

NOS. COA 20-304
COA 20-305

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

MOTION FOR LEAVE TO FILE
AN *AMICUS CURIAE* BRIEF BY
NORTH CAROLINA ADVOCATES FOR JUSTICE
AND JOHN LOCKE FOUNDATION

TO: THE HONORABLE COURT OF APPEALS OF NORTH
CAROLINA

The North Carolina Advocates for Justice (“NCAJ”) and John Locke Foundation (“JLF”), pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, hereby move this Court for leave to file an *amicus curiae* brief.

In accordance with Rule 28(i), NCAJ and JLF are conditionally filing their *amicus curiae* brief along with this Motion, within the time allowed for filing of the Defendant-Appellant’s brief by 30 June 2020.

NATURE OF APPLICANTS’ INTERESTS

NCAJ is a professional association of approximately 2,500 North Carolina attorneys. A primary purpose of NCAJ is the advancement and protection of the rights of those injured or damaged by the wrongful acts of others. In furtherance of its mission, NCAJ regularly participates in the legislative process, prepares resource materials, conducts continuing legal education seminars, and appears as *amicus curiae* before state and federal courts.

JLF was founded in 1990 as an independent, nonprofit think tank. JLF employs research, journalism, and outreach to promote its vision for

North Carolina—of responsible citizens, strong families, and successful communities. It is committed to individual liberty and limited, constitutional government. For many years it has advocated legislative measures designed to prevent eminent domain abuse by strengthening the public use requirement. Unfortunately, the North Carolina General Assembly as yet to enact such measures. Until it does, North Carolinians must rely on the state courts to protect their property rights by zealously enforcing the public use requirement.

REASONS WHY AN *AMICUS CURIAE* BRIEF IS DESIRABLE

This case concerns a fundamental right of landowners in North Carolina to be protected against the unconstitutional taking of their property by the government when said taking is not for a public use or benefit.

In this case, a private developer sought to acquire a sanitary sewer easement across Ms. Rubin's homestead in order to provide sewer service to his land and thereby enhance its value. When Ms. Rubin refused, the Town of Apex ("Apex") and the private developer entered into an agreement whereby Apex agreed to exercise its condemnation authority to acquire the requested easement in exchange for the developer agreeing

to pay all costs incurred by Apex in connection with the condemnation of a portion of Ms. Rubin's land.

Apex filed a direct condemnation action on 30 April 2015, to take an easement across Ms. Rubin property (the "2015 case"). On 8 July 2015 Ms. Rubin filed an Answer challenging Apex's authority to acquire the easement by alleging that the taking was not for a public use. Approximately two weeks later, on 25 July 2015, Apex installed a sanitary sewer line within the easement area condemned from Ms. Rubin. The trial court in the 2015 case (the "2015 trial court") subsequently entered a judgment dismissing Apex's condemnation action as unconstitutional because the taking was not for a public use. Apex asked the 2015 trial court to reconsider its ruling but was again denied. Apex appealed.

While on appeal, Apex continued to occupy the Rubin property. Post-appeal, Ms. Rubin sought to enforce the judgment. In response, Apex brought a second suit (the "2019 case") based on the same facts and circumstances as those decided in the 2015 case, but in which Apex advances a legal theory that it acquired an easement across Ms. Rubin's

land by inverse condemnation. Apex further claims that the only remedy available to Ms. Rubin is to accept compensation for the easement taken.

Apex takes the position that despite its lack of authority to take the easement via direct condemnation, it has authority to acquire an easement via inverse condemnation. Inverse condemnation, so Apex's theory goes, does not require a public use.

By continuing to claim ownership of easement rights across Ms. Rubin's property, Apex seeks to subvert the legal authority of the 2015 trial court as well as this Court's adjudication of its prior appeal. Apex advances a position that, if accepted, negates the prerequisite that private property may only be taken for public use, leaving property owners without core constitutional protections.

Apex has ignored the 2015 trial court's Judgment and this Court's affirmation of that Judgment.

The rulings in the 2019 case should be REVERSED and the original Judgment in the 2015 case should be AFFIRMED.

QUESTION OF LAW TO BE ADDRESSED

NCAJ and JLF's *amicus curiae* brief will address the following questions:

- I. Can condemnors acquire property by inverse condemnation or declaratory action that they lack authority to acquire via a direct condemnation action?

NCAJ AND JLF POSITION ON THIS QUESTION OF LAW

- I. Condemnors cannot circumvent the constitutional protections afforded property owners, including the guarantee that private property shall only be taken for a public use and upon payment of compensation by claiming ownership of property rights via inverse condemnation that it lacked the authority to acquire via direct condemnation because the taking was not for a public use. 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. It is not a process whereby condemnors can acquire private property without the requisite showing of public use.

Wherefore, NCAJ and JLF respectfully request that this Court grant them leave to file an *amicus curiae* brief.

Respectfully submitted, this the 30th day of June, 2020.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2020, I electronically filed the foregoing **MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE and JOHN LOCKE FOUNDATION** with the Clerk of Court in Case Nos. 20COA-304 and 20COA-305.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing
**MOTION FOR LEAVE TO FILE 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
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