

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

19-CVS-1579

NORTH CAROLINA DIVISION SONS OF
CONFEDERATE VETERANS, INC.,

Plaintiff,

–v.–

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

Defendants.

**BRIEF OF AMICI CURIAE
UNC ALUMNI AND DONORS**

In its Complaint, Plaintiff, the North Carolina Division of the Sons of Confederate Veterans (“SCV”), asserts that it owns the statue of the Confederate soldier (colloquially referred to as “Silent Sam”), which had stood on University of North Carolina (“UNC” or “University”) property for 105 years. SCV claims ownership – and standing to bring this lawsuit – based on the allegations that (1) the United Daughters of the Confederacy (“UDC”) made a conditional gift of the statue to UNC in 1913; (2) UNC violated a condition on that gift by removing the statue from campus, thus restoring ownership to UDC; and (3) UDC conveyed that ownership to SCV in 2019. None of these allegations is true.

The historical record makes clear that UDC never owned the Confederate monument and could convey no ownership of it to SCV. *Amici* attach to their brief the affidavit of Dr. Cecelia Moore, who served as University historian from 2014 until 2019. As part of her work for the University, Dr. Moore carefully studied historical records related to the Confederate monument. The records gathered and reviewed by Dr. Moore conclusively show that the monument was *not* a

gift from the UDC. As a simple matter of property law, the University always owned the monument.

Because SCV received no title from UDC, it had no standing to sue Defendants over its removal. And because SCV lacks standing, the Court had no jurisdiction to approve the parties' proposed resolution and enter the Consent Judgment. Based on the indisputable historical evidence, the Court should vacate the Consent Judgment.

ARGUMENT

I. SCV HAD NO STANDING TO BRING THIS SUIT

A. SCV's Claim to Standing Is Based on Its Purported Ownership of the Monument.

SCV alleged that the Confederate monument was a gift from UDC to UNC in 1913. *See* Compl. ¶ 42; *id.* ¶ 110 (“UDC’s presentation of the Confederate monument to UNC-CH was a conditional gift under North Carolina law.”). It alleged that UDC assigned its rights to the monument to SCV in 2019, and thus SCV is the current owner of the monument. *Id.* ¶¶ 18–20. The Complaint alleged, “Because Plaintiff is the current owner of any and all existing legal and equitable rights, title, and interests in the Confederate Monument, including any and all choses in action related to the Confederate Monument, Plaintiff has standing to bring this lawsuit.” *Id.* ¶ 19.

In the Consent Judgment, the Court made a series of conclusions based on these factual allegations and Defendants’ concession of them, adopting the parties’ position that SCV had standing. *See* Consent J. at 13, ¶ 6 (“Plaintiff has standing to bring this action and is a real party in interest for purposes of this action.”). The Court further recited the parties’ language concluding that the statue was a conditional gift from UDC to UNC, and that ownership reverted to UDC in 2019. *Id.* at 13 ¶ 9 (“UDC’s presentation of the Confederate Monument to UNC-CH was a gift

subject to the express material condition subsequent that the Confederate Monument remain annexed to the realty of the University campus ‘forever.’”); *id.* at 14 ¶ 13 (“[O]n or about January 14, 2019, any and all rights, title, and interests in the Confederate Monument . . . reverted to UDC based on the conditional nature of its gift to UNC-CH.”). Finally, the Court accepted the parties’ assertion that UDC assigned its rights in the statue to SCV in 2019, and that “Plaintiff is the current owner of any and all rights, title, and interests in the Confederate Monument.” *Id.* at 15 ¶¶ 17–18.

The Court then entered a final judgment based on these incorrect facts. *See id.* at 16–19. The judgment provided that SCV owned all rights to the monument, that SCV was entitled to actual possession of the monument, and that Defendants fund a \$2.5 million trust “for the preservation and benefit of the Confederate Monument.” *Id.* The conclusions of law and judgment must be set aside because they were based on false factual allegations in the Complaint and proposed Consent Judgment. SCV never had an ownership interest in the monument, and thus did not have standing to bring this suit.

B. UNC, Not UDC, Owned the Statue.

1. Most of the Funds for the Monument Were Raised by UNC Alumni, Not UDC.

SCV alleged that the monument was a gift to UNC, in part by implying that UDC was primarily responsible for the monument’s funding. *See* Compl. ¶ 110 (alleging that the monument was a gift to UNC). According to the parties’ filings, the plan for the monument was for UDC to “raise the money for the creation and purchase of the monument, and . . . any additional funds necessary to complete the project would come from private donors.” Compl. ¶ 29; Answer ¶ 29 (admitting allegation). Throughout their filings, the parties emphasize UDC’s role in fundraising to make it appear as though UDC had a larger role in financing the monument than it actually did.

See Compl. ¶ 33 (“UDC members worked to raise funds for the monument in 1910, but it appeared that they would not be able to raise sufficient funding in time for the monument to be erected in 1911.”); Answer ¶ 33 (admitting allegation); Compl. ¶ 41 (“UDC members continued to raise money for the Confederate Monument in 1912 and 1913 with the aid of private donors solicited by President [Francis] Venable and others connected to UNC-CH.”); Answer ¶ 41 (admitting allegation).

As Dr. Moore explains, UDC provided only a fraction of the funds for the statue. *See* Moore Aff. ¶ 8. President Venable solicited the majority of funds from UNC alumni. *See id.* UDC initially proposed the idea of the monument in 1907 and the UNC Board of Trustees approved the request in 1908. *See* Moore Aff., Exs. A & B. Shortly after, President Venable wrote Annie Hill Kenan, a UDC member heading UDC’s efforts, and said, “The Trustees were much pleased by the suggestion made by the N.C. Division and will be glad to cooperate with you in any way.” *See* Moore Aff., Ex. C.

UDC could not raise sufficient funds for the monument and President Venable commenced his own fundraising efforts. *See, e.g.,* Moore Aff., Ex. O (President Venable writing, “I wish to get matters in shape for a vigorous campaign to secure the necessary funds for this memorial”). In 1910, President Venable, without consulting UDC, halted work on the monument because fundraising efforts fell short. *See* Moore Aff., Ex. Q (President Venable writing to the sculptor, “I am altogether unwilling that you should expend time and money on this monument unless I can clearly see before me the funds from which you are to be repaid. . . . This means a postponement which I greatly regret but it is the only method of procedure to which I could lend my name”); *see also* Moore Aff., Ex. R (President Venable writing to the sculptor, “I had based my hopes on a large contribution from one who I thought was deeply interested and was well able to pay the

largest part of the expenses, but so far I have been disappointed in this”) (emphasis added). However, President Venable apparently remained dedicated to the fundraising effort. *See* Moore Aff., Ex. Q (President Venable writing to the sculptor, “I am determined that the monument shall be placed here and as soon as possible will undertake the further collection of funds, but you should have a signed contract for your work and I cannot sign such a contract until I see the money either altogether or almost entirely in hand”).

UDC acknowledged that it fell short of its fundraising expectations. In May 1911, Bettie Jackson London, chair of UDC’s monument committee, wrote President Venable that “[t]he [local] chapters have been very slow in making good their pledges – about half dozen are trying to unveil their own monuments this summer.” Moore Aff., Ex. Y. Ultimately, UDC was only able to raise about one-third, or \$2,500, of the \$7,500 needed for the monument. *See* Moore Aff., Ex. V (President Venable proposing that UDC raise \$2,500); Moore Aff., Ex. Z (President Venable writing to London, “You do not state what the pledges amount to but I suppose these cover the \$2,500”); Moore Aff., Ex. CC (President Venable writing to London, “I know that you were glad to hear the good news that the alumni had subscribed the \$5,000 on the monument fund. . . . I hope that the U.D.C. chapters can raise at least \$2,500. . . . This will make the proportion of the U.D.C.’s one-third and that of the alumni two-thirds”).

President Venable was far more successful. In June 1911, he spearheaded a fundraising campaign during UNC commencement activities that resulted in about \$5,000 in donations and pledges towards the monument.¹ The University bursar, President Venable’s office, and the UNC

¹ Considering UDC members contributed approximately one-third of the cost of the statue and UNC alumni contributed approximately two-thirds, if any group has an ownership interest based on the extent of their contributions, it is UNC alumni.

Alumni Association tracked donations from alumni. *See* Moore Aff., Ex. W (list of donors on letterhead of “Office of A.E. Woltz, Bursar, The Univ. of N.C., Chapel Hill, N.C.”); Moore Aff., Ex. X (list of donors on letterhead of the “President’s Office, Univ. of N.C., Chapel Hill, N.C.”); Moore Aff., Ex. BB (list of pledges made at annual alumni association meeting, signed by H. A. London, secretary of the Alumni Association of the University of North Carolina). In addition, President Venable donated at least \$125 of his own funds to the monument. *See* Moore Aff., Ex. W (listing \$25 donation for F.P. Venable); Moore Aff., Ex. BB (listing \$100 donation for Dr. F.P. Venable). In December 1911, President Venable confirmed that donors raised the total amount needed for the statue. *See* Moore Aff., Ex. NN (President Venable writing in *The University Record*, “Through the contributions of the United Daughters of the Confederacy and the alumni a fund of \$7,500 has been secured for the erection of a Soldiers’ Monument on the campus”).

Even so, after the statue was erected and dedicated, an outstanding balance of \$500 remained due to the sculptor. In 1914, UNC Trustees committed to pay this balance if the original pledges did not come through. *See* Moore Aff., Ex. UU (resolution adopted stating, “any balance which may still be due shall be paid by the University” if subscriptions not collected). Accordingly, the only thing that UDC “gave” UNC was the approximately \$2,500 it had raised, which it transferred to the University bursar. *See* Moore Aff., Ex. GG (President Venable writing to London, “I think it would be well to have the amount in the hands of the Treasurer of the UDC’s transferred to the Bursar of the University as soon as possible”).

To claim that UDC owned the statue at any time is to ignore this history. UDC no more owned the statue than a donor owns a piece of art for whose acquisition the donor made a gift of funds to the University. Never having owned the statue, the UDC could not gift it to the University or anyone else.

2. Even if the Monument Could Be Considered a “Gift” from UDC to UNC, the “Gift” Was Unconditional.

SCV alleged that UDC gave the monument to UNC subject to the condition that it remain annexed to UNC property “forever.” *See* Compl. ¶¶ 42, 108–111. According to SCV’s theory, Bettie London’s remarks at the unveiling ceremony – “may it stand forever” – reflected UDC’s intention to present the monument “under the condition that the Confederate Monument be annexed to the University campus ‘forever.’” *See id.* ¶¶ 42, 108. SCV further alleged that when UNC removed the pedestal from the monument site on January 14, 2019, the condition on the gift was violated and ownership interest in the monument automatically reverted to UDC. Compl. ¶¶ 113–114. This myth persists in the Consent Judgment. *See* Consent J. at 13, ¶ 9 (“UDC’s presentation of the Confederate Monument to UNC-CH was a gift subject to the express material condition subsequent that the Confederate Monument remain annexed to the realty of the University campus ‘forever.’”); *see also id.* at 13–14, ¶¶ 11–13 (concluding that the condition “failed” when UNC did not reannex the monument to the monument site, which caused all rights, title, and interests in the monument to revert to UDC).

Nothing in the historical record supports the notion that UDC or any of its members ever sought to place any condition on their contributions. Under North Carolina law, a completed inter vivos gift, or gift between the living, requires two elements: donative intent and delivery. *See Holloway v. Wachovia Bank & Trust, Co.* 333 N.C. 94, 100, 423 S.E.2d 752, 755 (N.C. 1992). Once given, such a gift is absolute and irrevocable. *See Courts v. Annie Penn Mem’l Hosp., Inc.*, 111 N.C. App. 134, 139, 431 S.E.2d 864, 866 (1993) (citing *Thomas v. Houston*, 181 N.C. 91, 94, 106 S.E. 466, 468 (1921), for proposition that “a gift inter vivos is absolute and takes effect at the time delivery is completed, provided there are no conditions attached”). Any condition on a gift

must be clearly expressed before delivery. *Courts*, 111 N.C. App. at 139, 431 S.E.2d at 866–67 (“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.’”) (quoting *Howell v. Smith*, 258 N.C. 150, 153, 128 S.E.2d 144, 146 (1962)).

Under North Carolina law, conditions subsequent are disfavored and must be clearly stated. *See Hall v. Quinn*, 190 N.C. 326, 130 S.E. 18, 20 (1925) (“A clause in a deed will not be construed as a condition subsequent, unless it expresses in apt and appropriate language the intention of the parties to this effect.”); *see also Washington City Bd. of Educ. v. Edgerton*, 244 N.C. 576, 578, 94 S.E.2d 661, 664 (1956) (“The law does not favor a construction of the language in a deed which will constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested.”). If a party intends to retain a reversionary interest in an item if a condition on a gift is violated, this must be “expressly and unambiguously stated.” *Town of Belhaven, NC v. Pantego Creek, LLC*, 250 N.C. App. 459, 468, 793 S.E.2d 711, 717 (2016); *see also Station Assocs., Inc. v. Dare Cty.*, 350 N.C. 367, 370, 513 S.E.2d 789, 792 (1999) (“This Court has declined to recognize reversionary interests in deeds that do not contain express and unambiguous language of reversion or termination upon condition broken.”).

The UDC members’ gifts were complete, individually and collectively, upon the transfer of the funds they had raised to the University’s bursar. *See Moore Aff.*, Ex. GG. This occurred well *before* the statue was installed and the unveiling ceremony took place in which London expressed the hope that it “may . . . stand forever.” Converting London’s aspirational effusion into a binding condition on the University would be a stunning departure from the facts and the law.

3. UDC Was Never Entitled to a “Return” of the Monument.

The Complaint and Consent Judgment contain misleading language to bolster the theory that UDC had an ownership interest in the statue. Specifically, the parties’ filings repeatedly state that Defendants have not “returned” the statue to UDC. *See* Compl. ¶ 55 (“Defendants or their representatives have not returned the Confederate Monument to UDC.”); *id.* ¶ 146 (“Defendants or their representatives did not return the Confederate Monument to UDC.”); Answer ¶¶ 55, 146 (admitting allegations); *see also* Consent J. 10, ¶ 43 (“Neither Defendants nor their representatives have returned the Confederate Monument to UDC.”).

UDC never had possession of the statue and was not entitled to its “return.” John Wilson, the monument’s sculptor, designed the monument at his studio in Boston, had the Confederate soldier figure cast in New England, and had other parts sent directly to UNC, where the monument was assembled. *See* Moore Aff., Exs. L & LL. Further, UNC did not intend to relinquish control of the monument when it removed the pedestal from the monument site in January 2019. *See* Compl., Ex. DD, at 86 (citing letter from Chancellor Carol L. Folt stating, “The base and tablets will be preserved until their future is decided.”).

4. There is No Contract Between UDC and UNC Regarding the Monument.

SCV also alleged that correspondence between President Venable and UDC members created a binding contract between UDC and President Venable in his official capacity as president of UNC. *See* Compl. ¶ 88 (“The writings back and forth between representatives of UDC and Venable in his capacity as President of UNC-CH constitute a binding contract under North Carolina law.”). SCV alleged that the contract provided that UDC would raise funds for the

monument, President Venable would raise funds as UDC's agent, and the statue would remain on the UNC campus "forever." *See id.* ¶ 89.

The correspondence between President Venable and UDC members does not reveal any intent to reach a contract on those or any other terms. *See Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 681, 821 S.E.2d 360, 366 (2018) ("The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time."). First, as previously discussed, *see infra* I.B.1, both President Venable and UDC were planning to raise funds from the beginning. Second, President Venable never acted as an agent of UDC. *See infra* Section I.B.5. Third, the use of the term "forever" in correspondence regarding the monument was intended as a sentiment, not a binding contract term. *See Moore Aff., Ex. E* ("I hope it will not be many years before it will stand silent & alone, on our beautiful University grounds, reminding future generations of the sacrifice of those men, nothing can dim . . .").²

Further, University archives do not contain anything that even purports to be a deed of gift or similar document regarding the monument. *See Moore Aff.* ¶ 7. Dr. Moore specifically looked for a formal document between UDC and UNC and found none. *See id.* Her affidavit states:

One potentially key document that I looked for, but did not find, was a deed of gift or other formal agreement between the UDC and the University. Although formal agreements commonly are executed by the University and its donors today, I found nothing to suggest that any such document was ever drafted or signed in connection with the Confederate monument.

² SCV's allegations that correspondence between President Venable and UDC members created a contract between UNC and UDC is inconsistent with SCV's theory that President Venable was an agent of UDC in connection with his work on the monument.

Id. The absence of a deed or other formal document between UDC and UNC is further evidence that UDC never had an ownership interest in the monument.

5. President Venable Was Not an Agent of UDC.

The parties represent that President Venable acted as an agent of UDC. *See* Compl. ¶ 33 (In letters to Wilson in 1910, “Venable noted that he was acting as the ‘agent’ of the UDC committee and that he was helping to raise funds from private donors”); Answer ¶ 33 (admitting allegation); *see also* Compl. ¶ 89 (alleged contract between UDC and President Venable provided that “Venable would act as UDC’s agent in raising funds for the Confederate Monument from private donors”).

Although President Venable once referred to himself as an “agent” of the monument committee in a letter to the sculptor, he was neither an employee nor an agent of UDC in any legal sense. A principal-agent relationship consists of two elements: (1) authority of the agent to act for the principal, and (2) the principal’s control over the agent. *See Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 509, 597 S.E.2d 710, 716 (2004). “The element of ‘control’ is the primary indicator of an agency relationship.” *Peace River Elec. Co-op., Inc. v. Ward Transformer Co.*, 116 N.C. App. 493, 504, 449 S.E.2d 202, 210 (1994).

UDC did not exercise control over President Venable with regard to the monument, and he did not act as UDC’s agent. President Venable solicited donations for construction of the statue; coordinated with the sculptor on the monument’s price, location, design, and delivery; signed the contract with the sculptor; and arranged for the sculptor to be paid. *See* Moore Aff., Ex. J (President Venable writing, “If there is any possible reduction in the price I shall be glad to know so that I can present it to [the committee] at the time of the meeting.”); Moore Aff., Ex. M (coordinating with sculptor on monument design); *see* Moore Aff., Ex. GG (President Venable

writing, “I think it would be well to have the amount in the hands of the Treasurer of the UDC’s transferred to the Bursar of the University as soon as possible. I have heard from Mr. Wilson and he will send the contract for me to sign in a few days.”). Notably, the contract for the monument was between President Venable and the sculptor, and UDC was not a party to it. *See* Moore Aff., Ex. LL. And UNC, not UDC, coordinated payment to the sculptor. *See* Moore Aff., Ex. GG (President Venable directing UDC to send funds it raised to UNC bursar); Moore Aff., Ex. HH (President Venable says he can sign contract and University bursar can pay sculptor); Moore Aff., Ex. II (London writing to President Venable that he should sign contract and handle funds).

President Venable worked on the monument in his individual capacity as well as in connection with his role as president of UNC. In letters to potential donors, President Venable characterized his involvement in fundraising efforts as a “labor of love” for UNC. *See, e.g.*, Moore Aff., Ex. EE (President Venable writing, “I hope very much you can aid me in finishing this task which has been a labor of love for the University.”). When he solicited donations in writing, he signed merely as “President,” did not mention UDC, and directed that funds be sent to Treasurer J. A. Warren. *See, e.g.*, Moore Aff., Exs. PP & QQ. In one instance, London specifically asked if President Venable would place an advertisement in the paper, *as president of the University*, soliciting donations ahead of commencement. *See* Moore Aff., Ex. Y (London writing, “Write something for us to have put in. Or have it done under your name as University President.”). And there is no evidence that when President Venable launched his successful fundraising campaign during 1911 commencement activities, he said he was acting an agent of UDC.

C. Because SCV Had No Ownership Interest, It Had No Standing to Bring Suit.

“In order for a court to have subject matter jurisdiction to hear a claim, the party bringing the claim must have standing.” *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C.

App. 102, 106, 744 S.E.2d 130, 133 (2013). “The ‘irreducible constitutional minimum’ of standing contains three elements: (1) ‘injury in fact’—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002).

SCV has no standing because it can claim no “injury in fact” resulting from the removal of the Confederate monument. A person generally suffers no injury in fact from the disposition of a piece of property in which it has no property interest. *See, e.g., Beachcomber Properties, L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (2005) (holding plaintiff suffered no injury in fact from amendment to condominium association agreement because he “was neither a party to a contract to purchase the . . . condominium, nor the property owner”). In its Complaint, SCV asserted that it “has standing to bring this suit” “[b]ecause Plaintiff is the current owner of any and all existing legal and equitable rights, title, and interests in the Confederate Monument.” Compl. ¶ 19. But SCV is *not* the owner of any legally protected rights in the Confederate monument. As a result, it can claim no injury in fact from the monument’s removal, and it had no standing to bring this lawsuit.

II. BECAUSE SCV HAD NO STANDING TO BRING SUIT, THE COURT HAD NO JURISDICTION TO ENTER THE CONSENT JUDGMENT

Standing “is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction.” *Thrash Ltd. P’ship v. Cty. of Buncombe*, 195 N.C. App. 678, 680, 673 S.E.2d 706, 708 (2009). “In order for a court to have subject matter jurisdiction to hear a claim, the party bringing the claim must have standing.” *Revolutionary Concepts*, 227 N.C. App. at 106, 744


S.E.2d at 133. SCV's lack of standing deprived this Court of subject matter jurisdiction to hear the case.

Because the Court lacked subject matter jurisdiction, it had no authority to enter the Consent Judgment. "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest," and so "[a] judgment is void, when there is a want of jurisdiction by the court over the subject matter." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). Even a consent judgment must be entered by a court with "general jurisdiction of the matters adjudicated." *Davis v. Davis*, 78 N.C. App. 464, 470, 337 S.E.2d 190, 193 (1985) (quoting *Edmundson v. Edmundson*, 222 N.C. 181, 186, 22 S.E.2d 576, 580 (1942)); accord *Milner v. Littlejohn*, 126 N.C. App. 184, 187, 484 S.E.2d 453, 455 (1997) ("A consent judgment is a contract of the parties entered upon the records of *a court of competent jurisdiction* with its sanction and approval." (emphasis added)).

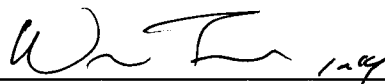
CONCLUSION

For the foregoing reasons, the Court should vacate the Consent Judgment, Declaratory Judgment, and Order.

Respectfully submitted, this day the 29th of January, 2020.



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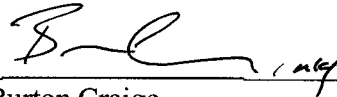
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on all parties by email and by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

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This the 29th day of January, 2020.



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