NO. COA 20-304 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

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PLAINTIFF-APPELLEE TOWN OF APEX'S BRIEF

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Plaintiff-Appellee the Town of Apex ("Town"), pursuant to N. C. R. App. P. 28(c), respectfully submits this Appellee Brief in response to the Defendant-Appellant's Brief filed herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

The key question herein is Rubin's claimed entitlement in 2020 to a mandatory injunction requiring the Town to remove an underground public sewer line serving 50 families - relief that she never requested

prior to the Town's filing of its complaint herein in early 2015, relief she failed to plead herein, relief she never asked the presiding judge, Judge O'Neal, to order at the 2016 all other issues hearing, and relief she failed to request as Judge O'Neal continued to preside over the case into 2017. Instead, Rubin now appeals Judge Collins' 2020 refusal to exercise his discretion and order the public sewer line removed - when Judge O'Neal did not order removal. (R pp 169-172). Rubin would have this Court turn pleading requirements well settled in case law and Rules of Civil Procedure on their heads.

Rubin's misstatements of law in her issues presented and attempts to misdirect the Court's review of the matter by referencing constitutional issues should be rejected. Even these recently raised arguments do not change the fact that Rubin did not request injunctive relief in Judge O'Neal's Judgment – and the Judgment did not so order. (R pp 33-39; App. 8-14). The Judgment does not state that the property is revested to Rubin. This settled fact and lack of injunctive relief in Judge O'Neal's 2016 Judgment looms large on Judge Collins' consideration of Rubin's mandatory injunction request in 2020. (R pp R

pp 33-39; App. 8-14; 155-161). Further, Rubin is not entitled to mandatory injunctive relief under settled North Carolina Supreme Court law. In addition, Defendant's purported constitutional claims also fail because the Town deposited and thereby paid compensation prior to the 27 July 2015 inverse taking. (R pp 12-14).

Judge Collins properly analyzed the legal and factual issues in denying Rubin's motion to enforce judgment – a request for a mandatory injunction, as well as granting the Town's motion for relief from judgment, to prevent the Judgment from being used prospectively as a basis for Rubin's attempts to have the sewer line removed. (R pp 155-168). Judge Collins' rulings rest on settled North Carolina law. No North Carolina statute or case supports Rubin's position. As is clear from the motion and briefs of Rubin's amicus parties, Rubin's case has been co-opted by special interest groups looking for legislative changes to North Carolina's condemnation statutes – and they are hoping this court will step in and change the law for them since their efforts on Jones Street have been unsuccessful.

The application of Judge O'Neal's Judgment is limited to the original condemnation complaint in 15 CVS 5836, not the sewer line located under Rubin's property. (R pp 33-39; App. 8-14). The Judgment found the original condemnation complaint null and void and dismissed it; the effect of which is that it is as if it had never been filed. (R pp 33-39; App. 8-14). The effect of Judge O'Neal's Judgment coupled with the installation of the modified underground sewer easement is that the Town's physical invasion of Rubin's property was a separate exercise of the Town's power of eminent domain from the filing of the original condemnation action. A physical invasion by a condemnor is always a taking. Dismissal of this condemnation action had no effect on the installation of the sewer line or the rights inversely taken by the Town. (R pp 33-39; App. 8-14). The Judgment does not prevent the Town's exercise of eminent domain power to inversely condemn an easement. (R pp 33-39; App. 8-14). Judge O'Neal's Judgment is fatal to Rubin's current attempts to receive a permanent injunction. The Judgment does not afford Rubin any of the relief she now seeks in her Motion. (R pp 33-39; App. 8-14).

STATEMENT OF FACTS

The Town is a municipal corporation organized and existing under the laws of the State of North Carolina and possesses the powers, duties and authority, including the power of eminent domain, delegated to it by the General Assembly of North Carolina. (R p 3, ¶ 1).

I. Original Condemnation Action.

Prior to the Town Council's adoption of a resolution to file the Original Condemnation Action and prior to the filing of the Original Condemnation Action, the Riley's Pond subdivision property was properly, voluntarily annexed, rezoned, the subdivision plat was approved by the Town. (R p 42, ¶ 6-7, 9-10). With voluntary annexation, the Town had the right to serve the Riley's Pond property with Town utilities including sewer service. N.C. Gen. Stat. § 160A-31(e). (R pp 43-44, ¶ 11).

The Town determined that gravity sewer service ran to a point just on the other side of the narrow portion of Rubin's property from the Riley's Pond subdivision, in the Arcadia West residential subdivision, at a point approximately 151 feet from the Riley's Pond tract. (R p 60) (App.

1). The location was driven in large part by the topography of the property. (R p 31). To extend sewer from this gravity sewer tap point, the Town would have to cross this narrow-width portion of Rubin's property (R S (I) p 317) – the same narrow portion of Rubin's property that the Town previously crossed with a water line easement in 2012 (R p 49). The water line easement crossing occurred in a location on this narrow strip of Rubin's property closer to Olive Chapel Road – essentially parallel to the location of the sewer line at issue in this case.[1] (R p 87). In this 2012 water easement condemnation case, Case No. 12 CVS 5333, Rubin did not contest the Town's right to condemn for the easement, and Rubin signed a consent judgment agreeing that the Town had the right to condemn Rubin's property for the water line easement and accepted the Town's estimation of just compensation (R p 96-98).

On 3 March 2015, after the Town Attorney's attempt to purchase an easement from Rubin was unsuccessful, the Town Council adopted a resolution authorizing the condemnation of the 40-foot wide sewer

[1] Topography was not a concern in the location of the water line across Rubin's property.

easement across Rubin's property. (RS (I) pp 232-235). Ms. Rubin was notified of the Town's decision on 5 March 2015. (R pp 63-64; 68). Rubin did not seek injunctive or other relief in the trial court prior to the Town's filing of its condemnation complaint approximately two (2) months after the resolution was adopted.

On 30 April 2015, the Town filed the Original Condemnation Action herein (R. pp 3-9), and deposited their $10,771 compensation estimate for the taking of a 40-foot wide, 151 feet long sewer easement – which amount is still held by the Clerk for Rubin. (R pp 12-13).

Several weeks after filing, Rubin's attorney sent the Town a letter stating Rubin intended to contest the right to take and "will be filing a motion to be heard by the Court on an expedited basis" and that "if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim ***for damages***." [emphasis supplied]. (R p 72). Rubin did not state that she requested or expected the sewer line to be removed, or that she would seek injunctive relief. (R p 72).

The Town responded through counsel, requesting that if Rubin intended to bring a motion, to do so soon. (R pp 69-71). Counsel for the Town and Rubin exchanged correspondence, and ultimately counsel for the Town re-stated the request for Rubin to bring the motion soon. (R pp 69-71). At no point did counsel for Rubin state that they intended to bring a claim for injunctive relief, either preliminary or permanent, to prevent the sewer line from being constructed. (R pp 69-71)

Rubin subsequently filed an Answer to the Complaint on 8 July 2015, requesting dismissal of the Condemnation Complaint, but did not request any injunctive relief. (R pp 20-24). Also, at no point did Rubin file "a motion to be heard…on an expedited basis." On 8 April 2016, almost a year after the Original Condemnation Complaint was filed, Rubin filed a motion for an "all other issues" hearing, and the only issue raised was the Town's right to take Rubin's property for the sewer easement plead in the Original Condemnation Complaint. (R pp 25-26). Again, Rubin did not plead or request permanent injunctive relief.

II. Judgment in Original Condemnation Action.

An "all other issues" evidentiary hearing was conducted by the Honorable Elaine M. O'Neal on 1 August 2016. (Aug. 2016 T). A final judgment was entered in on 18 October 2016 ("Judgment"). (R pp 33-39; App. 8-14). The Court found that the paramount reason for the taking of the sewer easement described in the Original Condemnation Complaint was for a private purpose and the public's interest was merely incidental. (R pp 33-39; App. 8-14).

The Judgment dismissed the Town's claim for an acquisition of a forty (40) foot wide sewer easement across Rubin's property as "null and void." (R pp 33-39; App. 8-14). The Judgment rendered the Complaint and Declaration of Taking a nullity. (R pp 33-39; App. 8-14), with the effect of which is as if it had not been filed. Although the Court heard evidence that the sewer line had been installed across Rubin's property approximately a year before the all other issues hearing was held, including evidence from Rubin, Rubin did not request the sewer line be removed and the Judgment did not require removal of the sewer line. (R pp 33-39; App. 8-14). The Judgment did not find that sewer line was installed pursuant to "quick take." The Judgment did not hold that title

is reverted back to Rubin. In fact, the Judgment simply states that the "[Town's] claim [in its Original Condemnation Complaint] to [Rubin's] property by Eminent Domain is null and void." (R pp 33-39; App. 8-14).

The Town filed a post-judgment Rule 59 and 60 motion, which was denied by Judge O'Neal after an in-person hearing.[2] (R pp 40-100; 101-102; Jan. 2017 T). Importantly, in the over 3 months from the entry of the Judgment to the denial of the Town's Rule 59 and 60 motion, Rubin did not ask Judge O'Neal to address the sewer line remaining on her property, did not ask Judge O'Neal to clarify her Judgment, and otherwise did nothing to advance the arguments in Court she now, several years later, makes, that the Judgment required removal and it would be unconstitutional for the sewer line to remain. (Jan. 2017 T).

The Town appealed Judge O'Neal's Judgment and Order denying the Town's post-judgment motions to this Court. (R pp 103-106). The Town did not seek a stay of the Judgment in the trial court or Court of Appeals. The Town's prior appeal was resolved on procedural grounds

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[2] Rubin misstates Judge O'Neal's ruling – Judge O'Neal denied the motion but did not find it "improper" or "meritless."

(holding the Town's post-judgment Rule 59 motion did not toll the time to appeal). *Town of Apex v. Rubin*, 262 N.C. App. 148, 821 S.E.2d 613 (2018). The Court's inclusion of a footnote classified as "dicta" related solely to the original condemnation complaint, not the existence of the sewer easement acquired by inverse condemnation on 27 July 2015. The Town filed a Petition for Discretionary Review and asked the Supreme Court. In doing so, the Town noted that failing to review the decision would be detrimental to the Town's acquisition and providing sewer service to its residents. The Town was not speaking in terms of removal of the sewer line on Rubin's property (as it was not the subject of the appeal), but was raising the concern that if the Town cannot extend sewer service to properly annexed, rezoned and approved subdivisions within the Town limits, the Town and their residents would be prejudiced.

III. Inverse Taking of Modified Sewer Easement.

In July 2015, after Rubin filed her answer and did not plead or request injunctive relief, and prior to the entry of the Judgment in the Original Condemnation Action, the Town modified the sewer easement necessary to serve the Riley's Pond subdivision. The Town decided, in

part as a courtesy to Rubin, to use the "bore method" to construct and install a sewer line under the narrow portion of Rubin's property, so as not to disturb the surface of her property. (R pp 29-32).

Different in easement size and scope, 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. (R pp 145-149; Doc. Ex. 16) No manholes were dug or are currently on Rubin's property. (R p 157, ¶ 11). The physical invasion and taking occurred on or about 27 July 2015. (R p 146, ¶3). A 10-foot wide Town underground sanitary sewer easement ultimately was a sufficient easement given the change in the way the Town chose to install the sewer line (bore method). (R p 157, ¶ 11). Further, 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, and the Town will not to have to access the surface of her property in the future to maintain or service the sewer line.

Given the language and effect of the Judgment, the construction of the 18-feet deep sewer line constituted a physical invasion and inverse condemnation of a sewer line easement on Rubin's property. (R p 157, ¶ 12). The dismissal of the Original Condemnation Action had no effect on the rights inversely taken. (R p 159-160, ¶ 11). The result is the Town acquired ownership of the sewer line easement on 27 July 2015. On 22 February 2016, the Town accepted as complete the sewer line, and it became a part of the Town's public sanitary sewer system. (R pp 145-149; Doc. Ex. 16). The sewer line remains in place, is in use, and serves approximately 50 residential homes and/or lots located in a properly annexed, rezoned and approved subdivision in the Town. (R pp 157-158, ¶14; 164, ¶7; Doc. Ex. 17). Further, the Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision. (R pp 29-32; 145-149).

The Town's sewer easement serves an entire subdivision within the Town. Removal of the sewer line and the corresponding interruption in public sewer service to residents of the Town would cause significant, immediate and irreparable harm. (R S (II) 477, ¶ 25). If the sewer line is

disabled or removed, the approximately 50 residential homes and/or lots would lose their connection to the Town's public sanitary sewer system. (R S (II) 477, ¶¶ 25-26). The existing sewer line is the only sewer line or facility touching or connecting the subdivision to Town sewer service. (R S (II) 477, ¶ 27). There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots. (R S (II) 477, ¶ 28).

IV. Rubin's Tardy Post-Installation Attempts to Have the Sewer Line Removed.

Approximately 3 ¾ years after the installation of the sewer line, Rubin filed a motion on 10 April 2019, seeking a permanent injunction to remove the sewer line. (R. p 122-139). Rubin's motion, entitled Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus, was filed herein (R. p 122-139). This was Rubin's first request for injunctive relief to the trial court. (R p 163, ¶4). Rubin does not cite the U.S. or N.C. constitutions or constitutional rights as her basis for the motion or basis for seeking removal of the sewer line. (R. p 122-139). (App. 2-7).

On 30 August 2019, the Town filed a Motion for Relief from Judgment asking the Court to hold that the 18 October 2016 Judgment

that Rubin has used to support all her claims herein shall not be used prospectively to challenge the construction, maintenance and operation of the sewer line and easement under her property. (R p 145-149).

V. Judge Collins' Orders & Rubin's Failed Forum Shopping Attempt

The pending motions were heard by the Honorable G. Bryan Collins on 23 May 2019. (May 2019 T.) At the hearing, Judge Collins announced that he was considering taking the matters in both the 2015 case and the 2019 case under advisement and would like to order the parties to mediation. The Town stated that they would be glad to mediate (May 2019 T. p. 69:8-9); Rubin said she would only agree to mediate if the Town brings "a satchel [of money] with them when they come…" to the mediation (May 2019 T. p 78:11-15). Ultimately, Judge Collins took the matters under advisement, and ordered the parties to mediation. (R pp 143-144). After two separate days of mediation which resulted in an impasse, Judge Collins scheduled a subsequent hearing on pending motions which occurred on 9 January 2020. (Jan. 2020 T.).

Prior to the 9 January 2020 hearing, and while the parties' motions were under advisement with Judge Collins, Rubin forum shopped by

filing a lawsuit in federal court, Eastern District of North Carolina, on 1 October 2019, against the Town and other parties, essentially requesting the same relief that she requests from the state court – a mandatory injunction to remove the sewer line. *Rubin v. Town of Apex, et. al.*, EDNC, file no. 5:19-cv-449-BO. Rubin filed the federal court lawsuit only after the state court mediation on 7 August 2019 resulted in an impasse and did not settle on terms acceptable to Rubin. The Town filed a motion to dismiss Rubin's forum shopping complaint which was granted by the Honorable Terrence W. Boyle on 27 March 2020. *Id.,* at Doc. 47.

With the 23 May 2019 and 9 January 2020 hearings, Judge Collins conducted in-court hearings totaling approximately 4 ½ hours on the parties' motions. (May 2019 T.; Jan. 2020 T.). At the conclusion of the 9 January 2020 hearings, Judge Collins took the motions in the 2015 case under advisement. (Jan. 2020 T. 123:17-23). After deliberating on the motions for over a week, Judge Collins denied Rubin's motion to enforce judgment and granted the Town's motion for relief from judgment. Judge Collins' orders were entered on 21 January 2020 (R pp 155-167).

Judge Collins orders in the 2015 original condemnation case found that Rubin was not entitled to mandatory injunctive relief to have the sewer line removed, concluding that she failed to plead or request said injunctive relief from the trial court (Judge O'Neal) and Judge O'Neal's Judgment did not order any injunctive relief. (R pp 155-161; Concl. of Law ¶ 9; R pp 162-168; Concl. of Law ¶ 4, 17). Judge Collins held that the effect of the Judgment is that the Town's underground sewer line and easement was a proper exercise of their sovereign power of inverse condemnation and Rubin's only remedy is at law – and is the recovery of just compensation for the value of the property rights taken by inverse condemnation. (R p 162-168). Judge Collins held that the 18 October 2016 Judgment that Rubin has used to support all her claims herein shall not be used prospectively to challenge the construction, maintenance and operation of the sewer line and easement under her property. (R p 162-168). Judge Collins' did not vacate the Judgment, did not alter its impact in dismissing the original condemnation complaint, and did not alter Rubin's ability to seek attorney's fees and costs for obtaining a dismissal of the original condemnation complaint.

Rubin filed notices of appeal for all four orders on 29 January 2020. (R pp 169-172).

ARGUMENT

I. STANDARD OF REVIEW

Rubin's motion to enforce judgment is a request for a permanent injunction to require removal of the public sewer line from beneath her property. The standard of review is the abuse of discretion standard. *Federal Point Yacht Club Ass'n, Inc. v. Moore*, 233 N.C. App. 298, 312, 758 S.E.2d 1, 9-10 (2014); *Buie v. High Point Assocs. Ltd. P'ship*, 119 N.C. App. 155, 161, 458 S.E.2d 212, 216 (1995); *Ashton v. City of Concord*, 160 N.C. App. 250, 584 S.E.2d 108 (2003) (quoting *Couch v. Private Diagnostic Clinic,* 146 N.C. App. 658, 663, 554 S.E. 2d 356 (2001)).

Rubin's argument that a *de novo* standard of review applies is misplaced. The *Piedmont Triad* case cited by Rubin is not a permanent injunction case; but only applies to a specific review under N. C. Gen. Stat. § 40A-7 of a condemnor's decision to condemn more property than the project calls for.

The standard of review for Judge Collins granting of the Town's Rule 60(b) motion for relief from judgment is manifest abuse of discretion. *Harris v. Harris,* 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983) (citing *Sink v. Easter,* 288 N.C. 183, 217 S.E.2d 532 (1975)).

II. JUDGE COLLINS PROPERLY DENIED RUBIN'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS

The arguments Rubin makes on appeal are arguments she should have made to Judge O'Neal or the court in 2015, 2016 and 2017 – instead of asking Judge Collins in 2020 for a "do over." The landowners in the North Carolina condemnation cases Rubin cites all requested injunctive relief in their answers or filed separate actions requesting permanent injunctive relief. Rubin failed to do so. So Rubin now asks this Court to ignore her pleadings and Judge O'Neal's Judgment, and create a remedy for her out of whole cloth, one that has not been endorsed by any North Carolina appellate court.

What remains after Judge O'Neal's Judgment is a physical invasion which is not accompanied by a condemnation complaint. Under settled North Carolina law, if a municipality physically invades a landowner's

property, an inverse condemnation has occurred and the landowner's sole remedy is compensation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *Beroth Oil Co. v. N.C. Dept. of Transp.*, 757 S.E. 2d 466, 473 (NC 2014)("In its simplest form, a taking always has been found in cases involving 'a permanent physical occupation.'"); *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). The recent North Carolina Supreme Court case of *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018) confirms that the inverse condemnation remedy is available to Rubin. Judge Collins merely applied existing North Carolina law to the facts as they exist in this case, and that resulted from Judge O'Neal's Judgment. Judge Collins was not willing to turn existing North Carolina condemnation law on its head to give Rubin a permanent injunction in 2020 under the facts and circumstances of this case.

A. Judge Collins Findings of Fact and Conclusions of Law Are Binding on Appeal

"Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof,* 192 N.C.App. 696, 700, 666 S.E.2d 497, 500 (2008) (citations omitted). Any findings of fact that are

challenged on appeal are binding if supported by competent evidence. *Id.* at 477, 751 S.E.2d at 226. The judgment and conclusions of law should be affirmed if they are supported by those findings. *Id.*

Rubin does not challenge findings of fact 1 – 12 in Judge Collins' Order denying Rubin's motion to enforce judgment. These findings are therefore binding on appeal. *Id.* Rubin does not challenge findings of fact 1-12 in Judge Collins' Order granting the Town's motion for relief from judgment. These findings are therefore binding on appeal. *Id.* Rubin makes a blanket statement in a footnote that the findings of fact should be afforded no deference, but this statement is an incorrect statement law, Rubin does not challenge the evidentiary support for these findings, and thus Rubin fails to properly challenge the findings of fact from Judge Collins' orders.

B. Judge O'Neal's Judgment did not require removal of the underground sewer line and did not grant Rubin injunctive relief

Rubin ignores the fact that she did not plead or request injunctive relief and the fact that the Judgment does not order permanent injunctive relief. Rubin glosses over this important omission – but the

Town trusts that the Court will not. Rubin's failure to plead injunctive relief and the Judgment's failure to order permanent injunctive relief is fatal to Rubin's claims herein.

As Rubin did not contest Findings of Fact 3, this finding is binding on this Court. *In re Schiphof, supra.* As such, Judge O'Neal's Judgment does not order the Town to perform any specific act, including but not limited to removal of the underground sewer line. Further, Rubin does not contest Conclusion of Law 9.

Even if Rubin's failure to contest Finding of Fact 3 is not issue determinative, there is no evidence in the Record that supports a finding that the O'Neal Judgment granted Rubin injunctive relief. At no point did Rubin request injunctive relief, either preliminary or permanent, from the Court to prevent or halt the sewer line's construction or to remove the sewer line nor did Rubin ask Judge O'Neal at the all other issues hearing to address the issue. Judge O'Neal did not order injunctive relief or revesting in her Judgement. Rubin then had the opportunity to have Judge O'Neal clarify her Judgment or otherwise ask Judge O'Neal to address the sewer line beneath her property, yet she refused to do so.

Therefore, there is no evidence in the Record to support a finding that the O'Neal Judgment granted injunctive relief or required the Town to remove the sewer line.

Further, Judge O'Neal's Judgment does not grant injunctive relief as a matter of law. First, N. C. R. Civ. P. 7(b)(1) requires an application to the court for an order to be by motion which… shall be made in writing, shall state with particularity the grounds therefor, ***and shall set forth the relief or order sought.*** [emphasis supplied]. In *In re McKinney,* 158 N.C. App. 441, 581 S.E.2d 793 (2003), this Court stated: "To be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter.:

> An application to the court for an order shall be by motion which… shall be made in writing, shall state with particularity the grounds therefor, *and shall set forth the relief or order sought.* The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N. C. R. Civ. P. 7(b)(1) (2001) (emphasis added in original). *See Farm Lines, Inc. v. McBrayer,* 35 N.C.App. 34, 40, 241 S.E.2d 74, 78 (1978) (trial court erred by granting relief not sought in motion, because motion failed to comply with requirement of Rule 7(b)(1) that it "set forth the relief or

order sought"). Rubin failed to set forth any injunctive relief in her pleading or any motion before Judge O'Neal, and therefore Rubin was not entitled to any injunctive relief in the Judgment.

Second, Judge O'Neal's Judgment cannot be viewed as *implying, self-executing,* or *automatically issuing* permanent injunctive relief, as Rubin contends. N. C. R. Civ. P. 65(d) provides that:

> (d) Form and scope of injunction or restraining order. - Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; ***shall be specific in terms; shall describe in reasonable detail,*** and not by reference to the complaint or other document, ***the act or acts enjoined or restrained;*** … [emphasis supplied]

This Court has held that these requirements are explicit and unambiguous, and an injunction cannot be issued in a cursory manner. *Wilner v. Cedars of Chapel Hill, LLC, 241 N.C. App. 389,* 773 S.E.2d 333 (2015). The purpose of Rule 65(d), taken from its federal counterpart, is to make certain that the restrained party is fully aware of what conduct is prohibited and to prevent undue restraint upon that conduct. *Woodlief, Shuford NC Civil Practice and Procedure* § 65:7 (2017); *Robinson v. Coopwood,* 292 F. Supp. 926 (N.D. Miss. 1968), judgment aff'd, 415 F.2d 1377 (5th Cir. 1969); *Schmidt v. Lessard,* 414 U.S. 473, 94 S. Ct. 713, 38

L. Ed. 2d 661, 18 Fed. R. Serv. 2d 13 (1974). No injunction should be so general as to leave the restrained party open to the hazard of conducting his business in the mistaken belief that his activity is not prohibited by the order. *Shuford* § 65:7 (2017); *Williams v. U.S.,* 402 F.2d 47 (10th Cir. 1967). The prohibited act or acts must be described in reasonable detail in the order itself and cannot be described by reference to acts set forth in the complaint or other document. *Shuford* § 65:7 (2017). As such, Judge O'Neal's Judgment cannot be read under the Rules of Civil Procedure and case law as granting a permanent injunction to Rubin; such relief cannot be *implied, self -executing* or *automatic* – and still be "specific in terms" and "describe in reasonable detail the act or acts enjoined or restrained."

This result is not surprising. Certainly if the issue of a permanent injunction to remove the sewer line was presented to Judge O'Neal, the Town would have requested to be heard on the injunction/removal issue, and the Judgment would have contained the specific terms of removal. Further, the Town would have moved to stay the Judgment pending the appeal in 2016. Also, the trial court would not likely have ordered the

disruption and removal of public sewer serve to the third party lot owners in the Riley's Pond Subdivision without giving these parties with an interest in the public sewer line and service a right to be heard. None of this occurred – because the Judgment did not put the Town on notice of or grant any injunctive relief.

It is also important to note that in the North Carolina cases Rubin cites in support of her position that the trial court should have granted permanent injunctive relief in 2020 – the landowners either plead injunctive relief at the time they challenged the taking, or filed separate lawsuits seeking mandatory injunctive relief. (Rubin's Appellant Brief, p 14 – *Nelson, Batts, Cozad, Fisher, Town of Midland, City of Statesville, Greensboro-High Point* cases). And in *Town of Midland v. Morris*, the landowners filed motions for preliminary injunction and had them heard before the construction of the pipeline occurred. 209 N.C.App. 208, 213, 704 S.E.2d 329, 334 (2011). It was only after the injunction motions were denied that the Town of Midland constructed the pipeline. And the context of the Court's comments about the landowners' remedies was in their discussion of whether the construction on the pipeline mooted the

appeal (the Court held it did not). *Id.* at 213-214, 704 S.E. 2d at 334-335. That is far different situation than we have in the case at bar. Also, Judge Collins' mootness finding is in the context of one of the alternative grounds for granting the Town's motion for relief from judgment, not his consideration of the motion to enforce judgment. (R pp 155-161).

Separately and distinctly, it is settled law that in a condemnation case pursuant to Chapter 136, if the landowner does not seek injunctive relief, the project is installed, and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law – which here is an inverse condemnation claim – but not a claim for mandatory injunction. *State Highway Commission v. Thornton,* 271 N.C. 227, 240-241, 156 S.E.2d 248, 258-259 (1967).

A party asserting constitutional rights still must properly plead and properly request relief from the court. The rules of civil procedure are not suspended merely because a party asserts constitutional rights – and Rubin cites no case so holding. Rubin tries to misdirect the court from the true issue at hand – and has inconsistently tried to justify why she did

not request injunctive relief – from stating she could not, to stating that she actually did, to stating that she did not need to. It is all fiction. Cases like the *Town of Midland v. Morris* and *City of Statesville v. Roth* illustrate how a landowner properly seeks permanent injunctive relief in a condemnation case – and the trial court's judgement in *Roth* shows what a judgment ordering injunctive relief looks like. *Roth*, at 803, 336 S.E. 2d 142, 143. Judge O'Neal issued no such order. Rubin's failure to ask Judge O'Neal to grant injunctive relief or clarify her order, and Rubin's failure to appeal Judge O'Neal's Judgment, are fatal to her 2020 attempts to receive permanent injunctive relief after the fact.

C. Rubin's motion was properly denied

Finding of Fact 3 and Conclusion of Law 9 provide ample basis and support for Judge Collins' denial of Rubin's motion to enforce judgment – and the Court can rule accordingly and stop its analysis here. Alternatively, we will address other aspects of Judge Collins' proper order below.

It was not lost on Judge Collins that Rubin is using the motion to request that he grant a mandatory injunction in 2020 to remove an

underground sewer line serving 50 residential homes – when Judge O'Neal, the trial court judge that originally heard the matter almost 4 years earlier, did not order the sewer line removed.

Rubin does not raise a violation of her constitutional rights as a basis in the motion (R. p 122-139). Rubin's after-the-fact argument does not change the analysis, as we will address in detail below. The following are the bases raised by Rubin in her motion to enforce judgment:

1. N. C. R. Civ. P. 70
2. N.C. Gen. Stat. § 1-302
3. N.C. Gen. Stat. § 1-298
4. Contempt
5. N.C. Gen. Stat. § 1-259
6. Writ of Mandamus
7. The Court's inherent authority

Judge Collins acted properly in not using these grounds to grant a permanent injunction. The Judgment does not order the Town to do any of the acts specified in N. C. R. Civ. P. 70 (to execute a conveyance of land or deliver deeds or other documents) or require the return or delivery of real property as per N.C. Gen. Stat. § 1-302. N.C. Gen. Stat. § 1-298 does not give the trial court on remand the authority to order a permanent

injunction where none was plead or contained in the judgment that is remanded from the appellate courts.

The Judgment does not order the Town to perform any specific act such as removal of the underground sewer line. Therefore, the Town cannot be held in contempt for failing to remove the underground sewer line. Moreover, the Motion fails to satisfy the statutory requirement for contempt motions, that it be supported by a sworn statement or affidavit. *See* N.C. Gen. Stat. § 5A-23(a1).

The trial court properly refused Rubin's request to use the Declaratory Judgment Act to construe and/or broaden the impact of the Judgment or to read into the Judgment injunctive relief. Such a request is improper in this captioned action. The original condemnation action was not a declaratory judgment action, and therefore N.C. Gen. Stat. § 1-259 is inapplicable in the original condemnation action.[3] A declaratory judgment is a separate and independent action, and may not be commenced by a motion in the cause. *Home Health and Hospice Care,*

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[3] Judge Collins also properly rejected the Declaratory Judgment Act as a basis to grant Rubin's motion pursuant to the authorities and arguments contained in Argument Section II, B, above.

Inc. v. Meyer, 88 N.C.App. 257, 362 S.E.2d 870 (1987). The trial court properly rejected Rubin's attempt to improperly use the Declaratory Judgment Act in this action. After all, the Town has filed a declaratory judgment/inverse condemnation action (19 CVS 6295) and Rubin is free to raise any claim for declaratory relief she believes she has as a counterclaim in that pending action.

Next, Rubin moves in the alternative for a writ of mandamus to "the Town or its officers commanding them to remove the sewer lines." (R p 125). A writ of mandamus is "an extraordinary remedy which the court will grant only in the case of necessity." *Edgerton v. Kirby*, 156 N.C. 347, 72 S.E. 365, 366 (1911). Rubin's assertions fail to meet this high standard. In support of this request, Rubin alleges "the Town has a legal duty to comply with the judgment and remove the sewer lines." Rubin's request rings hollow. Rubin cannot show that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly defined, positive legal duty to remove it. The Judgment mandated no such duty or requirement of the Town to remove the sewer lines. In fact, the Judgment imposes no obligations whatsoever upon the Town. The

absence of any duty alone warrants denial of Rubin's request for the Court to issue a writ of mandamus.

The function of a mandamus is to compel the performance of a ministerial act and not to establish a legal right. *Meares v. Town of Beaufort,* 193 N.C. App. 49, 667 S.E. 2d 224 (2008). Further, a writ of mandamus would not be issued to "enforce an alleged right which is in doubt." *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938). Manifestly, the Judgment does not order the Town to remove the underground sewer line, nor does it state that Rubin has a right to maintain her property without a sewer line in perpetuity. As such, Judge Collins properly denied Rubin's request for a writ of mandamus.

Although not contained in Rubin's motion, Rubin argued at the 9 January 2020 hearing that the trial court should order the sewer line removed pursuant to N.C. Gen. Stat. § 136-114. Judge Collins properly rejected this statute as a basis for permanent injunctive relief. N.C. Gen. Stat. § 136-114 allows a trial judge in a condemnation case to make any necessary order or rule of procedure, and states that the any order or rule of procedure "shall conform as near as may be to the practice in other

civil actions in said courts." Given (1) that ordering a mandatory injunction is not a "procedural order", (2) Rubin's failure to request injunctive relief before Judge O'Neal (N. C. R. Civ. P. 7(b)(1)), and (3) Judge O'Neal's Judgment not ordering injunctive relief (N. C. R. Civ. P. 65(d)), Judge Collins properly refused to order a permanent injunction under N.C. Gen. Stat. § 136-114.

D. Judge Collins acted properly in not exercising his inherent authority & Rubin's constitutional assertions do not change the analysis

Rubin argues that the trial court should have ordered a permanent injunction pursuant to the court's "inherent authority." Based on the uncontested findings of fact in the Order, and for the reasons stated herein, Judge Collins properly exercised his discretion in not using his inherent authority in this manner. *Ashton v. City of Concord*, 160 N.C. App. 250, 584 S.E.2d 108 (2003).

Rubin cites no case where a trial judge has granted a permanent injunction by using inherent authority in a condemnation case. Further, to the extent Rubin requested the trial court to make new findings of fact and legal determinations, Judge Collins did – and the findings and

conclusions supported his discretionary decision to deny to order a permanent injunction.

The only place Rubin's constitutional arguments fit is under the inherent authority banner. None of the other basis for the motion involve a consideration of constitutional rights. Having a physical invasion and sewer line on one's property does not automatically trigger a constitutional issue. North Carolina statutes and case law say that if a municipality physically invades a landowner's property, an inverse condemnation has occurred and the landowner's sole remedy is compensation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

The Judgment does not address in any respect the installation of the sewer line and resulting inverse condemnation, which pre-dates the Judgment. So the Judgment cannot be read to make any findings as to the constitutionality of the installation of the sewer line and corresponding easement. The Judgment simply dismissed the Town's condemnation claim which, based on Rubin's inaction on the issue of an injunction, was the only remedy available to Rubin. *In re McKinney,*

supra; *State Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E.2d 248 (1967).

As the Supreme Court held in *Thornton*, if the landowner does not seek injunctive relief, the project is installed, and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law – which here is an inverse condemnation claim – but not a mandatory injunction. *Id*. at 240, 241.

The facts of *Thornton* are substantially similar to the case at bar. The condemnor in *Thornton* brought a condemnation action to construct a public road across Thornton's property over a private road, and the public road was then widened approximately 30 feet. After the condemnation was filed, the landowner did not file a motion for injunctive relief. When the construction and project were approximately 96% complete, the landowner filed an answer contesting the right to take, requesting that the condemnor be permanently enjoined from appropriating their land for this project, and that the action be

dismissed.[4] *Id.* at 230. The trial court agreed with the landowner, found that the taking was not for a public purpose, and granted the permanent injunction requested by the landowner. *Id.* at 232.

The Supreme Court rejected the trial court's reliance on the *State Highway Commission v. Batts*, case and reversed the grant of an injunction. First, the Supreme Court acknowledged that the landowner had the right to request an injunction prior to the construction of the project. The Supreme Court distinguishes between an injunction against a condemnation proceeding and one to restrain construction of the project. The Supreme Court states: "An injunction against the institution or maintenance of condemnation proceedings, as distinguished from an injunction to restrain construction, is not properly issued, …" *Id.* at 236. The Court also noted in reversing the trial court's entry of an injunction

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[4] Unlike Rubin, the landowner in *Thornton* pled preliminary and permanent injunctive relief. The landowner in *Pelham Realty Corp. v. Bd. of Transp.*, 303 N.C. 424, 432, 279 S.E.2d 826, 831 (1981) did as well – which explains why the court considered injunctive relief. The *Pelham* court did not state that the effect of dismissal is the removal of previously installed utilities – there nothing had been installed – and the case certainly does not stand for the proposition that Rubin is entitled to removal under Judge O'Neal's judgment given the plain language of the Judgment.

after the project was constructed that the landowner did not apply for a temporary restraining order to halt construction – thus acknowledging such a motion was available to the landowner. *Id*. As such, Rubin had the opportunity to apply for injunctive relief regarding the construction of the sewer line and failed to do so. In fact, Rubin's first request for injunctive relief was 3 ¾ years after construction of the sewer line.

Our Supreme Court further held in *Thornton* that "…where the ground asserted therefor is one which the landowner may assert as a defense in the condemnation proceeding itself, for, in that event, the landowner has an adequate remedy at law." *Id*. at 236. This is because the facilities were already constructed. It is settled law that when there is an adequate remedy at law, injunctive relief should not be granted. Under similar facts as the case at bar, the Supreme Court in *Thornton* held that since the construction of the project had occurred, it cannot be restrained and an injunction is not properly issued. *Id*.

The Supreme Court provides the analysis when the Court is examining a challenge to the right to take for lack of public use or benefit

and the request for a dismissal of a condemnation action. The Supreme Court states:

> "…we must determine whether the trial court erred in its conclusion that the road in question was not constructed for a public use. ***If that conclusion was correct, the proceeding should have been dismissed.*** If that conclusion was error, the proceeding should be remanded for a further hearing to determine the compensation to be awarded the defendants for the taking of their land. [Emphasis supplied] *Id.* at 241.
>
> "If the premise [the landowner's argument that the taking is not for public purpose] is sound, the conclusion is sound and the trial court should have entered a judgment dismissing the proceeding, ***but not an injunction***." [Emphasis supplied] *Id.* at 236.

The Supreme Court eliminates as a possible remedy an injunction requiring the condemnor to remove the constructed infrastructure from the landowner's property. The result is a dismissal of the proceeding.

Further, the Supreme Court states:

> "If that [condemnor's] opinion [to enter and construct the project] was erroneous, the defendants are entitled to have this proceeding dismissed, leaving them to whatever rights they may have against those who have trespassed upon their land and propose to continue to do so." *Id.* at 240.

The Supreme Court again directs the landowner to remedies at law, and does not state that a permanent injunction is a remedy to remove

already constructed facilities on the property in a condemnation action. This certainly explains why the landowners in the *Town of Midland* case and other cases cited by Rubin moved for injunctive relief prior to construction of the facilities. A landowner's remedy against an entity with the power of eminent domain is not trespass, but an inverse condemnation claim. *McAdoo, supra.*

Here, consistent with *Thornton*, Judge Collins heard evidence that the sewer line had been installed under Rubin's property, and the Judgment did not require removal of the sewer pipe. The Judgment simply states that the "[Town's] claim [in its condemnation action] to [Rubin's] property by Eminent Domain is null and void." Rubin's arguments about "quick take" are misplaced. There is no evidence in the Record to support a finding or conclusion that "quick take" can serve as the basis to order removal of the sewer line. It is beyond the scope of Judge O'Neal's Judgment, and not supported by *Thornton*. The only relief granted to Rubin by the Judgment is the dismissal of this condemnation action.

Rubin's posturing a basis for her motion as a constitutional issue does not change this – and certainly does not change the fact that the grounds put forth to support the motion still fail. Certainly the same "constitutional issues" would have been at issue in the *Thornton* case, yet the *Thornton* court did not order removal of the public facilities that were installed on the landowner's property without a public purpose.

Second, the United States Constitution is only triggered if the Town attempted a taking without paying just compensation. The Town did not violate Defendant's Fifth Amendment rights because the Town paid compensation prior to the taking. Since there was a deposit by the Town as to its estimate of just compensation *prior* to the inverse taking of the sewer easement, no unconstitutional taking exists. *Knick v Twp. of Scott,* 139 S.Ct. 2162 (2019). The 5th Amendment to the United States Constitution states that "(n)or shall private property be taken for public use without payment of just compensation." Just compensation was paid by the Town in advance of the inverse taking of the sewer easement; and there has been no determination that the inverse condemnation was not for a public use or benefit – whether relevant under *Wilkie* or not. *Knick*

is inapplicable to the case at bar and there is no violation of the Fifth Amendment of the United States Constitution. Rubin cites no law supporting her assertion that the Town acted unconstitutionally in constructing and installing the sewer pipe given the pre-payment of compensation.

Further, Rubin's arguments that Judge Collins should have returned her property free and clear of the Town's sewer line is not supported by North Carolina law and ignores the procedural posture of the motion before Judge Collins. All the cases cited by Rubin for the return of her property differ from this case from a procedural standpoint. In each of those cases, the landowner is requesting the judge who is making the decision on the public use or benefit issue to grant injunctive relief. But here, Rubin did not ask the presiding judge for injunctive relief, but is asking a judge 3 ¾ years after the sewer line was installed – in the context of a motion for discretionary relief. The cases Rubin cites do not support her arguments that she is entitled to a permanent injunction.

As such, Rubin has not been deprived of a constitutional right; and certainly the assertion of a constitutional right does not impact Judge Collins' exercise of his discretion to refuse to use the court's inherent authority to grant a mandatory injunction under the facts and circumstances of this case.

E. The installation of the sewer line is properly analyzed as an inverse taking

Although the Court has ample basis as described above to affirm Judge Collins' order, a separate basis is his analysis that the effect of Judge O'Neal's Judgment is that the Town's physical invasion of Rubin's property on 27 July 2015 was an inverse taking. Rubin does not contest Findings of Fact 11 - 14. As such, these are binding on appeal. *In re Schiphof, supra.*

Judge Collins properly found that the effect of the Judgment is that the Town physically invaded Rubin's property without an applicable condemnation complaint. Under North Carolina law, a physical invasion by an entity with the power of condemnation is a taking, and the power of eminent domain insulates the Town from trespass actions. *Beroth Oil Co. v. N.C. Dept. of Transp.*, 757 S.E. 2d 466, 473 (NC 2014); *McAdoo v.*

City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988). The exclusive remedy for a physical invasion of private property by a municipality is inverse condemnation and the payment of compensation. *Id.*

No sewer easement was conveyed to a private individual. The 50 homeowners in the adjoining subdivision receive sewer service through the easement. None of those homeowners were conveyed or own any easement rights in Rubin's property. Consequently, the sewer line and easement exists for the use and benefit of the Town and its citizens. *State Highway Commission v. Thornton, supra.* Rubin cites no law that supports a conclusion that the Town's sewer line is anything other than an inverse taking.

Rubin misstates Judge Collins' analysis and use of the *Wilkie* case. Judge Collins properly references the *Wilkie* case for providing Rubin a remedy for the Town's physical invasion and inverse condemnation.[5] It is the *Beroth Oil* and *McAdoo* cases that support Judge Collins' analysis

[5] A more thorough analysis of *Wilke* is contained in the Town's Appellee Brief in the 2019 case, Argument, Section II, D.

that an inverse taking is what resulted from the Town's physical invasion coupled with Judge O'Neal's Judgment dismissing the original condemnation complaint as null and void but not ordering it removed. The effect of the Judgment is that it is as if the original condemnation complaint was not filed. *Hopkins v. Hopkins*, 8 N.C.App. 162, 169, 174 S.E. 2d 103, 108 (1970)("…null and void, i.e., as if it never happened."). Judge Collins findings of fact and conclusion of law on the inverse condemnation issue are correct, and serve as another basis to affirm his denial of Rubin's motion to enforce judgment.

III. JUDGE COLLINS PROPERLY GRANTED THE TOWN'S MOTION FOR RELIEF FROM JUDGMENT

Judge Collins' order does not provide the Town relief from the Judgment as it relates to dismissing the original condemnation complaint or prevent Rubin from request attorney's fees and costs under N.C. Gen. Stat. § 136-119. Judge Collins ordered that the Judgment not be used prospectively to attempt to challenge the existence of the underground sewer line and corresponding inversely condemned easement on Rubin's property. Such a ruling is well within the trial court's discretion under N. C. R. Civ. P. 60(b).

Rubin does not challenge findings of fact 1-12 in Judge Collins' Order granting the Town's motion for relief from judgment. These findings are therefore binding on appeal. *In re Schiphof, supra.*

"Where a final judgment or order has been entered in a particular case, Rule 60(b) will nevertheless allow for a party to obtain relief from that judgment or order '[o]n motion and upon such terms as are just[.]'" *North Carolina Department of Transportation v. Laxmi Hotels of Spring Lake, Inc.*, 259 N.C.App. 610, 817 S.E.2d 62, 69 (2018) (citing N. C. R. Civ. P. 60(b) (2017)). N. C. R. Civ. P. 60(b) provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: … (4) [t]he judgment is void…(6) [a]ny other reason justifying relief from the operation of the judgment." "'The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.'" *Id.* at 71 (citing *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971)).

Judge Collins was correct in finding that it would be just and equitable to allow the Town relief from the prospective application of the Judgment as it relates to the underground sewer line and corresponding easement, and he cites alternative grounds for doing so. Further Rubin did not seek injunctive relief in the original condemnation action, did not seek an injunction before the sewer line was installed, did not request injunctive relief at the Section 108 hearing, and the Judgment did not include an award of injunctive relief. These facts form the basis and support for Judge Collins' discretionary decision herein pursuant to N. C. R. Civ. P. 60(b)(6).

Further, the Supreme Court in *Thornton* has specifically excluded injunctive relief from the relief available to Rubin under the circumstances of this case. As such, Judge Collins under Rule 60(b)(6) properly grant the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer line and corresponding easement on Rubin's property.

Rubin's failure to seek and obtain injunctive relief prior to the construction of the sewer line and the Town's acquisition of the sewer

easement by inverse condemnation renders the Judgment moot as to the installation of the sewer line and corresponding easement. The Judgment's dismissal of the condemnation proceeding had no effect on the rights inversely taken. *Nicholson v. Thom*, 236 N.C.App. 308, 317, 763 S.E.2d 772, 779 (2014) (Issue is moot when question in controversy is no longer at issue).

When the trial court entered the Judgment, Rubin had not sought injunctive relief and the Town had already constructed the underground sewer line. The effect of the Judgment dismissing the complaint as null and void results in the Town's physical invasion not being the subject to condemnation complaint. *Hopkins*, *supra.* A physical invasion by an entity with the power of condemnation is always a taking. *Beroth Oil Co. v. N.C. Dept. of Transp.*, 367 N.C. 333, 341, 757 S.E. 2d 466, 473 (2014). As such, under settled North Carolina law, removal was no longer an option for Rubin. *In re McKinney, supra; Thornton, supra.* At the time of entry of the Judgment, the question of whether the Town had the authority to install the sewer easement described in the original condemnation action was moot – specifically as to the installation of the

sewer line and inversely condemned easement**.** Therefore, since the Judgment against the Town is moot, the Town should be granted the relief from the Judgment pursuant to Rule 60(b)(6).

A void judgment is a legal nullity. *Clark v. Carolina Homes*, 189 N.C. 703, 128 S.E.2d 20 (1925); *Shuford* § 60:7 (2017). "A lack of jurisdiction or power in the court entering the judgment always avoids the judgment." *Clark v. Carolina Homes, supra.* at 23. Therefore, since the Judgment against the Town is void as to Rubin's ability to contest the installed sewer line and corresponding easement, the Town should be granted prospective relief from the Judgment pursuant to Rule 60(b)(4).

An alternative basis for Judge Collins' order pursuant to Rule 60(b)(6) exists because there was a subsequent change in the law. In 2018, the North Carolina Supreme Court reversed the Court of Appeals and ruled that public use or purpose is not an element of an inverse condemnation claim. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018). Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law.

McNeil v. Hicks, 119 N.C.App. 579, 580-81, 459 S.E.2d 47, 48 (1995); *Hamby v. Profile Products*, LLC, 197 N.C.App 99, 676 S.E.2d 594 (2009)).

As a result of the *Wilkie* decision from the Supreme Court, coupled with Judge O'Neal's Judgment not requiring removal, the Judgment can have no prospective effect on or require removal of the sewer line. The legal basis for the Judgment no longer exists regarding the existence of the installed sewer line. So although the Judgment's "private purpose" finding as to the original condemnation complaint did not apply to the subsequent inverse taking on 27 July 2015, the Supreme Court's ruling provides an additional basis for Judge Collins' to grant the Town prospective relief from the Judgment regarding the existence of the sewer line and easement on Rubin's property.

Judge Collins properly exercised his discretion and granted the Town relief from the prospective application of the Judgment regarding the existence of the sewer line beneath Rubin's property, and his order should be affirmed.

CONCLUSION

For these reasons, the Town of Apex respectfully requests that the Court affirm Judge Collins' order denying Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus and affirm Judge Collins' order granting the Town's Motion for Relief from Judgment.

This the 31st day of August, 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 COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure and this Court's 28 August 2020 Order, counsel for the Appellee certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is less than 9,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the Appellant by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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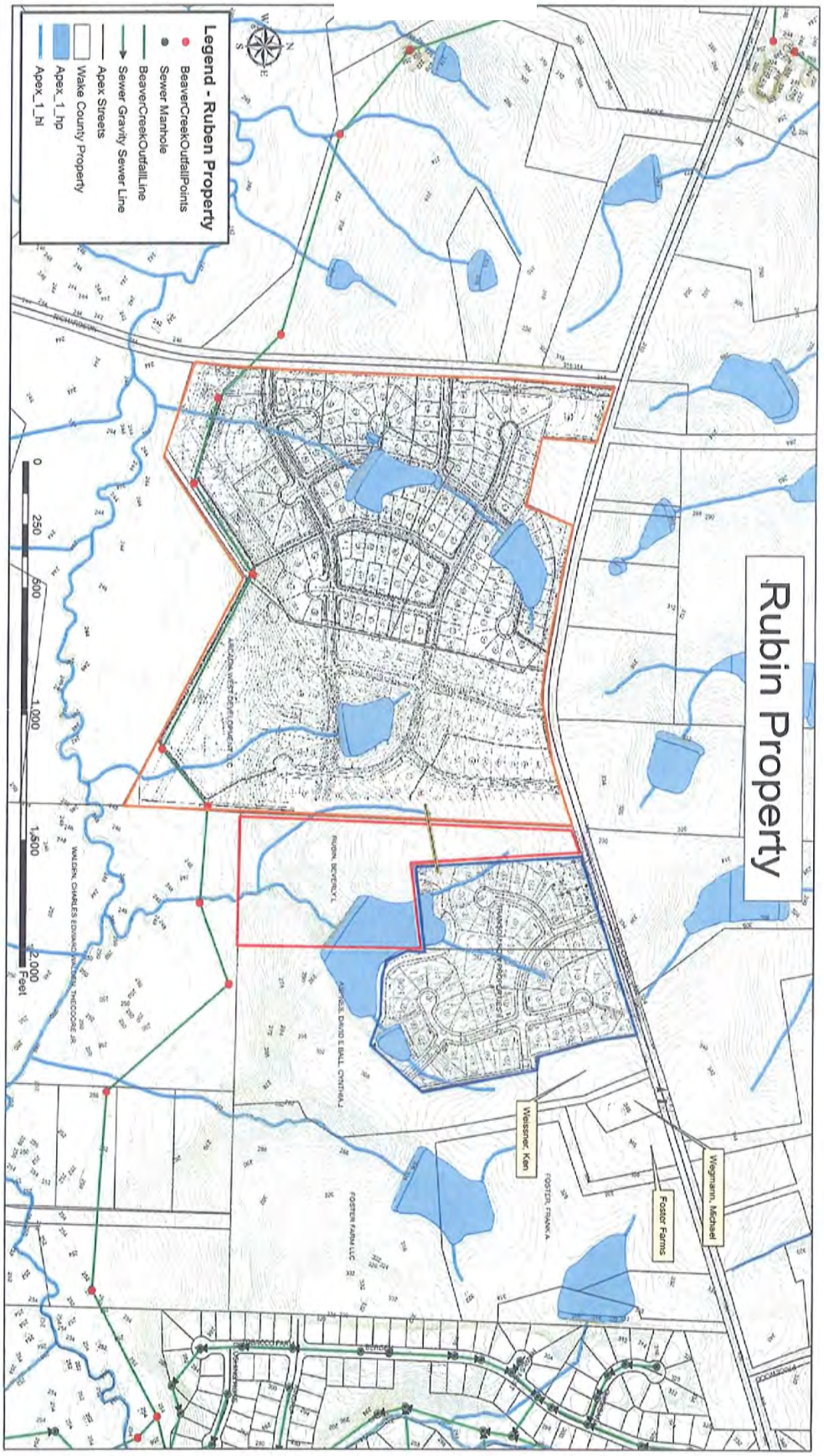
CONTENTS OF APPENDIX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BeaverCreekOutfallPoints
Sewer Manhole
BeaverCreekOutfallLine
Sewer Gravity Sewer Line
Apex Streets
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250
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Feet
Weissner, Ken
Foster Farms
Wegmann, Michael

STATE OF NORTH CAROLINA COUNTY OF WAKE TOWN OF APEX, Plaintiff, vs. BEVERLY L. RUBIN, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 5836 MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS

Pursuant to Rule 70 of the North Carolina Rules of Civil Procedure, sections 1-259, 1-298, and 1-302 of the North Carolina General Statutes, and this Court's inherent authority, defendant Beverly Rubin moves to enforce the judgment awarded to her by this Court. In the alternative, Ms. Rubin petitions this Court for a writ of mandamus, directing the Town of Apex to remove the sewer line currently bisecting Ms. Rubin's property.

In support of this motion and petition, Ms. Rubin shows the following:

1. This case involved an effort by a private real-estate developer—Bradley Zadell and his corporate entities—to use the Town's condemnation power for his personal enrichment.

2. Mr. Zadell entered into a contract with the Town whereby the Town would install sewer across Ms. Rubin's property so long as Mr. Zadell paid for all of the costs—including litigation costs.

3. At the insistence of Mr. Zadell, the Town commenced this lawsuit to install sewer lines across Ms. Rubin's homestead. Rather than await the outcome of the condemnation action, the Town used its statutory "quick-take" powers to immediately take possession of Ms. Rubin's property and install sewer lines on it before final judgment.

4. The condemnation action did not go as planned for the Town and the developer. This Court determined that the Town had violated Ms. Rubin's rights by taking her property for a private purpose—enriching Mr. Zadell.

5. As Judge O'Neal explained in her final judgment, the reason that the Town took the sewer easement was "for a private interest and the public's interest [was] merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need." Judgment at 5 ¶ 6 [Exhibit A (certified copy of judgment)].

6. Thus, the final judgment ordered that the Town's "claim to [Ms. Rubin's property] is null and void." Judgment at 6 ¶ 1.

7. After the Town lost, it appealed to the North Carolina Court of Appeals. That Court unanimously dismissed the appeal as untimely. *Town of Apex v. Rubin*, 821 S.E.2d 613, 617 (N.C. Ct. App. 2018).

8. The Town then petitioned the North Carolina Supreme Court for discretionary review. On April 9, 2019, the Supreme Court filed its order denying the petition. Exhibit B.

9. After the Town's third loss, the Court of Appeals certified the case back to this Court on April 10. Exhibit C.

10. Ms. Rubin now seeks to enforce this Court's judgment and have the Town remove the sewer lines that it installed on her property illegally.

11. This Court has the power to enforce its own judgments. Such power is inherent, and is also confirmed by a number of rules and statutes.

12. For example, N.C. Gen. Stat. § 1-298 provides that after a case is remanded to the trial court by an appellate court, the trial court "shall direct the execution [of the judgment] to

proceed" at the "first session of the superior . . . court after a certificate of the determination of an appeal is received." N.C. Gen. Stat. § 1-298. The certification of the appeal to this Court has been received and is attached to this motion. Ex. C. Therefore, Ms. Rubin is now requesting that this Court order that the judgment be executed against the Town.

13. Second, this Court also has contempt power for enforcement of its judgment through section 1-302 of the General Statutes.[1] Therefore, this Court may hold the Town in civil contempt until it removes the sewer lines.

14. Third, this Court may also grant supplemental relief through the Uniform Declaratory Judgment Act. That Act provides, "Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper." N.C. Gen. Stat. § 1-259. The judgment entered by this Court declared and decreed that the Town's claim to Ms. Rubin's property was "null and void." Judgment at 6 ¶ 1. Because the Town has refused to comply with the judgment, Ms. Rubin now requires further relief ordering the Town to remove the illegally placed sewer lines.

15. Fourth, this Court has authority to enforce its judgment under Rule 70. Under that rule, because the Town has failed to comply with the judgment by removing the sewer lines, this Court can order the Town or a third-party to remove the sewer lines, or this Court can hold the Town in contempt until the sewer lines are removed.

16. Fifth, this Court has the inherent authority to enter any order to make its judgment against the Town effective. As the North Carolina Supreme Court recently reaffirmed, "[i]t is well

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[1] Section 1-302 of the General Statutes provides, "Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt."

settled that, consistent with their inherent authority to enforce their own orders, North Carolina trial courts have jurisdiction to find new facts and determine whether a party has been 'disobedient' under a previous order that required the party to perform a 'specific act.'" *Pachas ex rel. Pachas v. N.C. Dep't of Health & Human Servs.*, 822 S.E.2d 847, 854 (N.C. 2019); *see also Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) ("Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment."). Because the Town has failed to comply with the judgment, this Court has the inherent authority to order the Town to remove the sewer lines.

17. Finally, should the Court deem each of these grounds insufficient to enforce the final judgment, this Court may issue a writ of mandamus to the Town or its officers commanding them to remove the sewer lines. *See In re T.H.T.*, 362 N.C. 446, 453–54, 665 S.E.2d 54, 59 (2008). Mandamus would be appropriate because:

(a) Ms. Rubin has a clear right to the full possession of her property, free of the sewer lines;

(b) the Town has a legal duty to comply with the judgment and remove the sewer lines;

(c) the Town's duty is ministerial and does not involve an exercise of discretion;

(d) the Town has failed to remove the sewer lines, and the deadline for the Town to remove the lines has now passed; and

(e) unless the Court grants Ms. Rubin relief under some other authority, Ms. Rubin has no other legally adequate remedies.

WHEREFORE, Ms. Rubin respectfully requests that this Court enforce its judgment and order the Town of Apex to remove the sewer lines on Ms. Rubin's property within thirty days of entry of its order on this motion.[2]

This the 10th day of April, 2019.

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[2] As noted in the Judgment, Ms. Rubin is entitled to payment of her attorneys' fees and costs incurred in connection with this litigation. For efficiency, Ms. Rubin will wait to seek payment of those fees until after the Town has fully complied with the Judgment.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ms. Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus was served by United States mail, first-class postage pre-paid, and addressed as follows:

David P. Ferrell
Nexsen Pruet PLLC
4141 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612

This the 10th day of April, 2019.

Matthew Nis Leerberg

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN Defendant.	JUDGMENT

This cause came before the undersigned Superior Court Judge for hearing as a result of Motions filed by the Defendant and the Plaintiff for a hearing pursuant to N.C. Gen. Stat. §136-108 during the August 1, 2016 Civil Session of Wake County Superior Court. The Court having reviewed the entire file in this action, including the Affidavits of Donald Ashley d'Ambrosi and Timothy L. Donnelly, P.E., live testimony by Defendant, along with exhibits from Plaintiff and an exhibit notebook consisting of sixteen exhibits offered by the Defendant. The Court makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. In this proceeding, Plaintiff, Town of Apex, has invoked the process of eminent domain to take a forty foot wide sewer easement consisting of 6,256 square feet in front of Defendant's residential house.

2. The stated reason in the Complaint for the condemnation action was for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex.

3. Within the Answer filed by Beverly L. Rubin, she asserted as a defense to the Complaint, that the Town of Apex did not have the right to take any of her property interests under the General Statutes in North Carolina and the North Carolina Constitution or the United States Constitution.

4. As early as May 19, 2015, less than a month after the condemnation lawsuit was filed, a letter was sent to counsel for the Town of Apex, informing the Town that Ms. Rubin intended to challenge the right to take the sanitary sewer easement by the Town of Apex.

5. During the pendency of this action, the current owner of the land that benefitted from the eminent domain proceeding, has continued to develop the property.

6. On March 3, 2015, the Apex Town Council approved on a 3 to 2 vote a Resolution Authorizing Eminent Domain Proceedings To Acquire A Sewer Easement.

7. For nine months prior to the passage of the Resolution, Brad Zadell, a private developer, requested that the Town of Apex condemn Defendant's property so that land that his company owned could be connected to a sewer line thereby substantially increasing the value of land.

8. During the entire time that Mr. Zadell's company owned the land that he wanted to be served by sewer, nobody lived on the land and no infrastructure had been installed on the property.

9. That prior to the Town of Apex's Resolution, Mr. Zadell had multiple communications with Public Works and Utilities Director, Timothy Donnelly, pressuring Mr. Donnelly to have the Town acquire a sewer easement across Ms. Rubin's property.

10. That it was Timothy Donnelly who presented the matter to the Town Council in closed session, requesting authorization for the Town to obtain the sewer easement.

11. That prior to the matter being presented to the Town Council for discussion and a vote, the Town of Apex prepared a contract between the Town and Mr. Zadell's company entitled "Unilateral Offer to Pay Condemnation Award, Expenses, and Costs". On February 10, 2015, Mr. Zadell on behalf of his company agreed to be responsible for all costs and expenses related to the Town's use of its eminent domain powers to obtain a sanitary sewer easement across Defendant's property for the benefit of Mr. Zadell's company.

12. Therefore, the members of the Town staff and attorneys for the Town prepared a contract discussing "a condemnation action filed by the Town in Wake County Superior Court in which action the Town seeks to condemn the easement shown on the plat attached hereto as Exhibit A" before the Town Council ever met to consider a condemnation action or voted authorizing such an action. Contained within the contract was a section entitled No Warranty of Success which states: "Promissor acknowledges and agrees that the Town has made no representation, warranty, or guarantee that the Condemnation Action will be successful at obtaining the easement sought in the Condemnation Action ..."

13. Then on February 26, 2015, also prior to the Town of Apex March 3, 2015, council meeting to consider Mr. Donnelly's request for the Town to use its powers of eminent domain, a purchase contract was prepared in which Mr. Zadell's company agreed to sell the property that he had requested be connected to sewer for Two and a half Million dollars ($2,500,000) more than the original purchase price for the land.

14. Contained within the February 26, 2015 Agreement of Sale, is an Exhibit F which states that: "That the Town of Apex will initiate condemnation proceedings against the Rubin property to condemn property for the sewer line to connect Arcadia West Subdivision with

Riley's Pond Subdivision. Seller, or an affiliate of Seller, will be financially responsible for the costs and expenses of such condemnation."

15. There is no evidence before this Court that, before the request of Mr. Zadell, the Town of Apex had approved plans to expand sewer service to property later owned by Mr. Zadell's company.

CONCLUSION OF LAW

1. The Town of Apex is a municipal corporation with powers of eminent domain that empower it to take private property through condemnation proceedings if such condemnation is for "the public use or benefit." The [public entity] can condemn property only for a public purpose and that it cannot take the land of one property owner for the sole purpose of providing sewer service for the private use of another, *State Highway Commission v. Batts*, 265 N.C. 346, 144 S.E.2d 126.

2. The determination of whether the condemnor's intended use of this land is for "the public use or benefit" is a question of law for the Court, N.C. Gen. Stat. §136-108.

3. Even when that proposed taking is for a "public use or benefit," the power of condemnation may not be exercised in an arbitrary and capricious manner. While the legislature has conferred the constitutional authority to delegate the right of eminent domain, and the right to condemn property for public use for sewer facilities is part and parcel of that right, it is limited, and may not be exercised arbitrarily and capriciously.

4. When the proposed taking of property is "for the public use for sanitary sewer and sewer facilities and other facilities described in the Complaint and appurtenances thereto, to improve the public utility system of the Town of Apex" such purpose normally would be sufficient to state a public use or benefit. Nonetheless, a case involving taking of private

property cannot be considered in a vacuum and without regard to its factual history. Further, the statute authorizing taking of private property must be strictly construed and, in a case in which the landowner disputes that the taking is for a public purpose, ambiguities should be resolved in favor of the owner whose property is being taken. The statutes authorizing eminent domain are in derogation of common law, and are to be strictly construed in favor of the landowner whose property is being taken, *City of Charlotte v. McNeely,* 8 N.C. App. 649, 175 S.E.2d 348 (1970)

5. In reaching this conclusion, the Court is cognizant that there is not a particularly high threshold for the Plaintiff's stating of its basis for contending that the taking is for a public purpose. However, the Court is convinced that the eminent domain statute and the Constitutions of North Carolina and the United States require more than the Plaintiff simply stating it is for a public use and benefit. The facts of what lead up to the decision by the Town to use its powers must be reviewed in determining whether it is in fact for the public or for a private land owner. The Constitutions of the United States and of the State of North Carolina both prohibit the arbitrary taking of private property without due process. U.S Constitution, Art. V; N.C. Constitution, Art I §19; *accord, Hogan v. Alabama Power Company,* 351 So.2d 1378 (Al.Ct.App., 1977).

6. The paramount reason for the taking of the sewer easement is for a private interest and the public's interest are merely incidental. The request for access to sewer service arose from the private interests of a private individual and his company, and not from any expansion of the Town's infrastructure or public need. There is no evidence that without the repeated requests of Mr. Zadell that the Town would ever have condemned an easement across Ms. Rubin's property. *Highway Comm. v. School,* 276 N.C. 556, 562-63, 173 S.E.2d 909, 914 (1970).

JUDGMENT

1. The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void.

2. Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintiff.

3. Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136.

4. No rulings made herein regarding Defendant's claims for attorney's fees under N.C.Gen.Stat. §6-21.7, which ruling is reserved for later judication upon Defendant's submitting a Motion in Support of such request.

Signed This the 6th day of Oct., 2016.

Elaine M. O'Neal

Superior Court Judge Elaine M. O'Neal

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Judgment upon the parties by depositing copies of the same in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service, addressed to counsel for plaintiff, David P. Ferrell, Vandeventer Black LLP, P.O. Box 2599, Raleigh, NC 27602-2599.

This 19th day of October, 2016.

Kenneth C. Haywood