No. 11-1420 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

**********

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

**********

THE HAMMOCK'S BEACH CORPORATION'S DEFENDANT-APPELLEE BRIEF

**********

Pursuant to Rule 28(f) of the North Carolina Rules of Appellate Procedure, the Hammocks Beach Corporation, Inc., through counsel, hereby adopts by reference the Brief of Defendant-Appellee the State Board of Education ("SBE"), attached hereto as **Exhibit A**, in its entirety. For all the reasons stated in SBE's

Brief, this Court should dismiss Plaintiffs-Appellants' appeal or, in the alternative, should uphold the challenged Orders of the trial court appointing SBE to be successor trustee of the Hammocks Beach Trust.

Respectfully submitted this the 5th day of March 2012.

**HUNTON & WILLIAMS LLP**

/s/ Frank E. Emory, Jr.

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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 COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (Microsoft Word 2010), the document does not exceed 8,750 words, inclusive of SBE's adopted brief but exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This the 5th day of March 2012.

/s/ Frank E. Emory, Jr.

## CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **THE HAMMOCK'S BEACH CORPORATION'S DEFENDANT-APPELLEE BRIEF** 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.

EXHIBIT A

No. COA11-1420 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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v.

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Defendants-Appellees.

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STATE BOARD OF EDUCATION'S
APPELLEE BRIEF

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## INTRODUCTION

Counsel for Plaintiffs-Appellants Hurst and Turner ("Appellants") argued to the jury, without any reservation or limitation, that if they returned a verdict for Appellants' on all issues:

> [T]hen 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 24 – p 1216, ln 4 (emphasis added))

Having secured a favorable jury verdict by making these representations to the jury, Appellants sat idle while the Court formally tendered the property to the North Carolina State Board of Education (the "Board") pursuant to its Judgment of October 26, 2010 ("October 26 Judgment") and its Order of the same date (the "October 26 Order"). Not until months later on January 26, 2011, and only after being notified that the Board had provisionally accepted the trusteeship, did Appellants appeal the October 26 Order on grounds that the trial court's tender was improper and that the Board was estopped from accepting it. The Court should dismiss the appeal and deny Appellants' relief on their claims because Appellants' appeal comes too late and is based on faulty arguments that stand in stark contrast to Appellants' argument to the jury.

First, Appellants are estopped from challenging the Board's appointment as trustee after explaining to the jury that if they voted in Appellants' favor the property first would be tendered to the Board, rather than directly to Appellants, and representing to the Court that tender to the Board was appropriate.

Second, Appellants mischaracterize the effect of the 1987 Consent Judgment on the Board's interest as contingent trustee, the North Carolina Supreme Court's ruling in Turner v. Hammocks Beach Corp., 363 N.C. 555, 681 S.E.2d 770 (2009) ("Turner II"), and the jury verdict they obtained.

Third, Appellants seek to estop the Board from serving as trustee based on the Board's assertion in its 2007 motion to dismiss that it did not have any interest in the trust under the terms of the Consent Judgment. Subsequently, the Supreme Court held otherwise, finding that the Consent Judgment did not clearly supersede the terms of the original trust agreement. Consequently, the Board's misapprehension of the Consent Judgment is not a factual assertion upon which the Appellants' relied, such that estoppel is an appropriate remedy.

Finally, Appellants ignore the express terms of the alternate disposition plan set out in the trust agreement, which requires a determination of impossibility or impracticability before the Board's opportunity to step in as trustee to be triggered. The trust agreement requires that the Board may serve as trustee only after the trust purposes have been declared impossible or impracticable. That declaration was not made until the jury reached its verdict. Therefore, the Board's right to accept the property was not triggered until after the jury verdict.

Appointment of the Board as successor trustee is consistent with the Trust's purposes and is in the public interest. The trial court's challenged Orders should be affirmed.

## STATEMENT OF THE FACTS

The 289 acres of coastal property at issue in this litigation (the "Trust Property") was deeded as part of a nearly 10,000 acre grant of land to the Hammocks Beach Corporation, Inc. ("HBC"), as trustee of a charitable trust, through a deed of August 10, 1950, and a written agreement of September 6, 1950 (hereinafter the "Deed" and "Agreement"), by Dr. William Sharpe and his wife, Josephine W. Sharpe. The Deed 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)

In 1986, the Sharpe and Hurst heirs sought to terminate the trust, and HBC filed a declaratory judgment to quiet title to the trust property. That action was settled in a 1987 Consent Judgment, under which HBC retained title as trustee,

with additional authority, 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 title to certain other tracts of property free and clear of any rights of HBC. (Doc. Ex. p. 22)

As reflected in the Consent Judgment, the Attorney General advised the Court at that time that the "the Board could not, and will not, spend tax revenues for the purpose of administering or improving a racially segregated facility," and 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)

In December 2006, Appellants – two of the Hurst heirs, Harriet Hurst Turner and John H. Hurst – filed the underlying action against HBC, the Sharpe heirs, and the Board and Attorney General Roy Cooper in his official capacity ("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 Appellants' interests in the Trust Property, eliminating the Trust's alternate plan of disposition. (R p 15) The State Defendants answered separately and moved to dismiss based in part on the belief that they were not entitled to enforce the trust and in part on their belief that the

Consent Judgment expunged the Board's interest. (R p 92) The trial court denied HBC's motion (R pp 40-41), but granted the State Defendants' motion "in light of the absence of any objection from plaintiffs or other defendants" (R pp 96-97).

Upon interlocutory appeal by HBC, the North Carolina Court of Appeals reversed the trial court as to dismissal of HBC. Turner v. Hammocks Beach Corp., 192 N.C. App. 50, 664 S.E.2d 634 (2008) ("Turner I"). However, the Supreme Court in turn reversed on the issue of HBC's motion to dismiss and remanded the matter. Turner II. The Court noted that the Consent Judgment declared that the 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, the Supreme Court held that the trial court properly denied HBC's motion to dismiss and remanded the case for trial.

Following trial, the jury returned a verdict for Appellants finding that the 1987 Consent Judgment did not expunge Appellants' contingent, future interest in the property; that it had become "impossible or impracticable" to use the Trust Property for the Trust purposes; and that HBC's Board had acted improperly by not making this determination.

On October 26, 2010, the trial court entered a Judgment and Order ruling that HBC would be removed as trustee; that the trusteeship would be tendered to

the Board (R pp 119-21); and setting a hearing for November 22, 2010, by which time the Board was to indicate "whether it wishes to accept appointment as successor trustee" (R pp 122-23). On November 4, 2010, the Board 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)

On January 3, 2011, a hearing was held by the trial court "for the purpose of fulfilling the Judgment entered in this matter by formally tendering to the [Board] the appointment as successor trustee." (R p 236) At the end of the hearing, the court ruled on all issues before the court, and these rulings were reduced to writing in an Order filed on January 12, 2011 (the "January 12 Order"). (R pp 236-42) On January 26, 2011, Appellants filed their Notice of Appeal from both the January 12 Order and October 26 Order. (R p 254)

## LACK OF GROUNDS FOR APPELLATE REVIEW

For all the reasons set forth in the Board's Motion to Dismiss Appeal filed with this Court on January 26, 2012, which are incorporated herein by reference, this Court has no subject matter jurisdiction over the appeal from either the October 26 Order or the January 12 Order.

## ARGUMENT

### I. THE APPELLANTS' UNEQUIVOCAL REPRESENTATIONS TO THE JURY AND TRIAL COURT DEFEAT THEIR APPEAL.

Appellants' representations to the jury during closing argument led the jury to believe the property would be tendered to the Board. The court followed the language of the Trust and tendered the trusteeship to Board. Appellants, therefore, have no basis to appeal the trial court's tender of the trusteeship or the Board's acceptance.

#### A. Appellants Are Estopped from Challenging the Board's Appointment as Trustee.

Appellants 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:

> [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 p1215, ln 14 – p1216, ln 4 (emphasis added)).

"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). See also Songwooyarn Trading Co. v. Sox Eleven, Inc., 714 S.E.2d 162, 168, 2011 N.C. App. LEXIS 1173, at *14 (N.C. Ct. App. June 21, 2011) (refusing to allow a defendant to raise a jury instruction as an issue on appeal where the court found that "any error would be an invited error"). 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, Appellants' counsel directed the jury to specific language in the Trust and explained to them – so they would not be "confused" as to what was going to happen if it voted in Appellant's favor – that the next step was for the property to be tendered to the State. Appellants 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.

1. Judicial Estoppel Precludes Appellants' Argument.

Having expressly represented to the jury that (if it voted "yes" on all three issues) the Trust Property would be tendered to the Board as successor trustee, Appellants are judicially 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, the three most commonly cited factors being as follows:

> (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)).

Appellants' stated position at trial is the opposite of what they argue to this Court. At trial, Appellants told the jury that "there will be a tender to the [Board] to see whether they wish to serve as a successor trustee." (TVII p1215, ln14 – p 1216, ln 4 (emphasis added)) Appellants' position now – that there should not

have been a tender to the Board and that the Board has no discretion to accept the tender – is "clearly inconsistent." See Powell, 364 N.C. at 569, 703 S.E.2d at 728.

The second factor is met because it would threaten judicial integrity for this Court to allow Appellants to take a position in stark contrast to the one they argued to the jury to secure a favorable verdict. At trial, Appellants led the jury to believe that the trusteeship would be tendered to the Board. No evidence or argument to the contrary was heard by the jury. The trial court, in accordance with Appellants' argument, subsequently tendered the trusteeship to the Board. Failure to estop Appellants from asserting a contradictory position means either that they misled the jury into believing that the Board had the option to take the property or that they are misleading this Court into believing that the Board did not have that option.

Here, Appellants' 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 Appellants. There was no issue before the jury that required Appellant to make the representation it did to the jury. Appellants in good conscience could not have made that representation if they were afterwards going to contend that it would be error to tender the trusteeship or if they intended to contend that the Board was precluded from accepting.

The third factor is met insofar as Appellants would have an unfair advantage if they are permitted to argue to the jury that the property would be tendered to the Board and remain as part of a charitable trust, while subsequently arguing to this Court that the trial court erred when it offered the trusteeship to the Board rather than transferring the property directly to Appellants.

The assertion to the jury at the conclusion of Appellants' closing argument was not an oversight or slip of the tongue on the part of its counsel – it served a strategic purpose. By implying that the Trust might continue if the Board accepted the trusteeship – Appellants' argument defused any traction that HBC may have gained with its argument that if the Appellants 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)

Appellants cannot now 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)).

B. Appellants Are Estopped from Challenging the Board's Appointment as Successor Trustee after Representing to the Court that Tender to the Board Was Appropriate.

Following the verdict, Appellants 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 statements made by Appellants, the trial court entered its Judgment and Order of October 26, 2010. The October 26 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)

Appellants are bound by their statements to the trial court and should be judicially estopped from adopting one position for their own benefit at trial and then subsequently taking an inconsistent position once the verdict had been entered, and their earlier stance had become inconvenient to their interests.

## II. THE TRIAL COURT PROPERLY APPOINTED THE NORTH CAROLINA STATE BOARD OF EDUCATION AS TRUSTEE.

### A. The Board's Interest in the Trust Survived the 1987 Consent Judgment.

#### 1. The Consent Judgment does not expunge the Board's interest.

The 1987 Consent Judgment does not terminate the Board's interest in the trust. The North Carolina Supreme Court has expressly ruled on this issue. In Turner II, the Court held that the Consent Judgment did not "clearly supersede[] the terms of the original trust in the event of impossibility or impracticability." 363 N.C. at 560-61, 681 S.E.2d at 775. Because Turner II determined that the settlors' alternate plan for disposition of the Trust Property survived the Consent Judgment, that necessarily meant that the Board's contingent interest as successor trustee survived.[1] Notwithstanding the Board's incorrect legal theory about the effect of the Consent Judgment, the Supreme Court's subsequent holding controls.

[1] Because the 1987 Consent Judgment ordered that the Trust be maintained, rather than terminated, and did not otherwise limit the future rights or suitability of the Board as trustee, the Judgment cannot be construed to preclude the Board from accepting appointment as trustee. Thus Appellants' collateral estoppel and res judicata arguments are without merit.

It is entirely incompatible with Appellants' theory that "any interest that the State Board of Education may have had in this trust" was extinguished.

Moreover, examination of the Consent Judgment reveals that nowhere does it conclude or decree that the Board's "interest" as a contingent, successor trustee in the remaining Trust property is "expunged." The Consent Judgment expressly decreed that HBC would continue as trustee of the remaining property, the property now at issue, "subject to the trust terms set forth" in the 1950 Deed and Agreement. Chief among those "terms" in the original Trust instrument is the following language:

> [I]f at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified and if such impossibility or impracticability shall have been declared to exist . . . , the property conveyed herein may be transferred to the [Board], to be held in trust for the purpose herein set forth.

(Doc. Ex. p. 2)[2]

The Consent Judgment found that the Board asserted that it could not and would not "spend tax revenues for the purpose of administering or improving a racially segregated facility." (R p 25) That finding did not adjudicate the Board's future interest in the Trust as successor trustee. In particular, the Consent

[2] "A consent judgment is a court-approved contract subject to the rules of contract interpretation. Walton v. City of Raleigh, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." Id.

Judgment made no finding how the Board might act at some future time in response to a tender of successor trusteeship, should the facility no longer be racially segregated. While the Consent Judgment contains an express provision that the "real property so vested in [HBC] as trustee shall be free and clear or any rights of the heirs" (R p 31 (emphasis added)), no such provision purports to eliminate the original terms of the alternate disposition with respect to tender to the Board.

Likewise, a necessary implication of the jury's finding that Appellants' future interests survived the Consent Judgment is that the Board's interest survived as well. Appellants' contingent interests in the Trust Property stem from the same language in the 1950 Deed that identify the Board as a successor trustee with a right of first refusal, just as Appellants argued to the jury in summation. Appellants' interest in the property was clearly contingent on the Board refusing to accept it.

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

The Board's honest, though mistaken, belief as to the legal effect of the Consent Judgment does not constitute a judicial admission. 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); 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). While a judicial admission of fact may be binding on a party, "[a] stipulation as to the law is not binding on the parties or the court." Bryant v. Thalhimer Bros, Inc., 113 N.C. App. 1, 14, 437 S.E.2d 519, 527 (1993) (citing State ex rel. Carringer v. Alverson, 254 N.C. 204, 118 S.E.2d 408 (1961)). A counsel's recitation of his legal conclusion concerning a matter at issue in the case is not a judicial admission. See 30B Michael H. Graham, Federal Practice. & Procedure Evid. § 7026 (Interim Edition 2011).

The Board's statement 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) was not a factual admission, but a legal conclusion. That it cannot be a judicial admission is evidenced by the fact that the Supreme Court expressly found to the contrary in Turner II. Like the Supreme Court, neither the Board nor this Court is bound to the Attorney General's 2007 legal opinion as to the effect of the 1987 Consent Judgment on the Board's future interest. See 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."), cert. denied, 376 U.S. 963, 11 L. Ed. 2d 981 (1964).

The only admission of fact was in paragraph 5 of its Answer. The Board stated:

> 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 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 statements are, by their terms, expressly limited to the facts as they existed at the time of the 1987 Consent Judgment. The remaining allegations of Paragraph 38 of the Complaint upon which Appellants focus, consist of Appellants' legal conclusions as of the time of filing of the complaint. As legal conclusions, they are not admitted even if they are not expressly denied. The requirement of Rule 8 of the Rules of Civil Procedure to admit or deny factual averments[3] 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

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

averments is meaningless." N.C.G.S. § 1A-1, Rule 8 cmt. sec. (*b*). (2011) (emphasis added).

The Board admitted in 1987 that the Board "could not, and will not" administer "a racially segregated facility" (Doc. Ex. p. 15), and therefore "ha[d] no interest in succeeding Hammocks Beach Corporation as trustee and would not agree to do so" (Doc Ex. p. 17). The Board's 2007 Answer merely recognized the express terms of the 1987 Consent Judgment.[4] But, as discussed above, the terms of the Consent Judgment did not limit the Board's ability - going forward - to accept trusteeship in the event it later became impossible or impracticable for HBC to fulfill the terms of the trust in the future.

Similarly, the Order of Dismissal entered by the trial court did not itself conclude that the Consent Judgment expunged the Board's interest, and it cannot be grounds to preclude the Board from accepting appointment. It simply recited what documents the Court reviewed and stated the fact that no party opposed the motion. (R p 94)[5] Whether the Board as contingent successor trustee may have

[4] The Board would still refuse to spend tax money to support a racially segregated facility, but the Charter was changed in 1989 on the heels of the Consent Judgment to eliminate all references to race.

[5] Contrary to Appellants' suggestion otherwise, neither has the Supreme Court ruled on whether the Board's interest was extinguished; it merely recited the case history:

been a necessary party is not determinative of this issue. Once the jury decided the impossibility or impracticability issue, the Board was brought back in by the Court, as Appellants told the jury would happen, to answer whether or not it wished to become successor trustee.

Without a tender to the Board, there could be no "refusal" as contemplated by the original Trust terms and the Answer and Motion to dismiss did not constitute such a refusal. There could be no tender to the Board until there had been a determination of impossibility or impracticability. That did not happen until after Judgment was rendered in the trial court.

Although the Board, in 1987, disclaimed any interest "in succeeding [HBC] as trustee" (Doc. Ex. p. 17), that disclaimer was made in conjunction with the Board's and all other parties' agreement through the Consent Judgment that the Trust would continue with HBC as trustee, rather than being transferred to another trustee or terminated. And, as described herein, that disclaimer was made for specific policy reasons that existed in 1987. The same policy reasons do not exist

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> As of 1987, the North Carolina Attorney General had advised that the [Board] had "no interest in succeeding [HBC] as trustee and would not agree to do so." The Attorney General and the [Board] thus moved to be dismissed as parties from the present action, and the trial court entered an order granting that motion on 24 August 2007.

Turner II, 363 N.C. at 557, 681 S.E.2d at 772.

today, as HBC in 1989 removed from its Charter all references to race. See Argument II.C.3. infra.

Without a tender of the property to the Board, there could be no "refusal" of that property as contemplated by the original Trust terms.

### B. No Grounds Exist to Estop the Board from Accepting the Property as Successor Trustee.

Appellants' argument that the Board is equitably estopped from accepting the appointment as trustee is without legal basis. The essential elements of equitable estoppel are "(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts." White v. Consol. Planning, Inc., 166 N.C. App. 283, 305, 603 S.E.2d 147, 162 (2004) (citations omitted), disc. review denied, 359 N.C. 286, 610 S.E.2d 717 (2005). To assert the defense of equitable estoppel, Appellants must have "(1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped." Id. Appellants fail to demonstrate that the Board made any false representations of material fact or that Appellants relied on any of the Board's representations.

First, the Board's theory regarding the legal effect of the Consent Judgment was not a false representation or concealment of any material facts. As discussed

in detail above, prior to the Supreme Court's decision in Turner II and the jury verdict, the Board understood the Consent Judgment to be a complete settlement expunging the interests of all parties, other than HBC, to the 290 acres that remained in the Trust. In Turner II, however, the Supreme Court determined that the Board's theory was incorrect and that the Consent Judgment did not clearly, as a matter of law, expunge the interests of others so that HBC could hold the land free and clear.

Second, Appellants did not rely on the Board's statements. In the October 2010 Pretrial Order, Appellants presented the following issue to be tried by the jury: "Has the State of North Carolina declined to accept the trust property for the purposes specified by Dr. Sharpe and refused to serve as successor trustee?" (R p. 116 ¶1.c.) In other words, as of October 2010, Appellants considered the Board's interest in the property to be unresolved.

Additionally, at the close of summation, Appellants' counsel told the jury that if they voted in Appellants' favor on all issues, "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." (TVII p 1215, ln 24) Appellants did not indicate to the jury that the Board was precluded from accepting the tender, or that Appellants considered the Board's interests in the property to be expunged.

Following the jury's verdict, Appellants' counsel represented to the trial court that tender to the Board was the appropriate next step required under the 1950 Deed and Agreement, saying "it's really not necessary for the Court to have a hearing just on that issue" because if the Board "choose[s] to be the successor trustee, then we don't need to get to the next issue because they take it over." (T VII 1276, ln 22-24; T VII 1277, ln 1-3) Such statements to the jury and the trial court are inconsistent with Appellants' last-minute contention that they relied on the Board's legal conclusion that its interests in the property were expunged. Appellants' conduct before, during, and after the trial demonstrate that Appellants did not rely on the Board's legal conclusions.

Appellants' arguments advancing "judicial estoppel" theories are equally inapposite here. Appellants have not met any of the three factors – clearly inconsistent positions, judicial acceptance of the position, and unfair advantage – required to establish judicial estoppel.

First, the Board's current position does not conflict with its prior <u>factual</u> assertions. The factual assertions made by the Board in 2007 were mere recitations of the facts as they existed at the time of the 1987 Consent Judgment. The Board is not seeking to refute those factual assertions. Instead, the Board's statement 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 ¶1) was a legal conclusion regarding

the effect of the Consent Judgment, not a factual assertion. That legal conclusion was refuted by the Supreme Court in Turner II, as discussed above. Because judicial estoppel is limited to prohibiting inconsistent factual assertions, it cannot prevent the Board from asserting a new legal theory based on the Supreme Court's ruling and the jury verdict in this case. See Whitacre P'ship, 358 N.C. at 32, 591 S.E.2d at 890 (holding that judicial estoppel is "limited to the context of inconsistent factual assertions and that the doctrine should not be applied to prevent the assertion of inconsistent legal theories" (emphasis added)).

The second factor is not met because it there is no threat to judicial integrity for this Court. Whitacre P'ship, 358 N.C. at 34, 591 S.E.2d at 892 ("[A] reasonable justification for a party's change in position may militate against its application in a particular case."). At no time did the Supreme Court hold that the Board's interest was extinguished; it merely recited the case history: See fn 5, supra. Additionally, the jury apparently accepted and the trial actually accepted Appellant's position that the trusteeship would be tendered to the Board. To estop the Board now from asserting a position consistent with Appellants' own representations to the jury would threaten judicial integrity and permit Appellants to reap the benefits of misleading both the jury and the trial court about their interest in the case.

The third factor required to establish judicial estoppel is also not met. Appellants already informed the trial court and the jury that the property would be tendered to the Board so that it potentially would remain as part of a charitable trust. The Board will derive no unfair advantage by now alleging a legal position consistent with the one Appellants already asserted to the trial court and the jury.

### C. The Trial Court's Appointment of the Board as Trustee Does Not Contradict the Jury's Verdict That It Had Become Impossible or Impracticable to Use the Property for Trust Purposes.

Appellants contend that the Board's appointment as successor trustee is incompatible with the jury's verdict that it had it become "impossible or impracticable" to use the Trust Property and land for the purposes specified by the settlors. Given the terms of Trust and Appellants' arguments to the jury, this assertion is unsupported and irrational.

First, this argument conflicts with the plan of the settlers. The Trust specifically requires that impossibility or impracticability be declared before the trusteeship can be tendered to Board as successor. The Trust instrument provides in pertinent part that

> if at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified and if such impossibility or impracticability shall have been declared to exist . . . the property conveyed herein may be transferred to the [Board], to be held in trust for the purpose herein set forth . . . .

(Doc. Ex. p. 2) Appellants' argument would rob this first alternate disposition of any meaning at all. Such an interpretation is not in keeping with the law. See Callaham v. Newsom, 251 N.C. 146, 149, 110 S.E.2d 802, 804 (1959).

Second, Appellants' closing arguments to the jury qualified the impossibility and impracticability determination to mean "under this trustee," i.e., HBC. (T VII p 1204, ln 6-14; T VII p 1205, ln 8-10) When entering their verdict in Appellants' favor, the jury accordingly would have acted with the understanding that determination of impossibility or impracticability applied to the current trustee, HBC. Appellants also argued this very point to the trial court more than once. (TVI p 1080, ln 21 – p 1081, ln 9; TVII p 1233, ln 7-22) Thus Appellants should be estopped from arguing that the jury's verdict precludes tender to the Board.

1. Appellants' Claim That the Board Will Not Use the Property for a Proper Purpose is Unsupportable.

Next, Appellants assert that the trial court's tender to the Board was made with the understanding that the Board intended to change the Trust's purposes impermissibly and turn the trust property into a public park. This also is incorrect and unsupported by the record or any other facts.

The trial court's January 12 Order states, "The North Carolina State Board of Education is hereby formally appointed as successor trustee to administer the Trust for the purposes set forth in the 1950 Deed and Agreement, subject only to

the approval of the Council of State." (R p 241) This precise language as to the purposes for which the Board would accept appointment disposes of Appellants' improper purpose argument.

2. The Board Does Not Intend to Cede the Property.

Second, Appellants' fallaciously contend that the State "plans to convert the property to a park for the general public by having the Board cede management of the property to the Division of Parks." (Appellants' Br. at 28) The newspaper article Appellants cite is rank hearsay – as the Board previously argued at the January 3, 2011 hearing – and is of no probative value whatever. With regard to the Board counsel's statements to the trial court at that hearing, the record entirely contradicts Appellants' assertion. What counsel actually said was this:

> Mr. Francis has contended that somehow . . . [the property is] just going to be turned over to parks and education, that it's not really the Board of Education. That's not the case, it is the State Board of Education that has passed a resolution indicating that it chooses to accept, subject, as Mr. Ziko indicated, to a vote by the Council of the State to approve the receipt of real property. . . .

(T (Appt) p 31) Citing statutory authority[6], Counsel went on to add:

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[6] (a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
(1) Selecting an agent;
(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

> [T]here's contemplation that the State Board of Education might enter into a memorandum of agreement appointing as an agent of the Board of Education, the Division of Parks and Recreation, to assist in the management of the trust property . . . .
>
> . . . .
>
> . . . . but, make no mistake, it would be the Board of Education that would be the trustee.

(T (Appt) p 32 (emphasis added)) So, there is no merit to the charge that the Board would "cede" the property to the Division of Parks and Recreation for the purpose of converting the Trust property to a State Park. Any agent of the Board, by law, would remain accountable to the Board to use the property to fulfill the Trust's purposes. In the event a dispute were later to arise, the Board as Trustee would be subject to the jurisdiction of the courts to account for how it was carrying out the Trust purposes. See N.C.G.S. § 36C-2-201 (2011). For this reason, Appellants' argument about improper exercise of cy pres is entirely off the mark.

3. The Trust Purposes Can Be Fulfilled by the Board.

Finally, Appellants appear to argue that the Trust purposes cannot be fulfilled because the settlors had a specific charitable intent to benefit black

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> (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
>
> (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

N.C.G.S. § 36C-8-807 (2011).

teachers and that this purpose cannot be achieved. Appellants appear to ignore, however, that the signers of the 1987 Consent Judgment – including the individual Appellants themselves – accepted that there had been a change of circumstances (for the better) since the Trust was created and agreed that the Trust should continue, with modifications. (R p 24 (acknowledging the "virtual disintegration of the organizations for black people which were contemplated by Dr. Sharpe as primary beneficiaries" of the Trust)). Appellants cannot reasonably argue that the same issues that were acknowledged and addressed by the Consent Judgment in 1987 now form the basis for terminating the Trust.[7] To the extent Appellants' brief may be construed to assert this argument, Appellants should be estopped from arguing the same facts and demanding a different result.

Moreover, HBC demonstrated flexibility in 1989 by amending its Charter to remove any language referring to race. Contrary to Appellants' argument, this change was within the authority of HBC. The Trust instruments themselves made no mention of race gave great discretion to HBC as to the full scope of trust beneficiaries. The Deed provided in relevant part that the deeded 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 for such others as are provided for in the Charter of [HBC]." (Doc. Ex. p. 1 (emphasis added))

[7] This was noted by the trial court. (T (Appt) p 62, ln 2-15)

The companion Agreement's language is of similar import and notes 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)) Even the original Charter of HBC noted that, although the Trust assuredly was intended to "safeguard" its benefits to black teachers, that was "not to be interpreted as undue discrimination against any other group." (Doc. Ex. p. 37) Moreover, the original charter had a broad list of beneficiaries.

Stated simply, HBC's 1989 amendments did not change the charitable trust's purposes. The changes were not at all analogous to Bogert's hypothetical example, quoted by Appellants, of converting a trust to aid education to one for the poor, where at least some original beneficiaries would subsequently be excluded. George G. Bogert, The Law of Trusts and Trustees, § 393 n.5 (2010). Nor were they like the situation in Brown v. Mem'l Nat'l Home Found., 329 P.2d 118 (Cal. App. 2d Dist. 1958), cert denied, 358 U.S. 943, 9 L. Ed. 2d 352 (1959) where the trustee's impermissible changes both narrowed and broadened the beneficiary base in a manner that excluded some original beneficiaries, e.g., veterans of any war other than World War II. HBC's 1989 Charter Amendment, in contrast, did not exclude any beneficiaries or any class of beneficiaries which were originally included. As the trial court noted, the State's black teachers would benefit far

more now by ensuring the Trust's benefits were open to all teachers, than by terminating the trust. (T (Appt) p 86)

4. Maintenance of the Trust is Consistent with the Settlors' Intent.

Last but not least, as a matter of public policy there is no reason that Board should be precluded from accepting the trusteeship. On the contrary, the end result of Board succeeding as trustee will be that the charitable intent of the trust grantors, Dr. and Mrs. Sharpe, will be accomplished and maintained. 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). That is what this Court should do here by affirming the Judgment and Order of the trial court entered on October 26, 2010.

There is no question that the settlors intended to create a charitable trust. They transferred specific real property to a named trustee to hold and use the same for "recreational and educational purposes." (Doc. Ex. p. 1) They provided that if HBC determined that is it impossible or impracticable for the trust property to be used for the stated purpose, the property may then be transferred to Board to be held "in trust" for the stated recreational and educational purposes. It is completely in keeping with the Deed and Agreement that Board succeeds as trustee if the Council of State approves of Board's provisional acceptance of the property.

## III. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW POST-JUDGMENT DISCOVERY

In advance of the January 3, 2011, hearing on their Motion for Reconsideration, Appellants issued a deposition subpoena on December 13, 2010, to Special Deputy Attorney General Thomas J. Ziko and a deposition subpoena duces tecum to State Parks Director Lewis Ledford with depositions to take place on December 23, 2010. (R pp 128-42) On December 17, 2010, through counsel the deponents filed objections to the depositions and alternative motions for protective order. (R pp 169-83) Deponents objected (a) to lack of proper service; (b) that Judgment already had been entered and that civil discovery "rules are designed to allow discovery only when the information sought is 'reasonably calculated to lead to the discovery of admissible evidence' to be used in the trial of the action in which discovery is sought," News & Observer Pub. Co. v. State, 312 N.C. 276, 284, 322 S.E.2d 133, 139 (1984); (c) because such depositions would cause unreasonable oppression, burden and expense to counsel for the Board, Thomas J. Ziko, who had already entered an appearance in response to the Court's October 26 Order; and, (d) that Appellants already had the opportunity to cross examine Deputy Parks Director Carol Tingley at trial, and it was oppressive and unduly burdensome now to subpoena her superior, Lewis Ledford, disrupting his planned family vacation in the holiday season and requiring production of voluminous documents. The subpoenas were served on the two non-party

deponents on December 22, 2010, who filed a supplemental objection on December 23, 2010; adding that they were not given reasonable time for compliance. (R pp 184-86) The trial court properly upheld the State's objections:

> Plaintiffs failed to identify the authority for their effort to depose Thomas Ziko and Lewis Ledford post-Judgment. The Plaintiffs' Motion is expressly based on the pleadings and proceedings of record in this case. Plaintiff has failed to convince the Court that the post-Judgment discovery would be relevant and material to the issues before the Court. Therefore, in its discretion the Court sustains the objections to the depositions and to the production of documents by Lewis Ledford under the subpoena duces tecum served on him.

(R p 240)

This Court's standard of review of a trial court's discovery order is deferential – the order will only be upset on appeal by a showing that the trial court abused its discretion. Fulmore v. Howell, 189 N.C. App. 93, 96, 657 S.E.2d 437, 440 (2008). To demonstrate an abuse of discretion, an appellant must show that the trial court's ruling was "manifestly unsupported by reason, or could not be the product of a reasoned decision." Id. Appellants cite no authority showing how the trial court abused its discretion under these facts.

## CONCLUSION

This Court should uphold challenged Orders of the trial court appointing the State Board of Education to be successor trustee of the Hammocks Beach Trust.

Respectfully submitted this the 5th day of March, 2012.

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N.C. App. R. 33(b) Certification: I certify that the attorney listed below has authorized me to list his names on this motion as if he had personally signed.

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect X3), the document does not exceed 8750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This the 5th day of March, 2012.

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## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **STATE BOARD OF EDUCATION'S APPELLEE BRIEF** 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**] By email transmittal;

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