Nos. 20COA-304
20COA-305

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX, Plaintiff-Appellee, vs. BEVERLY L. RUBIN, Defendant-Appellant.	)	**From Wake County** **15-CVS-5836**
TOWN OF APEX, Plaintiff-Appellee, vs. BEVERLY L. RUBIN, Defendant-Appellant.	)	**From Wake County** **19-CVS-6295**

****

BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ADVOCATES FOR JUSTICE
AND JOHN LOCKE FOUNDATION

****

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BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE AND JOHN LOCKE FOUNDATION

****

1067691 v. 2 00226.9999

ISSUE PRESENTED

I. CAN CONDEMNORS ACQUIRE PROPERTY BY INVERSE CONDEMNATION THAT THEY LACK AUTHORITY TO ACQUIRE VIA A DIRECT CONDEMNATION ACTION?

STATEMENT OF FACTS

Amicus Curiae North Carolina Advocates for Justice ("NCAJ") and John Locke Foundation ("JLF") adopt the Statement of Facts in the Brief of Appellant Beverly Rubin ("Rubin").

SUMMARY OF ARGUMENT

The Fifth Amendment to the U.S. Constitution and the North Carolina "law of the land" clause guarantee citizens shall not be deprived of property except for public use. The Town of Apex ("Apex") seeks to negate the "public use" requirement by claiming taking powers through inverse condemnation that it lacks through direct condemnation. Apex repeatedly took risks, hoping its continued use of Rubin's property would eventually supersede Rubin's constitutional rights. Apex lost when the 2015 trial court rightly nullified its attempted condemnation and protected the threshold public use requirement.

While on appeal, Apex began operating the line and allowed additional homeowners to connect to sewer service. This time the gamble worked: the 2019 trial court judgment misapplied precedent, vacating the requirement that every condemnation action (direct or inverse) must have a public purpose.

This 2019 case result ignores the ugly and foundational reality that Apex was granted an easement that violated Rubin's constitutional right because the taking lacked public purpose. Allowed to stand, Apex's actions offer a blueprint for government to circumvent constitutional rights to acquire private property when it otherwise lacks authority to do so. Like fruit from the poisonous tree, no subsequent action or span of time can make lawful that which was originally unlawful. Apex's claim that it acquired title to Rubin's property by inverse condemnation is flatly erroneous, and no theory it contrives can subvert the core constitutional prerequisite of a valid public purpose.

ARGUMENT

I. CONDEMNORS CANNOT CIRCUMVENT CONSTITUTIONAL PROTECTIONS AND TAKE PROPERTY VIA INVERSE CONDEMNATION WHEN THEY LACK AUTHORITY TO TAKE BY DIRECT CONDEMNATION.

A. Public use is an essential prerequisite to the taking of private property.

The right of the government to acquire private property is constitutionally limited for the protection of the citizenry: Government may only condemn private property for a public use and only with just compensation. *State Highway Com. v. Thornton*, 271 N.C. 227, 241, 156 S.E.2d 248, 259 (1967).

> It is not a sufficient answer that the landowner will be paid the full value of his land. It is his and he may not be compelled to accept its value in lieu of it unless it is taken from him for a public use. To take his property without his consent for a non-public use, even though he be paid its full value, is a violation of Article I, § 17, of the Constitution of this State and … of the United States.

Id. at 259. Even accepting the dubious theory that a condemnor can assert a takings claim by twisting the statutory provisions for inverse condemnation, the bedrock constitutional requirement that any taking by eminent domain must have a public purpose remains

unassailable. *See id.* (citing *Cozard v. Hardwood Co.*, 139 N.C. 283, 51 S.E. 932, 937 (1905), holding legislation giving private timberland owners condemnation power was unconstitutional without a public purpose).

B. Apex repeatedly took risks in an effort to avoid the "public use" requirement and should not be rewarded for its aggressive tactics.

On 30 April 2015, the Town of Apex condemned a sewer easement across Rubin's property by filing a complaint, declaration of taking, and depositing its estimate of compensation (15-CVS-5836, the "2015 case"). Apex used the Chapter 136, Article 9 condemnation procedure, which authorizes the process for NCDOT to acquire property for highway purposes, rather than the condemnation process intended for cities and towns found under Chapter 40A. Over the years, some local governments have obtained special legislation allowing them to use the Chapter 136 process.[1]

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[1] The use of quick take powers by local condemnors under Chapter 136 is problematic and directly caused the present controversy. Had Apex used the appropriate procedure naturally afforded by Chapter 40A, this case would have been resolved without confusion, multiple appeals and intervening years.

The Chapter 136 process is referred to as "quick take" because property interests transfer to the condemnor immediately upon filing the action. In this way, condemnation filing acts like any deed or other recording, except the conveyance is forced upon the property owner. Also like a deed, condemnation also requires a memorandum of action be recorded in the public registry. *Id. § 136-104.*

Chapter 40A condemnation process requires property owners receive at least 30 days' notice prior to filing condemnation, which gives property owners the opportunity to file an injunction. Questions of authority for the taking can be addressed <u>before</u> the government seizes property under Chapter 40A.

Our Supreme Court has cautioned that quick take powers allow a condemnor to enter "upon the land in reliance upon its own opinion as to its authority", <u>but it does so at its own peril</u>. *Thornton*, 271 N.C. at 240, 156 S.E.2d at 258. If the condemnor is correct, then its taking action cannot be dismissed, and the citizen's sole remedy is to contest the compensation. *Id*. "If that opinion was erroneous, the [landowners] are entitled to have [the] proceeding dismissed[.]" *Id*.

Because Apex used the quick take process to file its *direct condemnation,* the easement vested immediately. Quick takes do not require notice prior to the filing and do not provide time to seek a protective injunction. Property owners, however, have 12 months to answer and challenge a condemnor's authority for the taking. Rubin filed her answer within three months, alleging lack of public use (2015 R pp 20-22.) Prudence dictated that Apex delay its construction activities until a judge resolved the challenge to its authority. Instead, Apex quickly installed a sewer line within the condemned easement two weeks later. (2015 R p 163-164.)

C. Title to the easement area immediately transferred back to Rubin after the trial court held that the taking of the easement over Rubin's property was not for a public use.

Over a year after the sewer line had been installed, the trial court held that the taking of the easement across Rubin's property was not for a public use. It ordered the case dismissed and declared the acquisition of an easement interest null and void. Ownership of the easement taken <u>automatically</u> transferred back to Rubin upon the dismissal of Apex's condemnation action. Nothing in condemnation

statutes or other substantive law required any further order, as the dismissal is fully effective by itself. *Thornton,* 271 N.C. at 237, 156 S.E.2d at 256 ("defendants were entitled to dismissal").

In *Statesville v. Roth,* 77 N.C. App. 803, 336 S.E.2d 142 (1985) (distinguished on other grounds in *Tucker v. City of Kannapolis,* 159 N.C. App. 174, 180, 582 S.E.2d 697, 700 (2003)), this Court affirmed that title does not vest in a condemnor where a taking is not for a public purpose; title revests with the landowner. *Id.* *Roth* also affirmed the trial orders expelling improperly installed infrastructure after finding that the project was installed for a single private user and not a public benefit.

Thus, precedent supports power to restore full possession of a landowner's property. Unencumbered fee simple title revests in the contesting landowner by operation of law.

Rubin did not need an order reinstating her title; the encumbrance was cleared (vacated *ab initio*) and reverted on its own upon dismissal.

Contrary to Apex's claims, it was also unnecessary for Rubin to secure an injunction. The North Carolina Supreme Court was explicit on this point: dismissal is the appropriate result upon a finding that a condemnor lacks a proper public purpose. *Thornton*, 271 N.C. at 236, 156 S.E.2d at 255 (stating, "the trial court should have entered a judgment dismissing the proceeding, but not an injunction."). Rather, if a taking lacks a public purpose, then the original condemnation action should be dismissed. *Id.* at 258-59. Rubin was not required to move for an injunction to oust Apex from her land, and *Thornton* expressly disavowed this approach. Instead, Apex should have honored the trial court's authority in the 2015 case and sought guidance to remove its line.

Apex appealed the trial court's judgment from the 2015 case to this Court, which dismissed the appeal as untimely and explicitly affirmed the Superior Court's original ruling. Our Supreme Court declined to hear Apex's request for review in 2019, and remanded the case back to the trial court. Rubin immediately moved to enforce the 2015 trial court's judgment. Instead of accepting these uniform

rulings, Apex ignored the judgment from the 2015 case as affirmed by this Court and attempted to take another bite at the apple. Apex filed an action styled as a combination declaratory judgment/inverse condemnation action (the "2019 case"). In it, Apex claims it had already acquired an easement across Rubin's property this time by *inverse condemnation*.

D. Inverse condemnation is a process for property owners to force compensation for a taking where no direct condemnation action has been filed; it is not a process by which a condemnor may acquire property that was already found unlawful.

N.C. Gen. Stat. § 136-111 provides a private property owner relief to receive compensation if their property has been taken by the government without filing a condemnation action. It provides:

> "**Any person whose land** or compensable interest therein **has been taken** by an intentional or unintentional act or omission of the [condemnor][2] **and no complaint and declaration of taking has been filed** by said [condemnor] may, within 24 months of the date of the taking of the affected property or interest therein or the completion of the project

[2] "Department of Transportation" in the original.

> involving the taking, whichever shall occur later, **file a complaint in the superior court**…”.

Id. (emphasis added).

An “inverse condemnation” claim is brought by property owners against governmental agencies/entities in order to compel the government to pay just compensation for property already taken when the condemnor failed to follow the direct condemnation process. It is not a process by which the government takes land; that procedure is set out in § 136-103. The power to bring an inverse action lies with the property owner not the government. *Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 590, 697 S.E.2d 338, 339 (2010). The very purpose of the doctrine of inverse condemnation is to provide “a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so.” *Hoyle v. Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 8 (1970).

Only one known case involved a condemnor’s offensive claims for inverse condemnation. The U.S. District Court in *Camden County v. Ne. Cmty. Dev. Corp.*, 263 F. Supp. 3d 556, 565 (E.D.N.C. 2017) denied the United States’ theory that the county had inversely condemned

federal property. *Id.* Even though it failed, the United States' novel assertion was at least plausible, since it involved an alleged taking between condemnors.[3]

Apex takes the idea implausibly further and alleges it can somehow wield inverse condemnation offensively against a private citizen, but this position is unprecedented. Nothing in the text of the condemnation statutes or in principles of constitutional law support Apex's position, which is why no courts have upheld their audacious notion. As a condemnor, Apex simply lacks authority under the condemnation statutes to bring an inverse condemnation action, especially after its efforts to take by direct condemnation have failed.

E. Condemnors cannot acquire through inverse condemnation what they lack authority to acquire via direct condemnation.

1. Apex cannot claim ownership of the easement simply by leaving the sewer pipe in the easement area for 24 months when the taking had previously been adjudicated as unlawful.

[3] There was no taking because fee simple title returned to the County due to reversionary interest; it had not taken anything from the federal government. *Id.* at 563. The automatic effect of reverter is similar to the automatic reversion of Rubin's title upon dismissal of the 2015 condemnation. See *supra*, argument section I-C.

When private property is converted to public use without filing a proper complaint or deposit, § 136-111 gives the property owner 24 months from the alleged taking (or completion of project) to file an inverse condemnation action. It does not allow a condemnor's unsuccessful appeal to be used as a sword against a landowner and deprive her of constitutionally protected property rights.

As previously explained, N.C. Gen. Stat. § 136-111 allows landowners to force the government to acknowledge takings and pay compensation *when no complaint and declaration of taking has been filed*. *Id*. (emphasis added). This makes sense because if a complaint and declaration of taking have already been filed, the government has already acknowledged the taking and paid estimated compensation for it. It is precisely because Apex previously filed the direct action that the time limits of the inverse statutes are inapplicable to support the 2019 case. Apex certainly cannot plead time limitation to deprive Rubin of her constitutionally protected rights – especially since she had consistently prevailed and the time only passed because of Apex's untimely appeal.

Apex's inverse theory simply ignores the action it filed on 30 April 2015. Apex claims that it subsequently "physically invaded" and "inversely condemned" Rubin's property on 27 July 2015 by installing the sewer line. This is incorrect and analytically flawed. On 27 July 2015, Apex already owned the easement because its quick take filing.

Only after the 2015 trial court dismissed Apex's condemnation action for lack of public purpose (in October of 2016) did ownership of the easement in question revert back to Rubin. "If Apex tried to condemn the property for a private use, then the use would be improper and Apex would have no authority under the power of eminent domain, thus ending the inquiry". *Town of Apex v. Whitehurst*, 213 N.C. App.579, 712 S.E.2d 898 (2010). In short, any inverse condemnation must still be rooted in a valid public purpose, else the very eminent domain power and constitutionality of the taking is infirm, whether it is by a direct or inverse action.

2. Inverse Condemnation requires a public use for a de facto taking to be permitted by law, but public use is not a prerequisite for a landowner's inverse condemnation claims.

Thornton states that the doctrine of inverse condemnation has "no application where, as here, the contention is that the power of eminent domain does not extend to the taking in question." *Id.*, 271 N.C. at 241, 156 S.E.2d at 258.

Inverse condemnation, Apex argues, does not require public use and incorrectly claims *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018), supports this. *Wilkie* held that a property owner does not need to prove a taking was for a public use as a prerequisite to an action for inverse condemnation seeking compensation. Instead, it is the government's burden to show public purpose once the fact of inverse taking is established. In these appeals, Apex seeks to turn the condemnor's burden of public use into both a shield to defend its unlawful taking and a sword to victimize private citizens. Neither position is grounded in reason or legal authority.

Under *Wilkie,* inverse condemnation gives owners a process to receive compensation for a taking, not a process for a government to

acquire property it would be prohibited from taking by direct condemnation. Rubin "did not initiate this proceeding, nor did [she] establish the procedure to be followed." Apex did. *Thornton*, 271 N.C. at 237, 156 S.E.2d at 256. A condemnor "may not, by precipitate entry and construction, enlarge its own powers of condemnation" to either shorten a landowner's time to assert a defense or to abrogate the public purpose requirement as "an essential element of the right to condemn." *Id.* at 256-57. Allowing a government to avoid the requirement of public use by filing an inverse condemnation action when it lacks that same authority to take in a direct action would effectively eviscerate protections afforded North Carolina property owners.

F. Public policy implications

1. The government cannot unjustly deny fundamental rights

At the very heart of this matter lies a property owner's fundamental and constitutional right to own property. The Fifth Amendment and the North Carolina "law of the land" clause protect a North Carolina property owner's rights, subject only to its taking for a public use and upon payment of just compensation. Apex's direct

condemnation of the easement lacked public use and violated Rubin's constitutional right. It is analogous to the Fruit of the Poisonous Tree Doctrine: Once the taking was deemed unlawful, all of Apex's actions following the unlawful direct taking, including installing, maintaining, and operating the sewer line, are likewise unlawful, as is any subsequent claim by Apex of easement rights over Rubin's property. <u>To conclude otherwise allows a condemnor to circumvent the foundational constitutional requirement that private property may only be taken for a public use</u> or benefit. Regardless of how long the sewer line remains on Rubin's property and regardless of how many homeowners may be served by the sewer line, the fact remains that the sewer line easement was taken in violation of Rubin's constitutional rights. Judge O'Neal understood this, and her final judgment, as already affirmed by this Court, should finally be recognized.

If the ruling of the 2019 trial court stands, Rubin is deprived of her constitutional rights, her property <u>and</u> compensation for the same. Apex's position is striking and appalling when properly understood. In essence, Apex asks this Court to allow it to inflict a double injury on

Rubin: First, Apex would take Rubin's property without a constitutional foundation. Second, it would not even have to pay compensation for the pleasure, since more than 24 months has passed since they first began occupying the easement area.

The long-term implications to the rule of law and public policy of what Apex advocates here would allow the government to usurp the Constitution and statutes by bringing inverse condemnation actions to take property it could not take through a direct condemnation action. Affirming the 2019 court orders would do two great harms to our jurisprudence. First, it would undermine the vital maxim that one trial court judge cannot simply overrule another. Second, it would create an opportunity – even an incentive – for condemnors to attempt nothing short of an end-run around established law and unambiguous rulings of our courts. Allowing the government to be rewarded for its misbehavior will incentivize condemnors to ignore valid court orders and go shopping for a more receptive trial judge. Government could take property as it sees fit, then simply wait out an appeal – even an

appeal that it has already lost. Apex seeks to draft into condemnation law a true Catch-22.

2. The court must promote finality of judgments.

The Court must promote finality in litigation. That is, once a Court has given a judgment which is 'perfected', then the matter is over. Instead, Apex has chosen to ignore multiple court orders and rulings and continue this litigation. It has abused the law and convinced one superior court judge, to not only overrule another trial court judge who found the taking unconstitutional, but to also overrule the findings of this Court of Appeals that affirmed the trial courts' ruling. Allowing this will encourage losing parties to keep bringing an action before the Courts until it receives a favorable ruling. There will be no finality to cases and parties will be forced to litigate the same issues repeatedly.

The courts and the public are interested in the finality of litigation. The maxim, *interest reipublicae ut sit finis litium*, demands there should be an end of litigation for the repose of society. *Hicks v. Koutro*, 249 N.C. 61, 64, 105 S.E.2d 196, 199 (1958).

Apex had its chance in its direct condemnation action to bring forth all of its arguments and claims. The Court held an evidentiary hearing and found Apex's taking of Rubin's property unconstitutional. Apex, however, refused to accept this judgment and has made every effort to sidestep the legal authority of the trial court and this Court. Allowing Apex to circumvent the legal system and bring additional actions for the same remedy and misuse the inverse condemnation statute would give Apex a "second bite at the apple" — a result that finds no support in our jurisprudence. *See City of Lumberton v. U.S. Cold Storage, Inc.*, 178 N.C. App. 305, 309-10, 631 S.E.2d 165, 168-69 (2006) ("[A] party may not file suit seeking relief for a wrong under one legal theory and, then, after that theory fails, seek relief for the same wrong under a different legal theory in a second legal proceeding... We can perceive no reason why [the appellant] should be given two bites at the apple."). *Hicks*, 249 N.C. at 64, 105 at 199 ("The courts and the public are interested in the finality of litigation...."). "Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals." *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722-23, 152 S.E.2d 199 (1966).

Allowing Apex to act in this manner isn't only contrary to public policy but it encourages parties who have received an unfavorable ruling to continue to try to litigate their claims until they find a judge willing to give them a favorable judgment. Allowing claims in such a manner would erode the lower courts' authority, further undermine principles of finality and judicial economy, and if not checked and corrected, provide a great incentive to future litigants to proceed in this manner.

CONCLUSION

Over a century ago, the N.C. Supreme Court concluded that one powerful and wealthy landowner could not manipulate statutes to its favor and thereby take the property rights from its neighbor for its own private use, under color of governmental power:

> [T]he courts may not violate or weaken a fundamental principle… The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened.

Cozard, 139 N.C. 283, 51 S.E. at 937. *Amicus curiae* urge this Court to honor those principles. Apex should be denied attempts to take by inverse condemnation and compelled to vacate the Rubin property. For

the reasons stated here, the 2019 judgment should be REVERSED, and the original judgment in the 2015 action should be, *once again*, AFFIRMED.

This the 30th day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2020, I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE and JOHN LOCKE FOUNDATION with the Clerk of Court. The following counsel of record will be served via electronic mail:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, the undersigned hereby certifies that the foregoing **BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE and JOHN LOCKE FOUNDATION** contains no more than 3,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 30th day of June, 2020.

/s/ R. Susanne Todd
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE and JOHN LOCKE FOUNDATION** was served on the opposing party by placing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 30th day of June, 2020, addressed as follows:

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