NORTH CAROLINA COURT OF APPEALS

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Harriet Hurst Turner, and John Henry Hurst,

Plaintiffs-Appellees,

 \mathbf{v}_{\bullet}

From Wake County 06 CVS 18173

The Hammocks Beach Corporation,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS EVEN THOUGH A 1987 CONSENT JUDGMENT ENTERED BY THE ONSLOW COUNTY SUPERIOR COURT PRECLUDES PLAINTIFFS-APPELLEES FROM OBTAINING A TRIAL ON THE MERITS AS A MATTER OF LAW.

(R pp. 5-25, 61-83)

II. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS AND ALLOWED THE CASE TO PROCEED IN CONTRAVENTION OF A PRIOR ORDER ENTERED BY ANOTHER SUPERIOR COURT JUDGE.

(R pp. 5-25, 61-83)

III. WHETHER THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS BUT GRANTED RELIEF TO THE SIMILARLY SITUATED DEFENDANT WHO ALSO INVOKED THE PRECLUSIVE EFFECT OF THE 1987 CONSENT JUDGMENT.

(R pp. 21-25, 61-92)

STATEMENT OF THE CASE

This is an appeal from an August 23, 2007 order that denied Defendant-Appellant The Hammocks Beach Corporation's ("Hammocks Beach") Rule 12(b)(6) motion to dismiss Plaintiffs' Complaint. The parties to this appeal were parties -- two decades ago -- to an earlier action, in Onslow County, in which Hammocks Beach sought to quiet title to this property. That case ended in a Consent Judgment that conveyed a portion of the land held in trust by Hammocks Beach to Plaintiffs-Appellees "free and clear" and left other portions of the property in Hammocks Beach's care, as trustee, "free and clear of any interest" of Plaintiffs-Appellees.

Nonetheless, on December 15, 2006, Plaintiffs-Appellees Harriet Hurst Turner and John Henry Hurst (collectively, "the Hursts") filed the present action in Wake County Superior Court. Pursuant to Rules 12(b)(1) and 12(b)(3), of the North Carolina Rules of Civil Procedure, Hammocks Beach moved to dismiss the Complaint for failure of personal and subject matter jurisdiction, arguing that Wake County was an inappropriate venue because the Hammocks Beach property is in Onslow County and the Onslow County Court retained jurisdiction over the case in its Consent Judgment. The Wake County Superior Court denied that motion.

Thereafter, Hammocks Beach moved to dismiss pursuant to Rule 12(b)(6), on the ground that the Hursts released all interest in the property by virtue of the Consent Judgment and thus had no rights as beneficiaries of the trust to an accounting or to a claim of breach of fiduciary duty. The matter came on to be heard during the August 21, 2007 session of the Wake County Superior Court, the Honorable R. Allen Baddour, Jr. presiding. On August 23, 2007, the court entered an order denying the motion.

Hammocks Beach filed a Notice of Appeal from the August 23, 2007 Order on September 6, 2007. The Record on Appeal was filed on October 25, 2007 and docketed on October 26, 2007.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

This appeal involves an interlocutory order affecting a substantial right of Hammocks Beach. In such circumstances, North Carolina appellate courts permit immediate appeal. "[T]his Court has jurisdiction over an interlocutory appeal when the order appealed from affects a substantial right which would be lost absent an immediate appeal." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 646 S.E.2d 418, 422 (N.C. Ct. App. 2007); *see also* N.C. GEN. STAT. §§ 1-277(a), 7A-27(d)(1) (2005).

The substantial right and its loss absent immediate appeal are clear. "[T]he right to avoid the possibility of two trials on the same issues can be...a substantial right." *Gregory v. Penland*, 179 N.C. App. 505, 509, 634 S.E.2d 625, 629 (N.C. Ct. App. 2006) (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)) (citation omitted). The possibility of inconsistent judgments poses a risk to the administration of justice. The Consent Judgment was meant to bring an end to this litigation. The parties are the same, the issues are the same, and the risk of inconsistent outcomes is real.

There is no reason to re-litigate that which has been decided. Once a matter between two parties has been decided by the North Carolina courts, a party cannot relitigate that same matter. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 84, 609 S.E.2d 259, 261 (N.C. Ct. App. 2005); *Green v. Dixon*, 137 N.C. App. 305,

307, 528 S.E.2d 51, 53 (N.C. Ct. App. 2000), *aff'd*, 352 N.C. 666, 535 S.E.2d 356 (2000); (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)) ("Under the doctrine of res judicata, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them.").

In North Carolina, a consent judgment containing findings of fact and conclusions of law has a higher level of sanctity in the courts than does a mere settlement agreement. *Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 334, 564 S.E.2d 259, 265 (N.C. Ct. App. 2002) (stating that a consent judgment containing findings of fact and conclusions of law is both an order of the court and a contract, not just a contract). "A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court and operates as a judgment on the merits." *In re Thrift*, 137 N.C. App. 559, 562, 528 S.E.2d 394, 396 (N.C. Ct. App. 2000) (citations omitted).

STATEMENT OF THE FACTS

To put the Hursts complaint and Hammocks Beach's motion in proper context, one must consider the history of the property ("Hammocks Beach property"), the history of prior litigation, and the purpose of the 1987 Consent Judgment, which ended the prior litigation. (R pp. 61-82)

The Hammocks Beach property dates back to 1923, when Dr. William Sharpe, a neurosurgeon, acquired about 810 acres of high land adjacent to Queens Creek and Foster's Bay in Onslow County. In 1930 and 1931, he bought 2,000 adjacent acres (known as Bear Island) and nearly 7,000 acres of marshland. The high land portion capable of reforestation or cultivation was known as "The Hammocks." (R p. 64)

The Hammocks became dear to Dr. Sharpe, as did a couple -- John and Gertrude Hurst -- who lived on the property as tenants and caretakers. That couple became very close to Dr. and Mrs. Sharpe and cared for the Sharpe's children when they visited The Hammocks during vacation.

Dr. Sharpe told John and Gertrude Hurst that he wanted to devise the Hammocks to them. But Gertrude Hurst, a former teacher in the then segregated schools, urged Dr. Sharpe to give the property to an entity that would benefit black teachers and youth. Acceding to that request, Dr. Sharpe -- in 1950 -- gave the property to the Hammocks Beach Corporation, a not-for-profit whose purpose was

elementary, secondary and collegiate institutions for Negroes in North Carolina ... and for such other groups as are hereinafter set forth." The conveyance restricted the use of the property for the use and benefit of the members of "The North Carolina Teachers Association, Inc., and such others as are provided for in the Charter of Hammocks Beach Corporation." The trust also prohibited the mortgage or sale of the property. (R p. 65)

The terms of the trust imposed on the property numerous rights of use and possession in the Sharpe and Hurst families, including the right to cultivate, to quarry, to raise livestock, to travel over the land incident to taking fin fish and shellfish in adjacent waters, and to reside there. By 1986, the property, which once comprised nearly 10,000 acres, had been reduced to about 805 acres. (R p. 65) Prior to that time, two thousand ocean front acres had been conveyed at no cost to the State of North Carolina and now comprise Hammocks Beach State Park. (R pp. 65-66) Hammocks Beach had also conveyed 7,000 acres of marshland to the State of North Carolina. (R p. 66)

At the time the trust was created in 1950, Dr. Sharpe provided for the possibility that its purpose to provide a retreat for black teachers and students might become impossible or impracticable. In that case, he directed that the property be conveyed to the North Carolina State Board of Education (the

"Board") as trustee for the purpose of continuing the trust. If the Board refused the property, Dr. Sharpe directed that it be conveyed to him and to John and Gertrude Hurst and their heirs and descendants. (R p. 65)

The restrictions against the sale or mortgage of the property, the overlapping rights of the Hurst and Sharpe families, and the integration of the public schools rendered the fulfillment of the trust terms impossible or impracticable. As Judge Reid explained in his October 1987 Consent Judgment:

[T]he significant rights of use and occupancy vested in the Sharpe and Hurst families so encumber the land that under modern circumstances it would be totally impracticable to devote funds to improving the land for recreational activities that would conflict with such rights in the Sharpes and Hursts. Thus, by reason of a change of circumstances not foreseeable in 1950, financial and physical factors render fulfillment of the terms of the trust impossible. . . .

(R p. 67-68) The difficulties in complying with the terms of the trust, led to a dispute between the Sharpes, Hursts and Hammocks Beach over ownership of the property. This dispute lasted for over a decade and precipitated the 1987 Consent Judgment declaring the rights of the parties, including the Hursts. (R p. 63)

On July 28, 1986, Hammocks Beach filed, in Onslow County, a declaratory action to: (1) quiet title to the property; or (2) order a disposition of the property and administration of the trust to fulfill as nearly as possible Dr. Sharpe's general intent. (R p. 61) Hammocks Beach sought either fee simple title to a portion of

the property or that the terms of the trust be modified so that Hammocks Beach could hold an appropriate portion of the property free of any rights in the Sharpe and Hurst families. (R p. 69) The Sharpe and Hurst defendants counterclaimed and contended -- as the Hursts do here -- that it was impossible or impracticable to fulfill the trust terms, that Hammocks Beach had failed to properly administer the trust, that Hammocks Beach had acted capriciously, and that the trust should be terminated and all the property conveyed to the Sharpe and Hurst families. (R p. 61-62) Because the North Carolina State Board of Education was a contingent trustee, both the State Board of Education and the Attorney General of North Carolina were named defendants in the public interest. (R p. 63).

Judge Reid's October 29, 1987 Consent Judgment resolved forever the rights of the parties to the property. Here, in pertinent part, is the crucial finding in the Consent Judgment:

...Through their counsel, [the parties] have stated to the court that, subject to the court's approval, they have agreed to the entry of a judgment which would (1) enable Hammocks Beach Corporation to retain title to a sufficient portion of the land to serve the trust purposes, with additional powers of administration which should enable it to improve the property to the extent reasonably necessary, and (2) vest in the Sharpe and Hurst families a reasonable portion of the land *in exchange for their relinquishing rights in that portion to be vested solely in Hammocks Beach Corporation as trustee*. (emphasis added) (R pp. 70-71).

Here, in pertinent part, is the crucial conclusion of law:

- ...(c) The settlement which has resulted from negotiations between the parties, whereunder Hammocks Beach Corporation as trustee would hold title to an appropriate portion of The Hammocks *free of any claims* of the Sharpes and Hursts and with broader administrative powers, with the remainder of said property being vested in the Sharpe and Hurst defendants, is fair, reasonable, and in the best interests of the present and prospective beneficiaries of the trust, as well as the public interest, and is accordingly approved . .
- (d) The agreed settlement is fair and in the best interests of the unknown and unborn Sharpe and Hurst heirs, who have been fully and adequately represented by counsel. (emphasis added) (R pp. 71-72).

Finally, here is what the trial court ordered with respect to the property:

(3) Said real property so vested in Hammocks Beach Corporation as trustee *shall be free and clear of any rights* of the heirs of Dr. William Sharpe or of Gertrude Hurst or of the heirs of John and Gertrude Hurst. (emphasis added) (R p. 74).

The 1987 Consent Judgment is unambiguous. By its terms the Onslow County case was resolved and the issues brought then and now concluded.

Yet here today, in defiance of the powerful words of the Consent Judgment, the Hursts come -- 20 years later -- claiming a continuing reversionary interest as contingent beneficiaries in the trust and the right to take from Hammocks Beach the property that was awarded to it in the Consent Judgment. The Hursts either misread or ignore the language to which they agreed 20 years ago. What was done 20 years ago should not be undone.

Because the Hursts seek to relitigate the very legal and factual issues that were decided in the 1987 Consent Judgment, Hammocks Beach moved to dismiss the case. (R pp. 21-25, 26-60) Notably, the North Carolina State Board of Education and the State of North Carolina were sued in 1986 as contingent trustees in the event the trust purposes became impossible or impracticable. Those parties also filed a Rule 12 motion to dismiss in this case -- and they were dismissed because the Hursts conceded that the 1987 Consent Judgment expunged any interest those parties had in the Trust. (R pp. 85-92) Yet, Hammocks Beach's motion to dismiss based on the very same Consent Judgment was denied. (R p. 83) This inconsistency is inexplicable. Just as the 1987 Consent Judgment ended the State of North Carolina's interest in the Trust, it also ended the Hursts' ability to revisit the 1987 rulings.

For the reasons set out below, the ruling below should be reversed and this case dismissed with prejudice.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a denial of a Rule 12 motion to dismiss. *State v. Heard*, No. 06-1429, 2007 N.C. App. LEXIS 1405, at *4 (N.C. Ct. App. July 3, 2007) (citations omitted). This standard applies to all assignments of error and questions presented in this appeal. The question is "whether, as a matter of law,

the complaint, treating its allegations as true, is sufficient to state a claim upon which relief may be granted." *McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404 (N.C. Ct. App. 1998) (citing *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). Dismissal is warranted where on the face of the complaint there is an "insurmountable bar to recovery." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) (citations omitted). Such is the case here.

II. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS EVEN THOUGH A 1987 CONSENT JUDGMENT ENTERED BY THE ONSLOW COUNTY SUPERIOR COURT PRECLUDES PLAINTIFFS-APPELLEES FROM OBTAINING A TRIAL ON THE MERITS AS A MATTER OF LAW.

ASSIGNMENTS OF ERROR NO. 1 & 2 (R pp. 5-25, 61-83)

A consent judgment is a final judgment which precludes re-litigation of the same matter. *See, e.g., NationsBank of North Carolina, N.A. v. Am. Doubloon Corp.*, 125 N.C. App. 494, 501, 481 S.E.2d 387, 391 (N.C. Ct. App. 1997) (applying the doctrine of issue preclusion and ruling that the "consent judgment being a final judgment, having disposed of the issue [now raised], is binding upon the parties herein"). Issue preclusion "prevents [the] relitigation of issues actually litigated and necessary to the outcome of the prior action ... between the parties or their privies." *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127,

128 (1996) (quoting *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)).

The 1987 Consent Judgment was a final judgment on the merits. There is no substantive difference between what the Hursts claimed then and what they claim now. The key factual allegations contained in the Hursts' Complaint are verbatim the same as those found by the Onslow County Superior Court and set out in its 1987 Consent Judgment. (R pp. 7-10, 64-66, 69) The Hursts assert a reading of the 1987 Consent Judgment that is not supported by its actual terms. (R. pp. 10, 71)]

The legal averments of the Complaint all turn on the premise that the Hursts reserved rights to the Hammocks Beach property after the 1987 Consent Judgment. In seeking an accounting under N.C. Gen. Stat. § 36C-4-405.1, the Hursts assert that they "are remainder beneficiaries and interested persons." (R.p. 13). They are not. (R. pp. 71, 74) In seeking a termination of the trust under N.C. Gen. Stat. 36C-4-410, the Hursts again assert themselves as "contingent beneficiaries" who enjoy reversionary rights. (R.p. 14). They are not. (R pp. 71, 74) In seeking their breach of fiduciary claim, Plaintiff-Appellants must show that Hammocks Beach owes them a special duty. They incorrectly derive such a duty by again claiming themselves as "remainder beneficiaries and interested persons." They are not. (R

pp. 71, 74) As shown below, those interpretations do not accurately reflect the unambiguous language of the Consent Judgment.

The Hursts' Representations	Consent Judgment (1987)
Certain property vested to the Hursts "in	Certain property vested to the Hursts "in
exchange for their relinquishing rights of	exchange for their relinquishing rights in that
immediate use for cultivation, quarrying,	portion to be vested solely in Hammocks
raising livestock, fishing, residency, recreation	Beach Corporation as trustee." (R p. 71)
and other activities in the portion to be held	
solely by the Hammocks Beach Corporation as	
trustee." Paragraph 21 of Complaint (R p. 10)	
"The Consent Judgment provided that	"[Hammocks Beach] as trustee, shall be free
[Hammocks Beach], as trustee, holds title to	and clear of any rights of [the Hursts]."
[the Hammocks Beach property] subject to the	(R p. 74)
trust terms [], including Plaintiffs' remainder	
rights." Paragraph 23 of Complaint (R pp.	
11,12)	
Plaintiffs are "remainder beneficiaries and	"[Hammocks Beach] as trustee, shall be free
interested parties". Paragraphs 29 and 42 of	and clear of any rights of [the Hursts]."
Complaint (R pp. 13, 15)	(R p. 74)

If one could avoid res judicata and collateral estoppel by clever wordplay then those powerful doctrines that protect scarce judicial resources would be rendered void. The key issues raised by the Hursts are identical to those raised in the prior action. The Hursts allegations in this case merely re-state the arguments they made in the prior action: namely that fulfillment of the trust terms has become impossible or impracticable, that Hammocks Beach has acted capriciously, and that the Court should terminate the trust and order the property conveyed to the Hursts. (R pp. 12-16, 61-62, 69)

The difference is that the 1987 Consent Judgment -- which the Hursts themselves signed -- eliminated their rights to the property, which means they have

no right to litigate the issues now before this Court. As additional support for this proposition, the Consent Judgment expressly granted Hammocks Beach rights to mortgage or sell the property. (R. p. 73). The concept that Hammocks Beach could sell the property without any involvement by or consent of the Hursts is itself logically inconsistent with their assertion below that they retain any rights to it. In addition to the North Carolina authority already cited, other courts agree. Kavouras v. Fernandez, No. 92-1291, 1993 U.S. App. LEXIS 1980 (7th Cir. Feb. 2, 1993) (stating that "res judicata" bars plaintiff from asserting rights in property when prior court proceeding ruled that such property should be held "free and clear of any right" of the plaintiff); Suprenant v. Suprenant, No. 3909, 1986 Ohio App. LEXIS 5711, at *3, *5 (Ohio Ct. App. Feb. 12, 1986) (finding that a divorce decree, which provided property to the former husband "free and clear of any right or claim" by the former wife, was "res judicata as to ownership of all the couple's property"); Yachts Am., Inc. v. U.S., 673 F.2d 356, 361-62 (Ct. Cl. 1982) (finding that a consent decree, based on a settlement agreement expressing clear intent to resolve all issues, precluded relitigation of issue).

The findings of fact, conclusions of law and matters adjudicated within the 1987 Consent Judgment buttress the preclusive effect of that Order. *Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa* S.A., 56 F.3d 359, 369 n.4 (2d Cir. 1995) (finding that specific findings stipulated to by the parties manifest

their intent to be bound in subsequent litigation); *Klingman v. Levinson*, 831 F.2d 1292, 1296 (7th Cir. 1987) (finding that specific stipulations in a consent judgment satisfy the "actually litigated" requirement).

North Carolina law does not allow collateral attacks on judgments. A collateral attack is one "in which a plaintiff is not entitled to the relief demanded in the complaint unless the judgment in another action is adjudicated invalid." *Thrasher v. Thrasher*, 4 N.C. App. 534, 540, 167 S.E.2d 549, 553 (N.C. Ct. App. 1969) (citation omitted). "A collateral attack on a judicial proceeding is 'an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." *Reg'l Acceptance Corp. v. Old Republic Surety Co.*, 156 N.C. App. 680, 682, 577 S.E.2d 391, 392 (N.C. Ct. App. 2003) (citation omitted). The Hursts seek to avoid, defeat, and evade the 1987 Consent Judgment. They should not be allowed to do so.

In order for the Hursts to prevail in this suit, the following language in the 1987 Consent Judgment would have to be avoided, defeated, or evaded:

- the parties hereto, without in any way conceding error in their respective legal positions, have entered into a compromise resolution agreement and consented to entry of this Consent Judgment, fully intending to bind themselves, their heirs, assigns and successors. (R p. 63)
- In an effort to avoid the risk of a trial . . . and in search of a means of continuing the trust so as to carry out the original intentions of Dr. Sharpe, *the parties have negotiated at great length*. Through their counsel, they have stated to the court

that, subject to the court's approval, they have agreed to the entry of a judgment which would (1) enable Hammocks Beach Corporation to retain title to a sufficient portion of the land to serve the trust purposes, . . .; and (2) vest in the Sharpe and Hurst families a reasonable portion of the land in exchange for their relinquishing rights in that portion to be vested solely in Hammocks Beach Corporation as trustee. (R pp. 70-71)

- The settlement which has resulted from negotiations between the parties, whereunder Hammocks Beach Corporation as Trustee would hold title to an appropriate portion of The Hammocks *free of any claims of the Sharpes and Hursts* and with broader administrative powers, with the remainder of said property being vested in the Sharpe and Hurst defendants, is fair, reasonable, and in the best interests of the present and prospective beneficiaries of the trust, as well as the public interest, and is accordingly approved. (R pp. 71-72)
- The agreed settlement is *fair and in the best interests of the unknown and unborn Sharpe and Hurst heirs*, who have been fully and adequately represented by counsel. (R p. 72)
- Said property so vested in Hammocks Beach Corporation as trustee shall be free and clear of any rights of Dr. William Sharpe or of Gertrude Hurts or of the heirs of John and Gertrude Hurst. (R p. 74)

The foregoing directions of the Onslow County Superior Court bar the Hursts' case. They have no right to the nearly 290 acres owned by Hammocks Beach. It follows then that they have no standing to demand an accounting or to claim a breach of fiduciary duty.

III. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS AND ALLOWED THE CASE TO PROCEED IN CONTRAVENTION OF A PRIOR ORDER ENTERED BY ANOTHER SUPERIOR COURT JUDGE.

ASSIGNMENTS OF ERROR 1 & 2 (R pp. 5-25, 61-83)

North Carolina adheres to the rule that one Superior Court may not overrule the order of another. *Charns v. Brown*, 129 N.C. App. 635, 638, 502 S.E.2d 7, 9, (N.C. Ct. App. 1998). The question of ownership of the Hammocks Beach property was adjudicated by Judge Reid in his 1987 Consent Judgment, which the Hursts signed. (R p. 61-82) If the Hursts disliked the 1987 Consent Judgment, their sole recourse was to seek a direct appeal of that judgment. They did not appeal. But now they come, 20 years later, seeking to do by indirection that which they did not do directly. This effort must not succeed.

IV. THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT-APPELLANT'S FURTHER MOTION TO DISMISS BUT GRANTED RELIEF TO THE SIMILARLY SITUATED DEFENDANT WHO ALSO INVOKED THE PRECLUSIVE EFFECT OF THE 1987 CONSENT JUDGMENT.

ASSIGNMENTS OF ERROR 1& 3 (R pp. 21-25, 61-92)

The law should be consistent in its rulings and in the treatment of parties.

But the trial court's rulings on the two Rule 12 motions to dismiss are inconsistent and cannot be justified. The 1987 Consent Judgment constitutes a final judgment as to the ownership of the Hammocks Beach property as to all parties to that action. It was final for the State of North Carolina and it is final for the Hursts.

For the same reason that the State of North Carolina was dismissed, these proceedings must come to an end.

CONCLUSION

For these reasons, Hammocks Beach requests an order of this court to **REVERSE** the decision of the trial court denying Hammocks Beach's Further

Motion to Dismiss, and dismissing the case with prejudice.

This 30 day of November, 2007.

X M N

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **DEFENDANT- APPELLANT'S BRIEF** upon each of the parties in this lawsuit by electronic means by use of this Court's official electronic filing site (www.ncappellatecourts.org):

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This 32 day of November, 2007.

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