.

2. Whether the trial court erred in appointing the Board as trustee based on the principles of res judicata.

3. Whether the trial court erred in appointing the Board as trustee based on collateral estoppel.

4. Whether the trial court erred in appointing the Board as trustee because such an appointment would contradict the jury verdict.

5. Whether the trial court erred in refusing to allow Plaintiffs 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.

CONDITIONAL PETITION FOR WRIT OF CERTIORARI

For the reasons stated above, this Court should deny the Petitions for Discretionary Review. However, in the event the Court allows the Petitions for Discretionary Review *and* determines that some or all of Issues 1 – 5 set forth above under Additional Issues are improper for discretionary review, Plaintiffs respectfully and conditionally petition the Court to issue its writ of certiorari, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, and review those issues. Plaintiffs briefed and argued each of these issues to the Court of Appeals as other independent grounds for reversing the trial court's order appointing the Board as trustee. The Court of Appeals did not reach these issues because it properly reversed the trial court's order on the first narrow issue before it concerning the effect of the admissions in the Board's answer. Accordingly, it is possible that these issues cannot be presented as additional issues pursuant to Appellate Rule 15(d).

Appellate Rule 16(a) appears to limit the scope of discretionary review by this Court to issues actually reached in the decisions of the Court of Appeals. *See* N.C.R.App.P. 16(a) ("Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals."); *see, e.g.*, *Va. Elec. & Power Co. v. Tillett*, 316 N.C. 73, 76, 340 S.E.2d 62, 64–65 (1986) (remanding to Court of Appeals to consider in first instance "remaining issues raised by the parties but not addressed by that court in its opinion in this case"); *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 204–205, 695 S.E.2d 442, 449 (2010) (determining that discretionary review improvidently provided as to merits issues not reached in Court of Appeals decision which dismissed the appeal as interlocutory).

This Court may, however, address issues briefed but not reached in the decision of the Court of Appeals, if it chooses to do so by writ of certiorari. *See, e.g.*, *Misenheimer v. Burris*, 360 N.C. 620, 620, 637 S.E.2d 173, 174 (2006); *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 451, 406 S.E.2d 856, 859 (1991).

As explained above, the Court of Appeals did not need to reach Issues 1–5 because it correctly held that the trial court's order could be reversed by applying one of the most basic tenets of civil procedure—that a party is bound by the

admissions contained in its answer. Thus, it was unnecessary for the Court to address the other arguments made by Plaintiffs that provided additional, independent grounds for dismissal, i.e., Issues 1–5 set forth above.

However, if this Court allows the Petitions for Discretionary Review and concludes that some or all of Issues 1–5 are not properly reviewable as additional issues under Appellate Rule 15(d), it would be in the interests of judicial economy for the Court to review those issues at the same time it addressed the issues raised by the Petitions for Discretionary Review. These issues raise the same ultimate merits determination as the Petitioners—whether the trial court erred in appointing the Board as trustee. Inasmuch as they involve the same ultimate issue and to some extent overlap with each other, it would be sensible for the Court to address all these arguments together.

Furthermore, it would advance the interests of justice to dispatch with this appeal as soon as reasonably possible. This case is now approaching its seventh year in duration. If the Court were to reverse the decision below, unless it considers these issues, the case must be remanded to the Court of Appeals to consider Issues 1–5, other separate and independent reasons why the trial court erred in appointing the Board trustee. A remand and decision would prolong the case a minimum of six months, if not longer—that the parties have already briefed and argued the issues will not guarantee a quick disposition. *See, e.g., Bumpers v.*

Cmty. Bank of N. Va., 364 N.C. 195, 695 S.E.2d 442 (2010) *with Bumpers v. Cmty. Bank of N. Va.*, 718 S.E.2d 408 (N.C. Ct. App. 2011) (remand determination by Court of Appeals on issues previously briefed occurring approximately 15 months after Supreme Court decision). Therefore, it would advance the interests of justice to bring these already lengthy proceedings to a conclusion sooner rather than later. Issuing the writ of certiorari provides an appropriate vehicle to do so.

Accordingly, pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure and in the interests of judicial economy and justice, Plaintiffs respectfully request that if the Court allows the Petitions for Discretionary Review *and* determines that some or all of Issues 1–5 set forth above under Additional Issues are inappropriate for discretionary review, the Court issue its writ of certiorari to address those issues.

CONCLUSION

As explained, the unanimous, unpublished decision of the North Carolina Court of Appeals does not involve legal principles of major significance to the jurisprudence of this State, is not in conflict with decisions from this Court, and does not have significant public interest. Plaintiffs Harriett Hurst Turner and John Henry Hurst respectfully urge this Court to deny the Petitions for Discretionary Review filed by the State Board of Education and The Hammocks Beach Corporation.

Respectfully submitted, this 4 day of February, 2013.

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VERIFICATION

Charles T. Francis, being first duly sworn, deposes and says that he is counsel of record for Petitioners; that he has carefully read the foregoing Response to Petition for Discretionary Review Under N.C. Gen. Stat. § 7A-31 and Conditional Petition for Writ of Certiorari; and that the matters discussed therein which are not otherwise part of the record are true to his own knowledge.

Charles T. Francis

STATE OF NORTH CAROLINA
COUNTY OF WAKE

Sworn to and subscribed before me,
this the 4th day of February, 2012.

Virginia A. Marshall
Notary Public

Virginia A. Marshall
Printed/Typed Name

My commission expires: 12/11/17

VIRGINIA A. MARSHALL NOTARY PUBLIC JOHNSTON COUNTY, N.C.

CERTIFICATE OF SERVICE

I, Charles T. Francis, attorney for Plaintiffs-Appellants Harriett Hurst Turner and John Henry Hurst, certify that I served the foregoing Response to Petition for Discretionary Review and Conditional Petition for Writ of Certiorari, 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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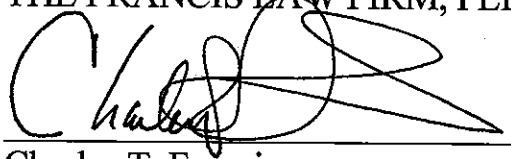
This the 4 day of February, 2013.

THE FRANCIS LAW FIRM, PLLC



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NO. COA11-1420
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

HARRIETT HURST TURNER and
JOHN HENRY HURST,
Plaintiffs,

v.

Wake County
No. 06 CVS 18173

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.

Appeal by plaintiffs from orders entered 26 October 2010 and 12 January 2011 by Judge Carl R. Fox in Wake County Superior Court. Heard in the Court of Appeals 23 April 2012.

The Francis Law Firm, PLLC, by Charles T. Francis and Alan Woodlief, Jr., and Bailey & Dixon, L.L.P. by Michael L. Weisel and Adam N. Olls, for plaintiffs-appellants.

Hunton & Williams LLP, by Frank E. Emory, Jr., Brent A. Rosser, and Ryan G. Rich, for defendant-appellee, The Hammocks Beach Corporation, Inc.

Attorney General Roy A. Cooper, by Special Deputy Attorney Generals James C. Gulick and Thomas J. Ziko, for defendant-appellee, the North Carolina State Board of Education.

BRYANT, Judge.

Where the North Carolina State Board of Education is judicially bound by admissions made in its answer and motion to dismiss, the trial court erred by appointing the North Carolina State Board of Education as successor trustee of the Trust property.

Facts and Procedural History

On 15 December 2006, plaintiffs Harriett Hurst Turner and John Henry Hurst filed a complaint against defendants The Hammocks Beach Corporation ("Corporation"), Nancy Sharpe Caird, Seth Dickman Sharpe, Susan Spear Sharpe, the North Carolina State Board of Education ("SBE"), and Roy A. Cooper, III, in his capacity as Attorney General of the State of North Carolina.

The complaint alleged the following: During the 1920's and 1930's, Doctor William Sharpe ("Dr. Sharpe") purchased 810 acres of high land on the mainland adjacent to Queens Creek and Foster's Bay in Onslow County, North Carolina. The highland portion was known as "the Hammocks." He also purchased adjacent property consisting of 2,000 acres of sandy beach outer banks and approximately 7,000 acres of marshland. Dr. Sharpe became closely acquainted with John and Gertrude Hurst ("Hursts"), who

moved onto the Hammocks, serving as managers and caretakers of the highland. Eventually, Dr. Sharpe communicated to the Hursts his desire to devise the Hammocks to them.

On 6 September 1950, Dr. Sharpe and Mrs. Hurst signed an agreement whereby Mrs. Hurst requested that Dr. Sharpe instead make a gift of the property in such a manner that African-American teachers and their then existing organizations could enjoy the Hammocks ("Agreement"). In 1950, by deed of gift ("Deed"), Dr. Sharpe deeded certain real property to the Corporation, as trustee to the Hursts. (The Agreement and Deed are collectively referred to as "the Trust").

The Corporation's charter stated that its purpose was "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 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 Corporation]."

A consent judgment was entered in 1987 stating that the Trust property originally consisted of approximately 10,000

acres. The 2,000 oceanfront acres, now known as Hammocks Beach State Park, were conveyed by the Corporation as trustee, to the State of North Carolina and now comprise Hammocks Beach State Park. The Corporation acquiesced in the claim by the State of North Carolina of title to approximately 7,000 acres of marshland. The deed provided the following:

> 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 [SBE], to be held in trust for the purpose herein set forth, and if the [SBE] 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 Corporation] 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.

In 1986, the Sharpe and Hurst heirs argued, through an action filed by the Corporation, that fulfillment of the terms of the Trust had become impossible or impracticable, that the Corporation had acted capriciously and contrary to the intent of the settlor of the Trust, that the Trust should be terminated, and that either a conveyance of all the property or an adjudication of title should be made to the Sharpe and Hurst families. Prior to trial, the parties reached a settlement that

was approved by the court in a consent judgment ("Consent judgment").

In the Consent judgment, the Corporation retained title as trustee to a portion of the land, with additional powers of administration given to the Corporation aimed at enabling it to improve the property to the extent reasonably necessary. The Consent judgment also vested in the Sharpe and Hurst families a portion of the real property in exchange for the relinquishment of certain rights, such as raising livestock, fishing, residency, recreation, etc., to be held solely by the Corporation as trustee.

The trial court found that the fulfillment of the terms of the Trust had become impossible or impracticable because

> [t]he 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 Consent judgment also stated that Dr. Sharpe's alternative plan of having the SBE serve as trustee in the event the terms of the Trust were impossible or impracticable failed for the

same reasons. Therefore, the Consent judgment provided that the Corporation, as trustee, was no longer under a prohibition against the mortgaging or sale of the property, as long as it received court approval, and as long as it furthered the purposes of the Trust.

Based on the foregoing, plaintiffs alleged that the Corporation had taken no steps since entry of the consent judgment in 1987 to improve the Trust property or to fulfill the purposes of the Trust, had failed to account for Trust funds, and had negligently mismanaged said funds. In their 2006 complaint, plaintiffs prayed that the court: enter an order requiring the Corporation to account for its administration of the Trust; enter an order terminating the Trust and vesting fee simple title to the Trust res in the contingent beneficiaries of the trust; award judgment in excess of $10,000.00 as compensatory damages; award judgment in excess of $10,000.00 for punitive damages; award interest on any judgment; and, award attorney's fees.

The Corporation moved to dismiss the action under Rules 12(b)(1) and 12(b)(3) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction and lack of proper venue. The trial court denied the Corporation's motion

in an order entered 15 June 2007. Thereafter, the Corporation filed a motion to dismiss and for a protective order pending resolution of the motion pursuant to Rules 12(b)(6) and 26(c). The SBE and the North Carolina Attorney General also filed a motion to dismiss, arguing that they were not proper defendants to the proceeding because the Consent Judgment had extinguished any interest that the SBE would have had in the trust and because the Attorney General had no intention of maintaining any action to enforce the trust.

On 24 August 2007, the trial court denied the Corporation's motion to dismiss and allowed SBE's motion; the trial court therefore dismissed all claims against SBE and the Attorney General with prejudice. Our Court heard an interlocutory appeal by the Corporation in *Turner v. Hammocks Beach Corp.*, 192 N.C. App. 50, 664 S.E.2d 634 (2008) ("Turner I"). In Turner I, we reversed and remanded with instructions to the trial court to grant the Corporation's motion to dismiss. *Id.* at 61, 664 S.E.2d at 642. The North Carolina Supreme Court then reversed our Court's holding that the trial court erred in denying the Corporation's motion to dismiss and remanded the matter for

further proceedings in the trial court.[1] *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 681 S.E.2d 770 (2009) ("Turner II").

Following a jury trial and jury verdict in favor of plaintiffs on all issues, the trial court thereafter entered a judgment and order on 26 October 2010. The 26 October 2010 judgment stated that the "Corporation shall be removed as Trustee of the Trust," upon the formal appointment of the SBE as successor trustee. The judgment also provided that in the event that the SBE refused to accept tender of appointment, the trust property would be distributed pursuant to the terms of the 1950 deed. A separate order also entered on 26 October 2010 acknowledged that SBE had previously declined to serve as successor trustee but stated that SBE was now entitled to tender of appointment as successor trustee to administer the Trust for the purposes set forth in the 1950 Deed and Agreement. The trial court then set a hearing date for a formal tender to SBE.

On 6 December 2010, plaintiffs filed a motion for reconsideration of the 26 October 2010 order and objected to the tender of appointment to SBE as successor trustee. Plaintiffs' motion for reconsideration was denied and their objection to the appointment of the SBE as successor trustee was overruled in an

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[1] There was no appeal from the trial court's dismissal with prejudice of all claims against SBE and the Attorney General.

order entered 12 January 2011. The trial court made procedural findings regarding deficiencies in plaintiffs' motion and made substantive findings regarding the merits of this case.[2] The 12 January 2011 order also formally appointed the SBE as successor trustee to administer the trust. From the 26 October 2010 and 12 January 2011 orders, plaintiffs gave notice of appeal.

Plaintiffs present the following issues on appeal: whether the trial court erred (I) in appointing the SBE as trustee based on (a) judicial admissions made by the SBE, (b) the doctrines of judicial and equitable estoppel, and/or (c) the principles of res judicata; and (II) in refusing to allow plaintiffs to pursue post-judgment discovery regarding the SBE's representation that

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[2] The 12 January 2011 order, included the following findings and conclusions: 1. The Plaintiffs' Motion does not specify the Rule of Civil Procedure under which Plaintiffs are applying for relief. The Motion seeks to alter or amend the Judgment and companion Order entered in this case to remedy alleged errors of law. Therefore, the Court deems it to be a motion under Rule 59 of the Rules of Civil Procedure. 2. Rule 59(e) requires that a motion to alter or amend a judgment "shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(e). The Plaintiffs served their Motion for Reconsideration on or about December 6, 2010, more than 10 days after the entry of judgment on October 26, 2010. 3. Even if Plaintiffs' Motion had been timely filed, motions to alter or amend judgments are limited to the grounds listed in Rule 59(a). Plaintiffs' Motion fails to specify a ground for relief recognized under Rule 59(a).

it would not and could not accept tender of appointment as trustee to the trust.

Standard of Review

Because these determinations each involve the application of legal principles and are properly classified as conclusions of law, we apply a *de novo* review. *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 516, 565 S.E.2d 716, 719 (2002) ("We review questions of law *de novo*.").

I

Plaintiffs first argue that the trial court erred in appointing the SBE as trustee where the SBE had made judicial admissions disclaiming any interest in the Trust and admitting that it "may not serve as successor trustee." We agree.

This Court has found that

> A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence.

Outer Banks Contractors, Inc. v. Forbes, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981) (citation omitted). It is "ordinarily made by a pleading (or lack thereof), or by a response (or failure to respond) to a pretrial demand for admissions, or by

stipulation entered into before or at the trial." Brandis & Broun on North Carolina Evidence Ch. no. 8 § 198 (7th ed. LexisNexis Matthew Bender). "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. Ronald Williams, Prof'l Ass'n*, 102 N.C. App. 355, 362, 402 S.E.2d 452, 456 (1991). Specifically, "[f]acts alleged in the complaint and admitted in the answer are conclusively established by the admission." *Harris v. Pembaur*, 84 N.C. App. 666, 670, 353 S.E.2d 673, 677 (1987) (citation omitted).

In the present case, paragraph 38 of plaintiffs' complaint stated the following:

> Because the trust purposes have become impossible or impracticable because the [SBE] may not serve as successor trustee, and in any event the substitution of the [SBE] 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 Corporation] to the heirs and descendents [sic] 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 descendents [sic] of the late Gertrude Hurst and the late John Hurst, as provided in the Deed and Agreement.

The SBE's Answer admitted the allegations set forth in paragraph 38 of plaintiffs' complaint by stating the following:

> 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.

On 9 August 2007, the SBE had filed a motion to dismiss as to their involvement in the case, stating that "[t]he Consent Judgment expunged any interest that the [SBE] may have had in the Trust[.]" Relying on the SBE's admissions and lack of interest in the trust, on 24 August 2007, the trial court granted the SBE's motion to dismiss and they were dismissed as a party to the action.

Defendants now claim that the SBE's statements made in their Answer and Motion to Dismiss were legal conclusions rather than factual admissions and that they should not be bound to those statements. Defendants rely on *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 14, 437 S.E.2d 519, 527 (1993) ("A stipulation as to the law is not binding on the parties or the court."), and *New Amsterdam Cas. v. Waller*, 323 F.2d 20, 24 (4th

Cir. 1963) ("When counsel speaks of legal principles, as he conceives them and which he thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the Court understands them."). We are not persuaded.

The contents of paragraph 38 of plaintiffs' complaint, to which defendants admitted in their Answer, appear to be a concession that is "binding in every sense." *Patrick*, 102 N.C. App. at 362, 402 S.E.2d at 456. There is no allegation or indication of fraud, misrepresentation, undue influence or mutual mistake. On the contrary, defendants clearly and forcefully asserted to the court in their motion to dismiss that they had no more interest in the litigation. The trial court granted their motion and allowed them to be dismissed.

SBE's Answer admitting their lack of interest in the Trust and the impracticability of fulfilling the Trust purposes qualify as judicial admissions, thus, SBE should be bound to their admissions and the facts admitted conclusively established. Based on the foregoing, we reverse the orders of the trial court appointing the SBE as successor trustee of the

Trust property and instruct the trial court to enter an order consistent with this opinion.

Furthermore, based on the disposition of plaintiffs' first argument, we need not reach plaintiffs' remaining arguments.

Reversed and remanded.

Chief Judge MARTIN and Judge MCCULLOUGH concur.

Report per Rule 30(e).