

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 19CVS1579

NORTH CAROLINA DIVISION SONS)
OF CONFEDERATE VETERANS,)
INC., a North Carolina corporation,)

Plaintiff,)

v.)

THE UNIVERSITY OF NORTH)
CAROLINA and THE UNIVERSITY)
OF NORTH CAROLINA BOARD OF)
GOVERNORS,)

Defendants.)

SUPPLEMENTAL BRIEF
IN SUPPORT OF
CONSENT JUDGMENT

Defendants The University of North Carolina (“the UNC System”) and The University of North Carolina Board of Governors (“the UNC BOG”) (collectively, “Defendants”) offer this Supplemental Brief based on the directive of the Court. As explained below, the allegations in Plaintiff’s Complaint – as to standing, jurisdiction, the causes of action involving the Monument, and declaratory relief – were enough to give the Court subject matter jurisdiction to address the issues presented in the Consent Judgment. The parties here were appropriate parties to resolve the disputes at issue, and there are no grounds under Rule 60(b)(4) or 60(b)(6) justifying relief from that Consent Judgment.

BACKGROUND

On November 27, 2019, this Court entered the Consent Judgment resolving the issues presented in the Complaint filed by Plaintiff in this case. On December 13,

2019, Proposed Intervenors moved to intervene in the lawsuit and sought to have the Court set aside the Consent Judgment. At a hearing on December 20, 2019, this Court denied the Motion to Intervene, concluding that Proposed Intervenors lack standing to participate in this action. At the end of the hearing, the Court noted that it wanted to further consider the issue of Plaintiff's standing and asked the parties to submit additional information about that issue to the Court.¹

DISCUSSION

A. Standards of Review

The judgment entered in this case is a Consent Judgment. Under North Carolina law, a consent judgment “is a contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval.” *Milner v. Littlejohn*, 126 N.C. App. 184, 187, 484 S.E.2d 453, 455-56 (1997); *see also Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (“A consent judgment is a court-approved contract”); *Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 334, 564 S.E.2d 259, 265 (2002) (noting that a consent judgment is “both an order of the court and a contract between the parties”). A consent judgment entered by a court in a judicial proceeding is a final determination of the rights adjudicated therein. *King v. Taylor*, 188 N.C. 450, 451-52, 124 S.E.751, 751 (1924); *Price v. Dobson*, 141 N.C. App. 131, 134, 539 S.E.2d 334, 336 (2000).

¹ It is the understanding of Counsel for Defendants that Plaintiff is submitting a brief addressing its standing to bring the lawsuit in this case. Defendants offer this brief addressing the Court's jurisdiction and authority over Plaintiff's claims and over the Consent Judgment in addition to Plaintiff's submission about its standing.

Given its final nature, a consent judgment is not ordinarily subject to appeal. *Price*, 141 N.C. App. at 134, 539 S.E.2d at 336 (“By joining in a consent order, a party waives his right to appeal from the judgment and leaves the case with no unresolved issue to appeal.”). Likewise, a consent judgment is generally not subject to a Rule 60 motion, and any Rule 60 motions related to consent judgments are subject to strict requirements:

Because a consent judgment incorporates the bargained agreement of the parties, such a judgment may be attacked only on limited grounds: “it cannot be changed without the consent of the parties or set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment.”

Yurek v. Shaffer, 198 N.C. App. 67, 79, 678 S.E.2d 738, 746 (2009) (quoting *Blankenship v. Price*, 27 N.C. App. 20, 22, 217 S.E.2d 709, 710 (1975)).

No party to the Consent Judgment has asked the Court to set it aside. At the December 20, 2019, hearing, the Court suggested on its own motion that it would review provisions of the Consent Judgment in the context of an inquiry under Rule 60(b)(4) or 60(b)(6). Under Rule 60(b)(4), a court may grant relief from a judgment if the judgment is “void.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). “A judgment will not be deemed void merely for an error of law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered.” *Ottway Burton, P.A. v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992); *see also Wendt v. Leonard*, 431 F.3d 410, 413 (4th Cir. 2005) (explaining that, under federal Rule

60(b)(4),² federal courts will find a judgment void only if it was subject to “egregious jurisdictional error”) (internal quotation marks omitted). Determining whether a judgment is void under Rule 60(b)(4) is left to the discretion of the Court. *See, e.g., Wayne Cty. ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984).

Under Rule 60(b)(6), a trial court may relieve parties from the effect of a judgment for “any other reason justifying relief” apart from the provisions in Rule 60(b)(1-5). A trial court may not set aside a judgment under Rule 60(b)(6) without concluding that “(1) extraordinary circumstances . . . exist, and (2) “justice demands . . . relief.” *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987). The types of circumstances providing “extraordinary circumstances” include (1) when a party did not have notice of a court proceeding, *see, e.g., Oxford Plastics v. Goodson*, 74 N.C. App. 256, 261, 328 S.E.2d 7, 10 (1985); (2) impossibility of enforcement of the judgment, *see, e.g., Curran v. Barefoot*, 183 N.C. App. 331, 343, 645 S.E.2d 187, 195 (2007) (concluding that judgment of specific performance against party who did not own personal property at issue in the action was “extraordinary circumstance”); and (3) to account for intervening changes in the law, *see, e.g., Hamby v. Profile Products, LLC*, 197 N.C. App. 99, 110, 676 S.E.2d 594, 601 (2009). Determining whether “any

² Our appellate courts have confirmed the persuasiveness of decisions related Rule 60 of the Federal Rules of Civil Procedure, writing that the “nearly identical provisions of our Rule 60(b) and Federal Rule 60(b) point to the Federal decisions for interpretation and enlightenment.” *See, e.g., Briley v. Farabow*, 348 N.C. 537, 545-46, 501 S.E.2d 649, 655 (1998) (internal quotation marks and citation omitted).

other reason justifying relief” exists is also left to the discretion of the Court. *See, e.g., Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 500 (1983).

Because this Court had subject matter jurisdiction to enter the Consent Judgment and since there are no reasons justifying relief, neither Rule 60(b)(4) nor Rule 60(b)(6) justify setting the Consent Judgment aside.³

B. This Court Has Subject Matter Jurisdiction And Authority To Enter The Consent Judgment In This Case.

Subject matter jurisdiction “involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (internal quotation marks and citations omitted). Subject matter jurisdiction is “the power to pass on the merits of the case[.]” *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983). “A court’s subject matter jurisdiction over a particular case is invoked by the pleading.” *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010).

For a court to have subject matter jurisdiction, there must be a justiciable controversy between the parties. *See, e.g., Time Warner Entertainment Advance/Newhouse P’ship v. Town of Landis*, 228 N.C. App. 510, 515-16, 747 S.E.2d 610, 614-15 (2013). A “justiciable controversy” is “an actual controversy between parties having adverse interests in the matter in dispute.” *Gaston Bd. of Realtors*,

³ As explained more fully below, Defendants are prepared to discuss any additional concerns related to the terms, operation, and administration of the Consent Judgment at the Court’s request.

Inc. v. Harrison, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984). “The existence of a justiciable controversy requires more than a simple disagreement between parties. . . . [I]t is necessary that litigation appear unavoidable.” *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001).⁴

While there were thirteen causes of action in Plaintiff’s Complaint, the core of Plaintiff’s Complaint involved two issues: (1) whether North Carolina law required the Monument to be reannexed to the University campus, *see* Plaintiff’s Complaint ¶¶ 57-75; and (2) who owned the Monument, *see* Plaintiff’s Complaint, ¶¶ 76-171. This Court had subject matter jurisdiction to address both of those issues and the claims related to those issues that were resolved in the Consent Judgment.

1. The Court Had Subject Matter Jurisdiction Over Plaintiff’s Monument Law Declaratory Claim.

In its Complaint, Plaintiff sought a declaration from the Court that N.C. Gen. Stat. § 100-2.1 required Defendants to reannex the Monument to the University campus. *See* Complaint ¶¶ 57-75. A plaintiff seeking a declaratory judgment, however, is “not required to allege or prove that a traditional ‘cause of action’ exists against defendant[s] in order to establish an actual controversy.” *Town of Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987); *accord Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006). A party may invoke North Carolina’s Declaratory Judgment Act to determine the validity and construction of a statute that presents parties with uncertainty. *See Town of Emerald Isle*, 320 N.C. at 646, 360

⁴ The unavoidability of litigation over the Monument is at this point beyond dispute.

S.E.2d at 760 (“A declaratory judgment may be used to determine the construction and validity of a statute.”); *see also* N.C. Gen. Stat. § 1-254 (noting that a party “may have determined **any** question of construction or validity” arising under a statute and obtain a declaration of rights from the court) (emphasis added). “A declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.” *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (internal quotation marks, citation, and alterations omitted).

The presence of the Monument on the University campus was a years-long controversy, and its removal provoked much confusion about how the situation would be resolved. *See, e.g.*, Susan Svrluga, “UNC in turmoil over Silent Sam, the Confederate monument toppled by protestors,” *The Washington Post* (Dec. 13, 2018) (found at <https://www.washingtonpost.com/education/2018/12/13/unc-turmoil-over-silent-sam-confederate-monument-toppled-by-protesters/>) (attached as Exhibit 1). Furthermore, the extent to which the monument law, *see* N.C. Gen. Stat. § 100-2.1, would require reannexation of the Monument to the University campus was also unclear. In that context, it is immaterial whether Plaintiff would have been able to prevail in seeking a declaration that the Monument should be reannexed to the University campus. Based solely on the face of Plaintiff’s Complaint, it is clear that Plaintiff invoked N.C. Gen. Stat. § 1-254 for proper purposes: to have the Court construe N.C. Gen. Stat. § 100-2.1 and to determine the legal relations at issue related to the removal of the Monument from the University campus. Plaintiff was

therefore an appropriate party to bring a claim seeking a declaration about the application of the monument law, and this Court had subject matter jurisdiction to address that monument law declaratory claim.

The Court also had subject matter jurisdiction over the parties' agreement about the disposition of the Monument itself. Section 100-2.1(c)(2) provides that the monument law's requirements do not apply to "[a]n object of remembrance owned by a private party that is located on public property and that is the subject of a legal agreement between the private party and the State or a political subdivision of the State governing the removal or relocation of the object." N.C. Gen. Stat. § 100-2.1(c)(2). The contractual provisions related to the disposition of the Monument embodied in the Consent Judgment were between Plaintiff (a private party) and Defendants (subdivisions of the State). The Court therefore had jurisdiction to declare that the transfer of the Monument accomplished through the Consent Judgment constituted a legal agreement between a private party and a political subdivision of the State, and that the agreement in the Consent Judgment fell outside the purview of N.C. Gen. Stat. § 100-2.1. *See* Consent Judgment, Entry of Final Judgment ¶ IV.

Because the Court had subject matter jurisdiction over Plaintiff's declaratory judgment claim under the monument law, there is no reason for the Court to conclude that the judgment is void under Rule 60(b)(4). Similarly, there are no "extraordinary circumstances" contemplated under Rule 60(b)(6) that created "any other reason" justifying relief from the judgment.

2. The Court Had Subject Matter Jurisdiction Over Plaintiff's Conditional Gift Declaratory Claim.
 - a. *Plaintiff And Defendants Were Appropriate Parties To Resolve Issues Related To The Ownership Of The Monument.*

In its Complaint, Plaintiff sought a declaration from the Court that it was the lawful owner of the Monument through an assignment of rights to the Monument. Proposed Intervenor questioned whether Plaintiff is a real party in interest with standing to enter into an agreement with Defendants about the disposition of the Monument and argued factual issues surrounding the circumstances under which the University came into possession of the Monument and the current ownership status of the Monument. As a preliminary matter, the underlying facts about those issues are not relevant here because the Court could properly rely on the parties' stipulation in the Consent Judgment that "Plaintiff has standing to bring this action and is a real party in interest for the purposes of this action." See Consent Judgment, Conclusions of Law ¶ 16. While parties cannot confer jurisdiction on a court by consent, see, e.g., *Whittaker v. Furniture Factory Outlet Shops*, 145 N.C. App. 169, 172-73, 550 S.E.2d 822, 824 (2001), North Carolina law is clear that parties can agree that a particular party has standing and that such an agreement is enough to establish that standing. See, e.g., *Accelerated Framing, Inc. v. Eagle Ridge Builders, Inc.*, 207 N.C. App. 722, 725-26, 701 S.E.2d 280, 282-83 (2010) (holding that plaintiff was a real party in interest with standing because of stipulation that parties wished to proceed as if the contract were between plaintiff and defendant even though plaintiff was not a party to the contract at issue); see also *Lawrence v. Wetherington*,

108 N.C. App. 543, 546-47, 423 S.E.2d 829, 830-31 (1993). The stipulation of the parties in this case was effective under North Carolina law to confer standing on Plaintiff without further inquiry into historical record evidence showing that Plaintiff had rights to the Monument under the assignment agreement.

Even if the Court scrutinizes the historical record evidence, this evidence reinforces the conclusion that Plaintiff had rights to the Monument under an assignment agreement and that Plaintiff was a real party in interest. Plaintiff's conditional gift claim can be summarized as follows: (1) The United Daughters of the Confederacy – North Carolina Division, Inc. ["UDC"] made a gift to the UNC System of the Monument under the condition that the Monument would remain on the University campus; (2) once the Monument was severed from the University campus, it was no longer a fixture and reverted to personal property; (3) the failure of Defendants to reannex the Monument to the realty of the University campus caused the condition in the conditional gift to fail, and the rights to the Monument reverted to UDC; and (4) since UDC assigned its rights to the Monument to Plaintiff, Plaintiff was entitled to a declaration that it owns and is entitled to possession of the Monument. *See, e.g.*, Complaint ¶¶ 17-18, 28, 30, 107-20.

There are two "essential elements" of an *inter vivos* gift: (1) "donative intent," and (2) "delivery, actual or constructive." *Holloway v. Wachovia Bank & Trust Co., N.A.*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992). "A person has the right to give away his or her property as he or she chooses and may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it." *Courts v. Annie Penn Mem.*

Hosp., Inc., 111 N.C. App. 134, 139, 431 S.E.2d 864, 866 (1993) (internal quotation marks and citation omitted). “The intent of the donor to condition the gift must be measured at the time the gift is made, as any undisclosed intention is immaterial in the absence of mistake, fraud, and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.” *Id.*, 431 S.E.2d at 866–67 (quotation and citation omitted).

Plaintiff set forth in its Complaint several allegations and related citations to the historical record that the presentation of the Monument to the University was a gift from UDC and that UDC’s intent was to make the gift subject to the condition that the Monument remain annexed to the University campus forever. *See* Complaint ¶¶ 28, 30, 42, 45. Plaintiff also included in its Complaint allegations that UDC assigned any and all of its rights to the Monument to Plaintiff. *See, e.g.*, Complaint ¶¶ 18-20. “It has long been the law in North Carolina that the assignee stands absolutely in the place of his assignor, and it is as if the contract had originally been made with the assignee, upon precisely the same terms as with the original parties.” *Credigy Receivables v. Whittington*, 202 N.C. App. 646, 652, 689 S.E.2d 889, 893 (2010) (internal quotation marks, citations, and alterations omitted). “Unless a contrary intention is shown, an assignment ordinarily passes whatever is necessary to make it completely effectual, and vests in the assignee all rights, remedies, and contingent benefits which are incidental to the things assigned[.]” 6A C.J.S. Assignments § 93.⁵ To the extent that UDC had any rights to the Monument after it

⁵ The parties stipulated in the Consent Judgment that Plaintiff had standing because UDC assigned to Plaintiff any reversionary interest it had in the Monument

was severed from the University campus and reverted to personal property,⁶ those rights now belong to Plaintiff based on the assignment agreement.

b. *The Parties' Contract Related To The Disposition Of The Monument Was An Enforceable Settlement Of Valid Disputed Claims.*

Plaintiff and Defendants entered into the contract embodied in the Consent Judgment in part to resolve the ownership disputes related to the Monument in the context of several uncertainties about how North Carolina law would apply to those disputes. Courts interpret contracts “according to the intent of the parties to the contract, unless such intent is contrary to law.” *See, e.g., Buettel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999) (citation omitted). “So long as the contract itself and the terms within that contract are not ‘contrary to public policy or prohibited by statute,’ parties are free to contract as they deem appropriate.” *Sylva Shops Ltd. P’ship v. Hibbard*, 175 N.C. App. 423, 426, 623 S.E.2d 785, 789 (2006). “Generally, parties are free to contract to anything as long as it is not illegal, unconscionable, or against the public interest.” *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citing 17 Am. Jur. 2d *Contracts* § 155 (1964)).

under the conditional gift. *See* Consent Judgment, Conclusions of Law ¶ 17; *see also Prelaz v. Town of Canton*, 235 N.C. App. 147, 149, 760 S.E.2d 389, 390 (2014) (noting that plaintiffs in case received interest in property subject to assignment agreement of reversionary interest).

⁶ Defendants rely on the statement of law set forth in the Consent Judgment about the reversion of fixtures to personal property once they are severed from the realty. *See* Consent Judgment, Governing Law § C.

In addition to the uncertainties related to the application of the monument law described above, it was unclear how North Carolina law would apply to the UDC entity as it existed in the early 1900s, its conduct related to the transfer of the Monument, and how the law would apply to it post-incorporation. At the time of its presentation of the Monument to the University, UDC was an unincorporated association; UDC is now incorporated. *See* Complaint ¶ 10 & Exhibit B. At the time of the Monument transfer, unincorporated associations were not recognized by the law; they were regarded as a non-entity – “an airy nothing, or a non-existent legal ghost,” *see, e.g., Stafford v. Wood*, 234 N.C. 622, 625, 68 S.E.2d 268, 270 (1951) (internal quotation marks and citation omitted). At that time, North Carolina common law provided that property held by an unincorporated association was owned by its members as tenants in common. *See, e.g., Venus Lodge No. 62 v. Acme Benevolent Ass’n*, 231 N.C. 522, 527, 58 S.E.2d 109, 113 (1950).

With respect to the time frame at issue in this case, North Carolina law has provided no definitive legal framework for the succession of property interests from an unincorporated nonprofit association to that entity upon its later incorporation. *See generally* N.C. Gen. Stat., ch. 55A, 59B. The law on how and under what circumstances that succession takes place is therefore unclear. Given this uncertainty, the parties could enter into a contract recognizing the succession of property interests from the unincorporated UDC to the later incorporated UDC entity. At least one court has recognized the legitimacy of property rights succession from an unincorporated association not recognized under the law to a later incorporated entity. *See Assoc. Alumni of the Gen. Theo. Seminary of the Prot. Epis.*

Church in the U.S.A. v. Gen. Theo. Seminary of the Prot. Epis. Church in the U.S.A., 163 N.Y. 417, 420-21, 57 N.E. 626, 626-27 (1900) (holding that incorporated entity was successor to unincorporated association and had standing to sue in dispute over conditional donation made by predecessor unincorporated association before incorporation). Because of the lack of clear legal precedent in North Carolina law, the parties had the right to enter into a contract resolving the issues (1) related to what extent UDC retained reversionary rights to the Monument after the severance of the Monument from the University campus, and (2) what effect UDC's later incorporation would have on its ability to succeed to the rights of its predecessor unincorporated association.

The North Carolina Supreme Court has also recognized that estoppel principles apply to a business course of dealings with an unincorporated association. In *Winchester v. Grand Lodge of Brotherhood of R.R. Trainmen*, 203 N.C. 735, 167 S.E. 49 (1932), the Supreme Court noted that “[o]ne who deals with an association as a legal entity capable of transacting business, and in consequence receives from it money or other things of value, is estopped from denying the legality of its existence.” *Winchester*, 203 N.C. at 747, 167 S.E. at 55 (internal quotation marks and citations omitted). Plaintiff has alleged facts and cited the historical record to show that Defendants treated UDC as a legal entity during the negotiations about the Monument and that those negotiations led to the UDC delivering things of value (the statue, pedestal, and tablets) to Defendants.⁷ Even if a court were ultimately to decide

⁷ See Complaint ¶¶ 24–44; see also, e.g., Complaint, Exhibit J (letter from Francis Venable to Annie Ruth Kenan negotiating conditions related to the

that UDC lacked legal status to make a conditional gift or to succeed to property interests through a later incorporation, North Carolina law indicates that Defendants could be estopped from denying UDC's lack of legal status based on the course of dealing about the Monument. The parties therefore had the right to enter into an agreement resolving the ownership issues related to the Monument in the context of this doctrine as well.

It is not relevant to this Court, though, whether the succession and estoppel doctrines set forth above would be applied to Plaintiff's benefit if these issues were litigated, or whether this Court would make the exact same findings of fact and conclusions of law to which the parties agreed in this case if these issues were adjudicated on the merits after discovery, motions, and the presentation of evidence. Parties are not required to "pursue the litigation to its bitter end even if they may be otherwise willing to settle," *Conklin v. Conklin*, ___ N.C. App. ___, ___, 825 S.E.2d 678, 682 (2019). Defendants were not obligated to undergo a process that could have taken years to complete just to get definitive rulings on the legal issues set forth above – rulings that may not have even ultimately resolved the disputes related to the removal or of the ownership and possession rights of the Monument. Requiring

construction and erection of the Monument) & Exhibits O and P (letters from Francis Venable to John Wilson in which Venable notes that he was the "agent" of UDC in the context of contract negotiations about the Monument). *See also* Exhibit 2 (September 24, 1909, letter of Francis Venable to Annie Ruth Kenan about whether a gateway or a monument would be more appropriate; attached); Exhibit 3 (February 25, 1910, letter of Francis Venable to Annie Ruth Kenan about negotiations on issues related to the design and dimensions of the Monument; attached).

Defendants to litigate this case “to its bitter end” to get these answers would be “exactly the opposite result encouraged by our statutes and case law.” *Id.*

The Court had subject matter jurisdiction over Plaintiff’s declaratory judgment claim about the monument being a conditional gift. Because Plaintiff and Defendants were appropriate parties to resolve that valid declaratory judgment claim, there is no reason for the Court to conclude that the judgment is void under Rule 60(b)(4). Similarly, there are no “extraordinary circumstances” contemplated under Rule 60(b)(6) that created “any other reason” justifying relief from the judgment.

3. The Court Had The Subject Matter And Authority To Enter The Consent Judgment In This Case.

The issues before this Court are (1) whether the parties could enter into a contract about ownership and possession rights related to the Monument, and (2) whether this Court has jurisdiction to approve that contract and the authority to enter a declaratory judgment to resolve this action. The contract that the parties entered into here as embodied in the Consent Judgment was a settlement agreement designed to resolve concrete disputes between the parties about the monument law and ownership issues. North Carolina courts have authority and jurisdiction to enter consent declaratory judgments in which the parties determine their rights and responsibilities and then have a court declare them.⁸

⁸ See, e.g., *Neighborhood Networks Publishing, Inc. v. Stoeckel*, New Hanover Cty. File No. 18CVS4093, 2019 WL 2342459 (N.C.B.C. Mar. 29, 2019) (entering “consent declaratory judgment” on issues related to defendant’s status as an independent contractor); *Howard v. St. Peter Catholic Church*, Guilford Cty. File No. 17CVS6996, 2018 WL 5725420 (N.C. Sup. Ct. Oct. 4, 2018) (entering consent declaratory judgment related to construction of a will); *Crowder v. Town of Montreat*, Buncombe Cty. File No. 14CVS05367, 2016 WL 10733126 (N.C. Sup. Ct. Jun. 6, 2016)

This case does not present an effort by the parties to generate an artificial lawsuit based in an ulterior motive or a failure of the parties otherwise to generate a justiciable matter for the Court.⁹ The parties here had substantial adverse interests related to the Monument. The parties then resolved those adverse interests through the contract approved in the Court’s Consent Judgment and an agreed upon declaration that Plaintiff is the rightful owner of the Monument. While these issues were resolved in a Consent Judgment agreed to by the parties, this was a justiciable controversy “litigated among adverse parties with substantial interest affected so as

(entering consent judgment on claim for declaratory judgment related to ownership of real property, conveyance to municipality, and conditions limiting municipality’s ability to build on real property); *Conner v. Hinson*, Union Cty. File No. 14CVS00888 2015 WL 13737755 (N.C. Sup. Ct. Oct. 22, 2015) (entering consent judgment in action with competing claims for declaratory judgment related to construction of easement and other agreements related to property interests); *Bauman v. Woodlake Partners, LLC*, Moore Cty. File No. 05CVS646, 2008 WL 8225376 (N.C. Sup. Ct. Feb. 12, 2008) (entering consent declaratory judgment to “construe[] and interpret[] the 2000 Woodlake Constitution and By-Laws, and the 2000 Woodlake Rules and Regulations”); *Zachary v. Gough*, Yadkin Cty. File No. 04CVS759, 2006 WL 4519200 (N.C. Sup. Ct. Mar. 27, 2006) (entering consent judgment on claim for declaratory judgment related to construction of will and distribution of estate).

⁹ See, e.g., *Parker v. Raleigh Savings Bank*, 152 N.C. 253, 253, 67 S.E. 492, 493 (1910) (dismissing a “suit made to order,’ arising, not out of a real controversy between the parties litigant, but instituted solely for the purpose of obtaining the opinion of the court upon a ‘feigned issue”). See also *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974) (affirming dismissal of action in which parties “ha[d] abandoned any vestige of hostility which might have created a justiciable controversy between [the contract parties] by joining in plaintiffs’ prayer for relief without denying any substantial allegations of the complaint”); *City of Raleigh v. Norfolk S. R. Co.*, 275 N.C. 454, 462, 168 S.E.2d 389, 394 (1969) (vacating declaratory judgment and noting that the court did not have “the duty of giving advisory opinions to any parties who may come into court and ask either for academic enlightenment or practical guidance concerning their legal affairs” and that relevant law “does not license litigants to fish in judicial ponds for legal advice”) (internal quotation marks and citation omitted).

to bring forth a clear articulation of the issues before the Court,” *see Creek Pointe Homeowner’s Ass’n v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 220, 225 (2001) (internal quotation marks and citation omitted). The difficult history of this controversy further underscores the importance placed by the parties on a resolution with finality and certainty to a situation that has been fraught with challenges for years. While some cases “often necessarily involve bargains that look like raw deals in hindsight, defense of the liberty of contract requires that court avoid the indulgence of paternalism and respect individuals’ entitlement to contract on their own terms.” *Severn Peanut Co. v. Indus. Fumigant Co.*, 807 F.3d 88, 91 (4th Cir. 2015) (internal quotation marks, citation, and alteration omitted).

C. Although There Is No Reason To Set Aside The Consent Judgment, Defendants Stand Ready To Discuss Changes To Provisions Of The Judgment.

At the December 20, 2019, hearing, the Court indicated that it may scrutinize and consider changes to the terms of the Consent Judgment. Defendants recognize that the Court may wish to review particular provisions, including (1) the extent to which there is court oversight of the trustee, (2) limitations to the use of trust funds in connection with the Monument, and (3) the location of the Monument and the conditions of its display. Defendants are prepared to provide any information required by the Court in its consideration of these and other related issues.

CONCLUSION

The potential that a court would issue a declaratory judgment mandating the reannexation of the Monument to the University campus was a substantial issue in negotiations between the parties in this case. The parties' resolution of disputed issues related to the ownership rights to the monument through a Consent Judgment with declaratory relief was a global settlement of both the monument law and ownership issues. By agreeing to settle the case and enter into the Consent Judgment, Defendants brought finality and clarity to the legal and practical issues surrounding the disposition of the Monument in a way that served their primary goal of protecting public safety on the campuses of the UNC System constituent institutions.¹⁰ Defendants' decision to settle this matter does not in any respect amount to an endorsement of Plaintiff's interests or goals. The Court had subject matter jurisdiction to resolve disputed issues between the parties through the imposition of the Consent Judgment. There is no evidence that the Consent Judgment is void, and there is no reason justifying relief to any party from the operation of the Consent Judgment.

¹⁰ *See, e.g.*, UNC-Chapel Hill, "Recommendation for the Disposition and Preservation of the Confederate Monument" ("Recommendation") (Dec. 3, 2018), found at <https://bot.unc.edu/files/2018/12/Final-Report.pdf>; "Executive Summary of the University of North Carolina at Chapel Hill Public Safety Panel Report" (Appendix A-1 to Recommendation) (Dec. 3, 2018), found at <https://bot.unc.edu/files/2018/11/Executive-Summary-UNCCH-Public-Safety-Panel-Report.pdf>.

Based on the Court's comments at the hearing on December 20, 2019, Defendants will be prepared to discuss issues related to the operation of the Consent Judgment and administration of the trust as directed by the Court.

This, the 29th day of January, 2020.

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STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 19CVS1579

NORTH CAROLINA DIVISION SONS)
OF CONFEDERATE VETERANS,)
INC., a North Carolina corporation,)

Plaintiff,)

v.)

THE UNIVERSITY OF NORTH)
CAROLINA and THE UNIVERSITY)
OF NORTH CAROLINA BOARD OF)
GOVERNORS,)

Defendants.)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief
has been duly served on the following:

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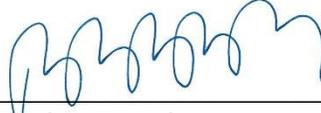
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This, the 29th day of January, 2020.

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<https://www.washingtonpost.com/education/2018/12/13/unc-turmoil-over-silent-sam-confederate-monument-toppled-by-protesters/>

UNC in turmoil over Silent Sam, the Confederate monument toppled by protesters

By Susan Svrluga

Dec. 13, 2018 at 6:29 p.m. EST

This semester more than any other, the University of North Carolina's flagship campus has been riven over a statue some see as a hateful symbol of racism and others defend as a historical monument.

Faculty have formally opposed plans to return the divisive Confederate monument to the Chapel Hill campus. More than 1,000 scholars have urged administrators not to punish teaching assistants threatening to withhold final grades in protest. More than 2,000 [alumni vowed not to donate money](#) until the monument, known as "Silent Sam," is gone for good. And two students are walking around campus with nooses hanging from their necks.

On Friday, the University of North Carolina System Board of Governors — a panel that oversees public universities in the state — meets and could determine the statue's fate. Early Friday morning activists were sharing photos on social media of a demonstration outside the meeting.

Erected more than 100 years ago to honor students who fought in the Civil War, the bronze figure of a young soldier has been the subject of debate for years. But fights over monuments elsewhere in the country turned the statue into even more of a flash point in Chapel Hill, much as a statue of Confederate Gen. Robert E. Lee became the locus of violent protests in Charlottesville last year. When protesters pulled Silent Sam down in August, they forced school officials to take a stand.

The Board of Governors had called the statue's removal unlawful and ordered the school's leaders to come up with a plan for Silent Sam's preservation.

Last week, the university's Board of Trustees approved a plan to return the statue to UNC, no longer in its prominent spot at an entrance, but in a \$5.3 million building to be erected elsewhere on campus with an ongoing cost estimated at \$800,000 a year.

Their vote drove hundreds of protesters to the streets of Chapel Hill. It set off a flurry of letters and resolutions — from student groups, faculty and more than 150 current and former UNC [athletes](#) — opposing a plan that included adding context to historical sites on campus but that many saw as an expensive shrine to white supremacy.

"It's just — unfathomable," said Jerry Wilson, a graduate student, that the school would commit to spending \$800,000 a year maintaining a home for a racist symbol even as it cites financial concerns in limiting student opportunities. "How can you in good conscience do that, knowing

the impact it has on black members of the Carolina community?” He and another student had won a grant to help attract students of color to UNC, and the proposal undercut their efforts over the past year, he said, and made clear to him how little the school values black students like himself.

“It really did hurt,” he said. “I don’t have the words to explain how much it hurt.”

He and his friend hung nooses around their necks this week.

Jerry J. Wilson, a doctoral student in education policy, leadership, and school improvement at the University of North Carolina at Chapel Hill, left, protests the statue known as "Silent Sam" with Cortland Gilliam, a third-year PhD student in the UNC education school. (Jerry J. Wilson, a doctoral student in education policy, leadership, and school improvement at the University of North Carolina at Chapel Hill, left, protests the statue known as Silent Sam with Cortland Gilliam, a third-year PhD student in the UNC education school. Jerry J. Wilson)

The proposal also angered some who say the statue must be returned to its pedestal, including some members of groups honoring the Confederacy.

A member of the Board of Governors derided the board for what he saw as cowardice and called the proposal illegal. Thom Goolsby responded to messages seeking comment by referring to a video he posted on social media last week.

[Thom Goolsby MBA, JD@ThomGoolsby](#)

\$5.3 Million Museum for Silent Sam?!? UNC Board of Trustees shows cowardice with illegal proposal. <https://youtu.be/VEBu2manPSg> [#unc](#) [#SilentSam](#) [#silencedsam](#) [#wral](#) [#wbtv](#) [#wlos](#) [#wunc](#)

[3:08 PM - Dec 4, 2018 · North Carolina, USA](#)

Some on campus support the plan approved by trustees. Chancellor Carol Folt had emphasized that the administration would prefer to move the monument off campus but could not do so under state law, which restricts what can be done with historical monuments. And some are resigned to the idea, feeling it is a workable solution given the restrictions.

“There are a lot of people that are hoping that the Board of Governors will grant what the administration has asked for,” said Harry L. Watson, a history professor at the university who specializes in Southern culture.

But others called on the administration to defy the state law, which they say is unjust.

At first, Watson thought the trustees' plan was perhaps the best the administration could do given all the pressures, even though he was shocked by the cost. After about a decade of budget cuts,

Watson said, he suspects the chancellor must be worried that if she doesn't accommodate the will of the Board of Governors and the General Assembly, then they could do irreparable harm to the university in retaliation.

But in the days since, and after hearing a university lawyer explain all the things UNC could not legally do, "I found myself thinking, 'We've got to break out of these legalisms.' What the community needs is some kind of moral leadership ... where we can hear from the very top, from the chancellor, from the trustees, the leading administrators speaking in one voice, absolutely denouncing white supremacy and racism."

Hampton Dellinger, a former North Carolina deputy attorney general, said a clear path exists that is legal and ethical and in the university's best interests: permanently remove the statue from campus. The administration keeps citing the state law, he said, but federal law is clear: Institutions that receive federal funds and institutions of higher education cannot tolerate or promote a racially hostile environment on campus. "That was established more than 50 years ago in the 1964 Civil Rights Act," Dellinger said.

"UNC has decided to stand on the wrong side of history," he said, "and, I believe, on the wrong side of the law."

At a faculty meeting last week, students interrupted, confronting Folt and reading from [the Rev. Martin Luther King Jr.'s letter from Birmingham Jail](#), with its scathing critique of "the white moderate, who is more devoted to 'order' than to justice."

Some teaching assistants and others threatened to leverage their control over final grades to force the university's leaders to agree Silent Sam will not be returned to campus.

A university spokeswoman said Thursday administrators have not seen evidence of grades being withheld. The school was closed Sunday until midday Tuesday because of a snowstorm, and some final exams were postponed.

Robert A. Blouin, executive vice chancellor and provost, warned deans last week that withholding grades would violate the teaching assistants' instructional responsibilities and result in serious consequences for employees who chose to do so.

Students are entitled to receive their grades without delay, he wrote. "It is especially critical for the students preparing to graduate next Sunday, as well as the thousands of students whose scholarships, grants, loans, visa status, school transfers, job opportunities and military commissions may be imperiled because lack of grades threaten their eligibility," Blouin wrote. "The proposed strike exposes the University and individuals who withhold grades to legal claims for the harm they cause to students."

Many faculty members had concerns that the action would have unintended consequences for students, but many also strongly felt they must support the teaching assistants' right to take action on the issue. A letter originating with UNC faculty that spread widely and gained more than 1,000 supporters sought to defend the teaching assistants and condemned any retaliation that might be taken.

“Universities must remain places committed to protecting and fostering students,” they wrote, “not to suppressing their right to speak freely and to dissent.”

The administration sees the threat of a strike as a breach of contract, one professor said, while the graduate students see it as a peaceful protest.

In a [letter](#) to parents, graduate students and others explained why they had threatened to strike. “Silent Sam has served to reinforce white supremacy on our campus since the moment ... Julian Carr bragged that he ‘horse-whipped a negro wench until her skirts hung in shreds’ at the statue’s dedication ceremony,” they wrote.

Many student groups, including student government leaders, said they plan to demonstrate at Friday’s meeting of the Board of Governors.

Supporters of the statue plan to gather this weekend at the pedestal where it used to stand.

43323

Sept. 24, 1909.

Mrs. James Kanan,

Wallace, N. C.

Dear Mrs. Kanan:

I have been thinking a good deal about the proposed monument to the students of the University who entered the Confederate service. I believe that your original plan was the wisest one and that really the only fitting memorial would be an artistic statue on the University grounds which would possibly cost some \$5000 or \$6000. I do not know just how much the Daughters of the Confederacy in this State can raise, but I am confident that a goodly sum can be raised from the alumni and that the Trustees will supplement this out of the University funds; certainly, I shall strongly urge that upon them. By pulling together we should be able to raise this amount and the monument could be unveiled at the Commencement of 1911, when we could gather here the students of the antebellum days as well as hundreds of others who have been to the University since, and have a great reunion.

The gateway that I mentioned before does not now appeal to me as in every respect worthy and I am sure that I can secure the gateway by other means.

I will try to secure a preliminary sketch of the monument if you approve of it and then if some of the ladies of your Committee can visit the University, we can settle other details.

February 25, 1910.

Exhibit 3

Mrs. James G. Kenan,
Wallace, N. V.

Dear Mrs. Kenan:

I thank you for your kind letter of February 21st. The designs and photographs have been received and I will hold them for the meeting of the Committee.

I am still very much in favor of the Boston design if we can possibly raise the money. I expect you are right about the changes in the dimensions of the pedestal.

My desire in regard to this monument is to have it appear not as a monument to the dead but to a noble ideal and as marking the heroic period of the University's history. I hope that the Committee will agree with me in this.

With regard to the check which you so kindly enclosed, I hope you will permit me to devote this to the monument. Aside from the task of speech-making which is always a depressing one to me, I greatly enjoyed my visit to Wilmington and my meeting with you and the ladies of the U. D. C.

I shall be glad to be at your service at any time with regard to this or any other matter.

Sincerely yours,

David P. Kenan