

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 19-CVS-1579

NORTH CAROLINA DIVISION SONS)
OF CONFEDERATE VETERANS, INC.,)

Plaintiff,)

v.)

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

Defendants.)

PLAINTIFF'S RESPONSE TO
THE COURT'S REQUEST TO
ADDRESS THE STANDING
OF THE PLAINTIFF

COMES NOW the Plaintiff, by and through its undersigned counsel, and in response to the Court's request, hereby addresses the Plaintiff's standing in this case.:

STATEMENT OF THE FACTS

The North Carolina Division Sons of Confederate Veterans, Inc. ("SCV"), strongly opposed the removal or relocation of the Monument honoring UNC students who fought for the Confederacy ("the Monument"), including the base and commemorative plaques that were removed at Chancellor Folt's direction. The Monuments Law clearly prohibited this action. The SCV began research bringing legal action against UNC on the basis of the Monuments Law in an effort to prevent the Monument's removal from campus and force UNC to obey the law and put the statute back up.

As part of its due diligence in preparing for legal action, SCV recognized it had to have standing.



Accordingly, extensive research was done and determined that the United Daughters of the Confederacy- North Carolina Division, Inc. (“UDC”) had the strongest standing position based on the UDC’s property rights in the statute. It was determined obtaining the rights to the Monument from the UDC would enhance the standing of the SCV and thus the SCV obtained an assignment of all rights and interests, both legal and equitable, from the United Daughters of the Confederacy—North Carolina Division, Inc. , with respect to the Monument. *See* Assignment of Rights, signed Nov. 23, 2019 (“Assignment”).

The SCV also determined it was willing to attempt to negotiate in good faith with UNC to avoid a long and expensive legal fight where neither side could be confident of complete victory.

On November 27, 2019, SCV filed a 13-count lawsuit against UNC seeking multiple declaratory judgments and stating various legal claims, including breach of contract, quasi-contract, conversion, trespass, replevin, and quiet title, and further requesting various injunctive and equitable forms of relief. *See generally* Verified Compl., filed Nov. 27, 2019 (“Complaint”). Notably, each count in the Complaint was premised on UNC's having moved and/or damaged the Monument. *See id.*

SCV and UNC agreed to settle the litigation without further action. *See* Consent Judgment, Declaratory Judgment, and Order, signed Nov. 27, 2019 (“Consent Judgment”). In short, UNC would pay to SCV \$2.5 million, to be placed in a Monument

Trust, and SCV would take physical possession of the Monument. *See id.*

Shortly after the Consent Judgment was filed, SCV Commander Kevin Stone issued a private email to SCV's membership explaining the negotiations, lawsuit, and settlement with UNC ("Stone email"). *See Mot. for Relief, Ex. 1 of Ex. 1 thereto.* Based on some information and inferences purportedly gleaned from the Stone Letter, the Defendant-Intervenors filed a Motion to Intervene and a Motion for Relief from the Consent Judgment. *See id.* The trial court denied the Defendant-Intervenors' Motion to Intervene, thus mooting the Motion for Relief.

It is obvious Mr Stone's private email to the SCV members was not a legal brief nor was it meant to be. Mr. Stone, as happens with lay people, misstated the legal issues in the case. Mr. Stone's email was unfortunately ham fisted and he erred by falling into bragging and puffing.

This email proves Benjamin Franklin maxim "Well Done Is Better Than Well Said".

The email could have clearly pointed out the issues were complicated.

The email could have pointed out both sides had colorable positions on the law and would take years to go through appeals and the outcome of the case - no matter what arm chair lawyers think- would be uncertain.

The email could have more elegantly stated it would be extremely expensive. The email could have more elegantly stated this agreement was letting both sides achieve

laudable goals - UNC was making sure the statute wasn't a focal point of rioting mobs endangering students and staff and the SCV was able to ensure the memory of the war veterans was honored and protected.

The email could have stated both sides were compromising in order not to let "the perfect be the enemy of the good".

At the end of the day, once all the howling and protesting and twittering is over this consent order is valid because the SCV has standing.

QUESTION PRESENTED

Does the SCV have standing in this litigation?

ARGUMENT

"Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

"If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (citation omitted).

Dion v. Batten, 248 N.C. App. 476, ___, 790 S.E.2d 844, 847-48 (2016).

"Plaintiffs have the burden of proving that standing exists." *Chávez v. Wadlington*, ___ N.C. App. ___, ___, 821 S.E.2d 289, 292 (2018) (quoting *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010)).

As is particularly relevant here:

"Legal entities other than natural persons may have standing." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990). "To have standing the complaining association or one of its members must suffer some immediate or threatened injury." *Id.* at 129, 388 S.E.2d at 555 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342, 97 S. Ct. 2434, 2441, 53 L. Ed.2d 383, 393 (1977)). "[A]n association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.* at 129, 388 S.E.2d at 555 (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211-12, 45 L. Ed.2d 343, 362 (1975)).

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and © neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 130, 388 S.E.2d at 555 (citing *Wash. State Apple Advert.*, 432 U.S. at 343, 97 S. Ct. at 2441, 53 L. Ed.2d at 394). "When an organization seeks declaratory or injunctive relief on behalf of its members, 'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.'" *Id.* at 130, 388 S.E.2d at 555 (quoting *Warth*, 422 U.S. at 515, 95 S. Ct. at 2213-14, 45 L. Ed.2d at 364).

Willowmere Cmty. Ass'n, Inc. v. City of Charlotte, 370 N.C. 553, 557, 809 S.E.2d 558, 561 (2018). Upon information and belief, there is no question of associational standing in this case; rather, the only challenge here is regarding the substantive elements of standing.

Substantively, as summarized by the North Carolina Court of Appeals:

Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed.2d 636 (1972). To satisfy standing requirements, a plaintiff must show: (1) "injury in fact," or injury that is concrete and particularized, and actual or imminent; (2) causation between the challenged action of the defendant and the injury; and (3) likelihood that the injury will be redressed by a favorable decision. *Transcontinental Gas Pipe Line Corp. v. Calco Enter.*, 132 N.C. App. 237, 246, 511 S.E.2d 671, 678 (Wynn, J., concurring) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S. Ct. 2130, 119 L. Ed.2d 351, 354 (1992)), *disc. review denied and dismissed*, 351 N.C. 121, 540 S.E.2d 751 (1999).

Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr., 153 N.C. App. 176, 179-80, 568 S.E.2d 883, 886 (2002).

In the instant case, SCV's standing is premised on the Assignment from UDC. "An assignment is a formal transfer of property or property rights from one to another." *Hinshaw v. Wright*, 105 N.C. App. 158, 164, 412 S.E.2d 138, 143 (1992) (citing *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 317 S.E.2d 408 (1984)).

"Assignments are governed by the general principles of contract law." *Parkersmith Props. v. Johnson*, 136 N.C. App. 626, 632, 525 S.E.2d 491, 495 (2000) (citing *Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E.2d 736 *disc. review denied*, 304 N.C. 390, 285 S.E.2d 832 (1981)). "In North Carolina, parties are free to contract and bind themselves to any terms that are not contrary to the public policies of this state or prohibited by statute." *Town of Belville v. Urban Smart Growth, LLC*, 252 N.C. App. 72, 76, 796 S.E.2d 817, 821 (2017) (citing *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C.



240, 242-43, 539 S.E.2d 274, 276 (2000)).

Here the Assignment transferred from UDC to SCV "any and all of UDCS's reversionary or other existing legal or equitable rights, title, and interests in and to the monument to the extent that North Carolina law provides for such interest(s)." Assignment ¶ 2. The plain and unambiguous text of the Assignment illustrates an intent to transfer every possible right or interest UDC may have in or with respect to the Monument. *See Master v. Country Club of Landfall*, ___ N.C. App. ___, ___, 823 S.E.2d 115, 120 (2018) ("W]hen the language of a contract is clear and unambiguous, the court must interpret the contract as written." (quoting *Root v. Allstate Ins. Co.*, 272 N.C. 580, 583, 158 S.E.2d 829, 832 (1968))); Merriam-Webster Dictionary Online (defining "any" as one, some, or all indiscriminately of whatever kind or quantity); *id.* (defining "all" as "the whole amount, quantity, or extent of"; "as much as possible").

Not only did the Assignment convey the title UDC had in the Monument, but the Assignment also transferred any cause of action UDC had with respect to the Monument. *See* Assignment ¶ 2.

Choses in action are assignable. *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 109 S.E. 378 (1921). An assignment operates as a valid transfer of title of a chose in action, and an assignee becomes a real party in interest who may maintain an action thereon in his own name and acquire such right, title, and interest as the assignor had. *Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E.2d 736, *disc. rev. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981).

NCNB Nat'l Bank of N.C. v. W. Sur. Co., 88 N.C. App. 705, 708, 364 S.E.2d 675, 677

(1988).

Accordingly, it is clear that SCV acquired the UDC's standing to bring suit against UNC with respect to the Monument. *See, e.g., U.S. Bank Nat'l Ass'n as Tr. for Holder of SAMI II Inc. Bear Stearns Arm Trust v. Estate of Wood*, ___ N.C. App. ___, ___, 836 S.E.2d 270, 274-75 (2019) (lender's assignee had standing to bring declaratory judgment action against borrower's successor in interest); *Town of Black Mountain v. Lexon Ins. Co.*, 238 N.C. App. 180, 184-85, 768 S.E.2d 302, 306 (2014) (assignment of subdivision performance bonds from county to town was sufficient to confer standing on town to bring breach-of-contract action against insurers); *Tate v. Tate*, 95 N.C. App. 774, 776, 384 S.E.2d 48, 49 (1989) (county department of social services, as assignee of mother's right to child support payments, had standing to contest trial court's elimination of father's arrearages).

If and to the extent it is contended that SCV coordinated and acquired its standing behind the proverbial scenes or otherwise kept its pre-suit dealings and positioning private, there is nothing nefarious about such lawful actions, even if calculated to gain an advantage in the litigation. *See Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 25, 351 S.E.2d 779, 785 (1987)

If and to the extent it is contended that SCV's claims (as acquired from UDC) against UNC would not be successful, that is not the appropriate test. Clearly, if the litmus test for bringing suit were whether or not the plaintiff will ultimately prevail, no

one would ever bring suit. Rather, the correct test is whether SCV had a reasonable basis upon which to file suit against UNC. *See Gray v. Bryant*, 189 N.C. App. 527, 528, 658 S.E.2d 537, 538 (2008) ("A claim 'is frivolous if a proponent can present no rational argument based upon the evidence or law in support of [it].'" (quoting *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004))). Even assuming that an astute defendant could conceive of one or more viable defenses to SCV's claims against UNC, that does not mean that SCV's claims are invalid nor does it mean SCV lacked standing. *See Sydnor v. Qualls*, 2016-Ohio-8410, 78 N.E.3d 181, at ¶ 35 (Ct. App.) (observing that a mere conflict in the evidence, standing alone, generally does not establish a fraud on the court worthy of granting relief from an otherwise valid judgment (citing *Bank of Am. v. Kuchta*, 141 Ohio St. 3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at ¶ 13)).¹

As previously noted by the North Carolina Court of Appeals, "[a] judgment is not void if the court has jurisdiction over the parties and the subject matter and had the authority to render the judgment entered." *Huggins*, 84 N.C. App. at 24, 351 S.E.2d at 784. And because none of these essential elements is missing here, the Consent Judgment

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"Although decisions from other jurisdictions are not binding on this Court on an issue arising under North Carolina law, we may consider such decisions as persuasive authority." *Brookline Residential, LLC v. City of Charlotte*, ___ N.C. App. ___, ___ n.4, 796 S.E.2d 369, 374 n.4 (2017) (citing, inter alia, *Carolina Power & Light Co. v. Employment Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009)).



is not void as a matter of law. *See, e.g., id.* at 24, 351 S.E.2d at 784-85.

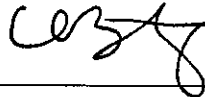
CONCLUSION

In light of the foregoing arguments and authorities cited, it is clear that the SCV had standing with regard to the above-captioned litigation. SCV validly obtained all rights and interests, both legal and equitable, that UDC had with regard to the Monument, and based on the Assignment from UDC to SCV, SCV had several cognizable claims regarding the Monument.

This is 29th day of January, 2020

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CERTIFICATE OF SERVICE

Undersigned certifies that the Plaintiff's Brief on Standing to which this certificate is affixed was served upon the party(s) to this action and to lawyers filing amicus curiae briefs by hand delivery or by depositing a copy of the same, enclosed in a first class postpaid wrapper properly addressed to the attorney(s) of record for such other parties, in a post office or official depository under the exclusive care and custody of the United States Postal Service and by email, on this 29th day of January, 2020.

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