No. COA20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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TOWN OF APEX, Plaintiff-Appellee, v. BEVERLY L. RUBIN, Defendant-Appellant.	))))))))	<u>From Wake County</u> 19-CVS-6295

* *

PLAINTIFF-APPELLEE'S MOTION TO DISMISS

* *

INDEX

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

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PLAINTIFF-APPELLEE'S MOTION TO DISMISS

* *

Plaintiff-Appellee the Town of Apex (the "Town"), by and through the undersigned counsel, files this motion under Rule 37 of the North Carolina Rules of Appellate Procedure to dismiss the appeal of the Defendant-Appellant Beverly L. Rubin ("Rubin"). Rubin attempts to appeal an order denying a Rule 12(b)(6) motion to dismiss and an order granting a preliminary injunction to preserve the status quo. Both orders are interlocutory, do not affect a substantial right, and are not immediately appealable.

The Town respectfully requests that this motion be considered and decided by a motions panel of this Court, as opposed to being deferred to a merits panel, so that the parties may preserve resources, and address and brief only the issues that survive dismissal. To facilitate that request, the Town has filed this motion immediately upon receipt of notice that Rubin's appeal has been docketed.

STATEMENT OF FACTS

Town is a municipal corporation which possesses, *inter alia*, the power of eminent domain. On or about 27 July 2015 the Town physically invaded Rubin's property and installed an underground sewer line. The Town used the "bore method" to construct and install a sewer line under a narrow portion of Rubin's property to connect the Riley's Pond subdivision to the Town's public sanitary sewer system. The bore method was employed so as not to disturb the surface of Rubin's property, and eliminate the necessity to access the surface of her property to maintain the sewer line. The eight (8) inch, 156 foot long gravity flow sewer line was installed at a depth of eighteen (18) feet and placed inside an eighteen (18) inch steel casing. During construction, bore pits were dug on each side of Rubin's property on 20 July 2015, the casing was inserted

on 27 July 2015, and the sewer line was installed on 29 July 2015. No manholes were dug or are currently on the Rubin's property. The taking occurred on or about 27 July 2015. A 10-foot wide Town underground sanitary sewer easement was sufficient given the use of the bore method by the Town. The Town was able to avoid taking any access or similar rights in the surface of Rubin's property. The surface of Rubin's property was not disturbed during construction. The Town will not to have to access the surface of her property to maintain the sewer line. (R p. 84, ¶ 8).

The Town thereby inversely condemned an underground sewer easement which is more particularly described in paragraph 19 of the Amended Complaint as follows:

> "New 10' Town of Apex Sanitary Sewer Easement," said area containing 1,559 square feet (0.036 acres) more or less, all as shown on that certain survey plat entitled "EASEMENT ACQUISITION EXHIBIT" by Taylor Land Consultants, PLLC, said survey plat being attached to the Complaint as **Exhibit B.** (R pp. 85).

The underground sewer line remains in place, is in use, and serves approximately fifty (50) residential homes and/or lots in the Riley's Pond Subdivision which lies within the Town and was properly annexed, rezoned, and the subdivision plat thereof duly approved by the Town. (R

pp. 85, ¶ 17). The existing sewer line is the only sewer line or facility touching or connecting the subdivision to Town sewer service. There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots.

Prior to the installation of the underground sewer line the Town had deposited the sum of $10,771 with the Wake County Clerk of Superior Court as just compensation for the taking of a forty (40) foot wide sewer easement across Rubin's property. The deposit was made in a direct condemnation filed by the Town on 30 April 2015 to acquire a forty (40) foot wide sewer easement across Rubin's property (15-CVS-5836). (R pp. 83-90, ¶ 3). Rubin successfully opposed the Town's Complaint to take a forty (40) foot wide sewer easement described in 15-CVS-5836. The trial court held following an all other issues hearing in the direct condemnation (15-CVS-5836) that the paramount reason for the taking of the forty (40) foot wide sewer easement was for a private purpose and the public's interest was merely incidental. A Judgment was entered in 15-CVS-5836 following an all other issues hearing declaring the condemnation claim alleged in the Town's complaint to be null and void and dismissing it. (R pp. 18-35). Although the trial court heard

evidence that the sewer line had been installed a year earlier, the Judgment did not require removal of the sewer line. The Judgment simply states that the "[Town's] claim [in its complaint] to [Rubin's] property by Eminent Domain is null and void." (R pp. 8-14).

This declaratory judgment action does not collaterally attack the Judgment in the direct condemnation (15-CVS-5836), but seeks a declaration of the parties' rights in the existing underground sewer line and easement – which was not addressed in the prior Judgment. (R pp. 83-90). As a result, the Judgment has no effect on the rights of the parties as to the claims raised herein. Any argument which Rubin contends she has with regard to the Judgment is available to her in her appeal of the direct condemnation (15-CVS-5836).

In order to protect the Town's interest and the homeowners and citizens of the Town living in the Riley's Pond subdivision, as well as to maintain the status quo, the Town filed this declaratory judgment action in Wake County Superior Court on 13 May 2019 (19-CVS-6295) ("declaratory judgment/inverse condemnation action"), along with a Verified Motion for Preliminary Injunction to enjoin Rubin from taking any action to remove or disturb the sewer line and easement on her

property during the pendency of the action.

The amended complaint herein seeks a declaration of the parties' rights in the existing underground sewer line and easement. (R pp. 83-90). A declaration of such rights does not implicate the Judgment which merely dismissed as null and void the original condemnation (15-CVS-5836). The Town's rights in the underground sewer easement arise from its physical invasion and installation of the sewer line—an inverse condemnation and lawful exercise of its sovereign power of eminent domain. While the direct condemnation in 15-CVS-5836 was pending but prior to the entry of the Judgment, the Town on 27 July 2015 physically invaded Rubin's property and installed the underground sewer line beneath her driveway.

Rubin did not seek to enjoin the installation of the sewer line or assert a claim for inverse condemnation in the direct condemnation (15-CVS-5836).

Rubin has not filed an answer herein. She has alleged no claims nor sought any relief. So any assertion by her that there exists a risk of inconsistent rulings herein is mere speculation.

PROCEDURAL HISTORY

On 13 May 2019, the Town instituted this declaratory judgment action by the filing of a complaint against Rubin. (R pp. 3-15). The complaint alleges a declaratory judgment claim to declare the rights of the parties in the inversely condemned underground sewer easement, requests the court to enjoin Rubin from taking any action to remove or interfere with the sewer line, and demands a jury trial for Rubin's benefit on the issue of the amount of compensation for the inverse taking of Rubin's property. (R pp. 3-15). The Town also filed a motion for preliminary injunction on 13 May 2019. (R pp. 18-35). Rubin filed a motion to dismiss in lieu of answer based on Rule 12(b)(6) of the Rules of Civil Procedure on 16 May 2019. (R pp. 40-77). The Town filed an amended complaint on 30 August 2019 and Rubin filed a motion to dismiss amended complaint based on Rule 12(b)(6) of the Rules of Civil Procedure on 25 September 2019. (R pp. 83-90). A hearing was conducted on 23 May 2019 and continued on 9 January 2020 on Rubin's motion to dismiss and the Town's motion for preliminary injunction.[1] An order was

[1] The trial court conducted a hearing on the pending motions in 15 CVS 5836 during the same trial setting as this case on 9 January 2020, but concluded the hearing on the pending motions in 15-CVS-5836 before beginning the hearing on the motions in 19-CVS-6295.

entered denying the Rule 12(b)(6) motion to dismiss on 21 January 2020 and an order was entered granting the preliminary injunction on 21 January 2020. (R pp. 102-111).

Rubin filed a notice of appeal of the order denying the motion to dismiss and granting the preliminary injunction on 29 January 2020. (R pp. 112-115). The notice of appeal also lists and attempts to appeal the two orders entered on 21 January 2020 in the dismissed and null and void direct condemnation case (15-CVS-5836). (R pp. 112-115).

LAW AND ARGUMENT

I. SUMMARY OF ARGUMENT

Rubin has given notice of appeal of two interlocutory orders. One order denies Rubin's Rule 12(b)(6) motion to dismiss the Town's amended complaint. The other order grants a preliminary injunction to enjoin Rubin from interfering with an underground sewer line which lies 18 feet under a narrow portion of her property during the pendency of the action. The sole effect of the preliminary injunction is to maintain the *status quo*. (R pp. 104-111).

Neither of these interlocutory orders affects a substantial right and therefore are not immediately appealable. Orders such as these which

simply allow an action to proceed are usually not deemed to affect a substantial right. Under such rationale, the denial of a motion to dismiss for failure to state a claim is not appealable because it allows the action to proceed and does not generally impair any rights that cannot be corrected on appeal from the final judgment. Similarly, an order entering a preliminary injunction solely for the purpose of maintaining the *status quo* is not immediately appealable. Further, Rubin's ability to use the underground easement area on her property is not a right or interest that will be clearly lost or irreparably harmed if the preliminary injunction order is not reviewed before final judgment in this declaratory judgment/inverse condemnation action. *Miller v. Swann Plantation Development Co., Inc.*, 101 N.C. App. 394, 396, 399 S.E.2d 137, 139 (1991).

The amended complaint herein seeks a declaration of the parties rights in the existing underground sewer easement, and the remedy available to Rubin for the Town's inverse taking of the easement. The declaration of rights sought by the Town herein relates solely to the underground sewer easement inversely condemned by the Town. The requested declaration is separate and distinct from the direct

condemnation in 15-CVS-6295. Rubin is certainly able to address issues from the orders entered in the 2015 case through her separate pending appeal in that case (No. COA20-304).

II. ORDERS ARE INTERLOCUTORY

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E. 2d 377, 381 (1950). Applying this definition of an interlocutory order, Judge Collins' order denying Rubin's motion to dismiss pursuant to Rule 12(b)(6) is interlocutory. Judge Collins' order granting a preliminary injunction to preserve the *status quo* is likewise interlocutory.

III. SUBSTANTIAL RIGHT NOT AFFECTED

Rubin is unable to show that the denial of her Rule 12(b)(6) motion to dismiss or the granting of the Town's preliminary injunction affects a substantial right. This is so because the 21 January 2020 orders in no way prevent Rubin from effectively defending against the Town's claims. An interlocutory appeal of these orders is unnecessary to protect Rubin's

rights.

Rubin's attempted appeal of the denial of a Rule 12(b)(6) motion to dismiss a declaratory judgment complaint should be dismissed. *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974) ("No appeal lies from a refusal to dismiss an action", citing *Goldsboro v. Holmes*, 183 N.C. 203, 111 S.E. 1 (1922)).

Rubin's purported appeal of the grant of a preliminary injunction that preserves the *status quo* pending the outcome of the case is not appealable. *Onslow County v. Moore*, 129 N.C. App. 376, 387-388, 499 S.E.2d 780, 788 (1998). In addition, Rubin's ability to use the underground easement area on her property is not a right or interest that will be clearly lost or irreparably harmed if the preliminary injunction order is not reviewed before final judgment in this declaratory judgment/inverse condemnation action. *Miller v. Swann Plantation Development Co., Inc.*, 101 N.C. App. 394, 396, 399 S.E.2d 137, 139 (1991).

Neither of these interlocutory orders herein affect a substantial right. Rubin has tacitly so acknowledged this by failing in her motion to consolidate the records, briefs and oral arguments herein to even argue

that the two orders affect a substantial right or are immediately appealable. (See No. P20-98).

IV. ORDERS ARE NOT APPEALABLE

Neither order was certified for immediate appeal pursuant to Rule 54(b). N. C. Gen. Stat. § 1-277 and N. C. Gen. Stat. § 7A-27(d) afford an exception to Rule 54(b) for interlocutory orders that involve a substantial right that would be lost, prejudiced, or less than adequately protected if an immediate appeal is not permitted. See N. C. Gen. Stat. § 1-277(a); N. C. Gen. Stat. § 7A-27(d)(1); *J & B Slurry Seal Co. v. Mid-South Aviation*, 88 N.C.App. 1, 362 S.E.2d 812 (1987).

The appealability of interlocutory orders pursuant to the substantial right exception is determined by a two-step test. *Miller v. Swann Plantation Development Co., Inc.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 139 (1991), citing *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). "[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Id.* at 395, 399 S.E.2d at 139. Although our appellate courts have said that the substantial right test is "more easily stated than applied", the court's

established standards are not so difficult to apply in this case because no substantial right is implicated and Rubin has suffered no injury which must be corrected before final judgment.

The orders do not finally adjudicate any rights whatsoever but simply serve to continue the action. *Veazey v. City of Durham, supra.* The order denying the motion to dismiss requires Rubin to file answer. The preliminary injunction merely maintains the *status quo* until a final judgment is entered – which practically means that a publicly owned and maintained sewer line that has been 18 feet underneath a narrow portion of Rubin's property for 4 ¾ years cannot be interfered with. As such, neither affects a substantial right nor are they immediately appealable.

A. Order Denying Rule 12(b)(6) Motion To Dismiss

Rubin's motion to dismiss was made pursuant to Rule 12(b)(6). (R pp. 40-77). A denial of a motion to dismiss under Rule 12(b)(6) merely serves to continue the action then pending. *State v. Fayetteville St. Christian School*, 299 N.C. 351, 261 S.E.2d 908 (1980). No final judgment is involved, and the disappointed movant is not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits.

Id. Thus, an adverse ruling on a Rule 12(b)(6) motion is an interlocutory order from which no direct appeal may be taken. *Id*.; citing *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Godley Auction Co. v. Myers*, 40 N.C.App. 570, 253 S.E.2d 362 (1979).

Judge Collins did not finally determine any issue, or impair any right of Rubin in the inverse condemnation case. Trial avoidance is not a substantial right or a valid justification for a fragmented appeal. *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). Further, Rubin's listing of the final orders in the direct condemnation action (15-CVS-5836) in her notice of appeal in the 2019 case was improper and does not implicate a substantial right in the 2019 case. Rubin will have the opportunity to address the orders in the direct condemnation (15-CVS-5836) in her appeal filed therein.

Adequacy of a complaint in a declaratory judgment action is determined by plaintiff's entitlement to a declaration of rights. Even if the plaintiff is on the wrong side of the controversy, if she states the existence of a controversy, she states a claim for a declaratory judgment. *Walker v City of Charlotte*, 268 N.C. 345, 150 S.E.2d 493 (1966). By construction of the underground sewer line the Town physically invaded

Rubin's property and inversely condemned the underground sewer easement. Town contends that it thereby acquired the easement and has the right to continue the maintenance and use of the underground sewer line therein. Rubin asserts that that she is entitled to an order requiring the removal of the sewer line. Rubin formally sought such an order in the direct condemnation (15-CVS-5836). Consequently, a genuine controversy exists between the Town and Rubin as to their respective rights and duties in and to the easement. Motion to dismiss for failure to state a claim is not appropriate where complaint alleges a justiciable controversy. *Id.*

Nor does Rubin's argument herein that this declaratory judgment action is somehow barred by *res judicata* or the prior pending action doctrine enable this appeal. This declaratory judgment action does not involve the same facts as the direct condemnation (15-CVS-5836). The Town's rights in and to the underground sewer easement herein arise from a physical invasion and installation of an underground sewer line on 27 July 2015 – not the original condemnation complaint in 15 CVS 5836. The original condemnation action does not address the installed sewer line and easement – Rubin made no request to the trial court to

address the installed sewer line and easement and the trial court did not address the installed sewer line and easement. Consequently, *res judicata* does not apply. *Flynt v. Flynt,* 237 N.C. 754, 75 S.E.2d 901 (1953).

The direct condemnation in 15-CVS-5836 was an unsuccessful attempt by the Town to exercise its power of eminent domain to acquire a sewer easement for a public purpose. The direct condemnation was dismissed because the Court found that the paramount reason for the taking was for a private purpose and the public's interest was merely incidental. Public use or purpose is not an element of the inverse condemnation that occurred on 27 July 2015, and is the subject of this action. *Wilkie v. City of Boiling Spring Lakes,* 370 N.C. 540, 809 S.E.2d 853 (2018). As a result, the critical facts affording the basis for the dismissal of the direct condemnation in 15-CVS-5836 are not relevant or material to the physical invasion and installation of the underground sewer line that is the subject of this action. Public purpose is not a requirement for an inverse condemnation. *Id.* The principal case relied upon by Rubin in the trial court—*Williams v. Peabody,* 217 N.C. App. 1, 5, 719 S.E.2d 88 (2011)—is distinguishable in that the principal legal

question addressed therein by this Court was whether identical parties were present in both lawsuits. The dispute in *Williams* arose out of the same factual dispute as to conveyance of four parcels of real property. The direct condemnation in 15-CVS-5386 and the declaratory judgment action in 19-CVS-6295 arise out separate and distinct factual disputes. The controversy or dispute alleged in the declaratory judgment action in 19-CVS-6295 did not materialize until Rubin filed her motion to enforce judgment in the 15-CVS-5386, which occurred after the entry of the Judgment in 15-CVS-5386. As a result, *res judicata* does not bar this declaratory judgment action. *City of Charlotte v. Rousso*, 82 N.C. App. 588, 346 S.E.2d 693 (1986).

Rubin's argument that this declaratory judgment action is barred by the prior pending action doctrine does not enable this appeal. A final judgment was entered in the direct condemnation (15-CVS-5836) on 18 October 2016. Consequently, the direct condemnation in 15-CVS-5836 is not a prior pending action for the purpose of abating this declaratory judgment action. *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E.2d 860 (1952); *Clark v. Craven Regional Medical Authority,* 326 N.C. 15, 387 S.E.2d 168 (1990) (a prior action is pending until its

determination by final judgment). Rubin relied on *DOT v Stimpson*, 258 N.C. App. 382, 392, 813 S.E.2d 634, 640-41 (2018) in the trial court to support her assertion that the direct condemnation in 15-CVS-5836 is a prior pending action. In *Stimpson* there was no question as to the existence of a prior pending action in that no final judgment had been entered in the pending inverse condemnation. Moreover, the direct condemnation filed second by the Department of Transportation ("DOT") purported to take the same property as the inverse condemnation. The trial court in *Stimpson* permitted DOT to file its direct condemnation as a counterclaim in the pending inverse condemnation. The original condemnation action filed herein was a final judgment. Further, this declaratory judgment action is the only action that will allow Rubin to receive compensation for the 10 foot wide underground sewer easement inversely condemned by the Town and therefore is not duplicative of the direct condemnation in 15-CVS-5836.

The denial of the motion to dismiss for failure to state a claim is an interlocutory order not affecting a substantial right from which any purported appeal is premature. N. C. Gen. Stat. § 1-277; N. C. Gen. Stat. § 7A-27. No right will be lost if not appealed and determined after final

judgment.

B. Preliminary Injunction

The purpose of a preliminary injunction is to preserve the *status quo* pending trial on the merits. Issuance is discretionary with the hearing judge after a careful balancing of the equities. *State v. Fayetteville St. Christian School*, 299 N.C. 351, 261 S.E.2d 908 (1980). Application is temporary and lasts no longer than the pendency of the action. *Id*. Its decree affords no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order not receive appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. N. C. Gen. Stat. § 1-277; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975).

Rubin did not file a written response in the trial court to the motion for preliminary injunction, and did not offer any evidence or sworn testimony at the hearing in opposition to the motion for preliminary injunction. Significantly, other than just not wanting the sewer line

under her property, she did not raise any problems or issues with the underground sewer line during the 4 ¾ years that it has remained in place 18 feet under a narrow portion of her property.

Rubin's ability to use the underground easement area on her property is not a right or interest that will be clearly lost or irreparably harmed if the preliminary injunction order is not reviewed before final judgment in this declaratory judgment/inverse condemnation action. *Miller v. Swann Plantation Development Co., Inc.*, 101 N.C. App. 394, 396, 399 S.E.2d 137, 139 (1991).Moreover, Rubin failed to argue at the 9 January 2020 hearing that she had a substantial right that would be lost due to the granting of the preliminary injunction. (January 9, 2020 transcript, pp 121-125; Jan. 2020 T p 121-125; App. 1-6).

Rubin is not prevented from accessing her property. The Town did not acquire any rights to the surface of Rubin's property which could impair access.

The sewer line is public and owned by the Town. The preliminary injunction essentially requires Rubin to follow existing Town ordinances and applicable state laws that prohibit damage to or interference with public facilities. Town of Apex, North Carolina, Municipal Code § 14-20;

City of Fayetteville v. E & J Investment, Inc., 90 N.C. App. 268, 368 S.E.2d 20 (1988).

Therefore, the order granting a preliminary injunction is not immediately appealable.

CONCLUSION

Rubin attempts to appeal an order denying a Rule 12(b)(6) motion to dismiss and an order granting a preliminary injunction to preserve the *status quo*. The orders do not dispose of the entire controversy. The complaint alleges a genuine controversy and therefore states a claim. Both orders are interlocutory, do not affect a substantial right, and are not immediately appealable. For the reasons stated herein, Rubin's appeal should be dismissed.

Respectfully submitted, this the 19th day of May, 2020.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **PLAINTIFF-APPELLEE'S MOTION TO DISMISS** upon the parties, via U.S. Mail, postage prepaid to the following:

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This the 19th day of May, 2020.

/s David P. Ferrell
David P. Ferrell

CONTENTS OF APPENDIX

WAKE COUNTY

FILE NO. 15 CVS 5836

&

FILE NO. 19 CVS 6295

BEFORE THE HONORABLE

G. BRIAN COLLINS

TRANSCRIPT OF HEARING

TOWN OF APEX v. BEVERLY RUBIN

At Wake, North Carolina
January 9, 2020
Transcribed by: Kim Padgett
Date Transcribed: January 30, 2020

can do or not do at that point.

THE COURT: All right. You can stop. The Motion to Dismiss the action in 19 CVS 6295 is denied. All right.

MR. FERRELL: The -- the other Motion that we have, judge, is the Motion for Preliminary Injunction in this new action and it's, essentially, for the Court to enjoin any interference or damage or removal of the pipe during the pendency of the declaratory judgment action.

We have cited, Your Honor, to the case of *AEP Industries v. McClure* that, essentially, stands for the proposition that when a party is seeking permanent injunctive relief, that preliminary injunction shall be issued to prevent --

THE COURT: I'm inclined to do that and it seems -- I mean, do you object to that? Seems like that --

MR. HAYWOOD: Yes, Your Honor. I mean --

THE COURT: -- you're facing -- you're --

MR. HAYWOOD: This has got to come to a conclusion.

THE COURT: Yeah. But if -- if you tear up that pipe and it turns out that you're wrong, that's going

to be a lot of money for no reason.

MR. HAYWOOD: How can it be wrong when Judge O'Neal said they have no right to an easement? Can I come on your property and build --

THE COURT: No, no, no. You don't need to get that way with me. I'm trying to cut to the chase here.

MR. HAYWOOD: Right. And I'm trying to say that you either have the right to be on somebody's property or you don't. And it's already been established there is no right to be on her property. We can't go back and change that. And there's no way in this particular proceeding today that we can --

THE COURT: I'm not sure, Mr. Haywood, that you're right that it's been established that there's no right to be on her property. What's been established is that the eminent domain action is dismissed.

MR. HAYWOOD: Correct.

THE COURT: And I'm not sure those things are the same.

MR. HAYWOOD: So how can a town or a state be on somebody's property having it been determined by a court that there is not eminent domain right to a public use?

THE COURT: Inverse condemnation.

MR. HAYWOOD: And you cannot have an inverse condemnation if you filed an eminent domain action. You cannot have both. That's what the statute says, that in the event that the condemnor does not file an eminent domain action, then the property owner can, by way of relief, bring as their claim an inverse condemnation only for compensation. She doesn't want any money. She wants her property back without anybody being able to use it.

There is no law in North Carolina or any other jurisdiction I'm aware of where you could have a parallel eminent domain action and an inverse action going at the same time. You can't do it.

THE COURT: Well, the Motion to Dismiss was denied. The Motion for a Preliminary Injunction is allowed. I'm going to take the Motions in the 2015 case under advisement, but for right now we're going to leave everything just like it is. Leave the pipe alone and I'll decide what I'm going to do about the 2015 action as soon as I possibly can.

MR. FERRELL: Your Honor, I'll prepare proposed orders and circulate them --

THE COURT: All right.

MR. FERRELL: -- to opposing counsel.

THE COURT: And I -- it would be helpful to me if each of you would prepare proposed orders on your respective motions to enforce the 2015 judgment. That would help me figure out how to do that.

MR. FERRELL: Yes, Your Honor.

THE COURT: All right.

MR. FERRELL: Thank you.

MR. HAYWOOD: And a matter of procedure, since Your Honor is leaving, I understand, going to another county --

THE COURT: Yeah. I'll be back from time to time, but I can -- does anybody object to me signing it out of county out of term?

MR. FERRELL: I would agree to that, Your Honor.

THE COURT: All right.

MR. HAYWOOD: Of course.

THE COURT: Just get it to me as soon as you can.

MR. FERRELL: Thank you, Your Honor.

THE COURT: I'll be in and out. I'll be here on most Fridays.

MR. FERRELL: Okay. Thank you.

THE COURT: All right. Thank you. We're in recess until 9:30.

(THEREUPON, THE HEARING WAS CONCLUDED.)