NO. COA 20-305 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 19-CVS-6295

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PLAINTIFF-APPELLEE TOWN OF APEX'S BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

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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

Beverly L. Rubin ("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 declaratory judgment complaint. (R pp 102-103). 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. R pp 104-111). The sole effect of the preliminary injunction is to maintain the *status quo*. Neither of these interlocutory orders affects a substantial right, they are not immediately appealable, and Rubin's appeal of the two interlocutory orders should be dismissed.

Alternatively, the Town properly stated a claim for which relief can be granted under the Declaratory Judgment Act and therefore Rubin's motion to dismiss was properly denied by Judge Collins. Further, Rubin's attempt to request relief under the Declaratory Judgment Act in the 2015 case to remove the sewer line forecloses her ability to oppose the Town's request for relief under the Declaratory Judgment Act herein to protect that same sewer line. (R p pp 60-65). Rubin cannot have it both ways.

Rubin's claim of *res judicata* to support her motion to dismiss should be rejected, for it is based on a false premise that the original condemnation action (15 CVS 5836) address the installation of the underground sewer line under Rubin's property. (R pp 40-77). Rubin did not plead or request injunctive relief, and the Judgment did not order

permanent injunctive relief. (R pp 8-14). The 2019 declaratory judgment action is about the existence of the sewer line and the resulting inverse condemnation – issues not addressed by Judge O'Neal.

It is clear from the pleadings in the 2015 case, the Judgment in the 2015 case, and settled North Carolina law that the Judgment did not address installation of the underground sewer line under Rubin's property, did not grant Rubin a permanent injunction, and did not require the Town to remove the sewer line. (R pp 8-14; 46-52; 54-57). Further, Rubin can hardly use the prior action pending doctrine to support her motion when she has admitted that a final judgment was entered in the 2015 action. (R p 41 ¶ 5). The 2015 action is no longer pending for purposes of the application of the prior action pending doctrine.

Rubin's attempt to misdirect the Court's review of these interlocutory matters by raising constitutional issues should be rejected. No order implicates constitutional issues. Rubin has not filed an answer or asserted any claims in response to the Town's amended complaint. Nevertheless, Rubin erroneously mischaracterizes the installation of a

sewer line as an unconstitutional taking. Even raising these arguments in the context of the motion to dismiss does not provide a basis for the court finding *res judicata* or prior action pending – the only two bases for dismissal raised before the trial court. (R pp 40-44). In addition, Rubin'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).

Rubin did not file a response in the trial court to the Town's motion for preliminary injunction, did not raise before the trial court the issues she now raises in opposition to the preliminary injunction, and thus Rubin's contest of Judge Collins' preliminary injunction should be rejected. Regardless, Judge Collins properly issued a preliminary injunction to maintain the *status quo* pending a final determination on the merits in this action.

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 8-14). The Judgment found the original condemnation complaint null and void and dismissed it; the

effect is that it is no longer in place and applicable to the installed sewer line. (R pp 8-14). The effect of Judge O'Neal's Judgment 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 an entity with the power of eminent domain is always a taking. Dismissal of this condemnation action had no effect on the installation of the sewer line or the rights previously inversely taken by the Town. (R pp 8-14). The Judgment does not prevent the Town's exercise of eminent domain power to inversely condemn an easement, (R pp 8-14), nor does it impact the Town's power of eminent domain prospectively. Further, the Judgment does not order the Town to perform any specific act, such as removal of the underground sewer line. (R pp 8-14). Judge O'Neal's Judgment is fatal to Rubin's current attempts to dismiss the Town's declaratory judgment action and to have the preliminary injunction dissolved. The Judgment does not afford Rubin a basis to support her motion to dismiss. (R pp 8-14; 40-77).

STATEMENT OF FACTS

The Town is a municipal corporation organized and existing under the laws of the State of North Carolina. (R p 3, ¶ 1). The Town 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.[1]

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. (Jan. 2020 T 36:19-23; 37:8-10; R pp 31). 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 easement across Rubin's property. (RS (I) pp 203-207). 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

[1] Since Rubin attempts to use the 2015 original condemnation action as a basis to seek dismissal of this 2019 declaratory judgment action, the Town must set out the relevant facts surrounding the 2015 action herein.

Town's filing of its condemnation complaint approximately two (2) months after the resolution was adopted. (Jan 2020 T 42:16-47:13).

On 30 April 2015, the Town filed the Original Condemnation Action, having case number 15 CVS 5836. (R. pp 46-52), and deposited $10,771 as an estimate of the compensation for the taking of a 40-foot wide, 151 feet long sewer easement. (R pp 83-90, ¶ 3). The Clerk is still in possession of the $10,771 deposited by the Town for Rubin's benefit for the taking of property. (R pp 83-90, ¶ 3).

Rubin subsequently filed an Answer to the Complaint on 8 July 2015, requesting dismissal of the Condemnation Complaint, but did not request injunctive relief. (R pp 54-57). 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. 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. (R pp 8-14). A final judgment was entered in the Original Condemnation Action on 18 October 2016 ("Judgment"). (R pp 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 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 8-14). The Judgment rendered the Complaint and Declaration of Taking a nullity. (R pp 8-14). 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 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 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] (May 2019 T 7:4-10). 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.

The Town appealed Judge O'Neal's Judgment and Order denying the Town's post-judgment motions to this Court. (May 2019 T 7:4-10). The Town did not seek a stay of the Judgment in the trial court or Court of Appeals. The Town's prior appeal of the Judgment in the 2015 case

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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."

was resolved by this Court on procedural grounds (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 line and easement acquired by inverse condemnation on 27 July 2015. The Town filed a Petition for Discretionary Review in the 2015 case and asked the Supreme Court to exercise their discretion and hear the appeal on the merits. (R pp 94, ¶ 7). 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 entire width of a narrow portion of Rubin's property, so as not to disturb the surface of her property, and not to have to access the surface of her property in the future to maintain or service the sewer line. (R pp 83-90, ¶¶ 18-19).

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. (R pp 18-26, ¶ 7). 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 18-26, ¶9-10) No manholes were dug or are currently on Rubin's property. (R p 18-26, ¶7). The physical invasion and taking occurred on or about 27 July 2015. (R p 18-26, ¶12).

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 pp 83-90 ¶¶ 18-19). 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 pp 8-14; 83-90, ¶¶ 11, 18). The dismissal of the Original Condemnation Action had no effect on the rights inversely taken. (R pp 18-26; 83-90). 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 83-90, ¶¶ 11, 18). 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 83-90, ¶

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 104-111, Find. of Fact ¶ 2). The acquisition of the easement by inverse condemnation essentially rendered the Judgment moot regarding its prospective effect on the existence of the sewer line.

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 in the 2015 case, seeking a permanent injunction to remove the sewer line. (R pp 104-111, Find. of Fact ¶ 2). Rubin's motion, entitled Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus, was filed in the Original Condemnation Action (R pp 60-65; 104-111, Find. of Fact ¶ 2). This was Rubin's first request for injunctive relief to the trial court. (R pp 104-111, Find. of Fact ¶ 18). 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 pp 60-65), but cites the following bases: (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; and (7) The Court's inherent authority (R pp 60-65, ¶¶ 12-16).

On 30 August 2019, the Town filed a Motion for Relief from Judgment in the 2015 case 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 S (II) p 300).

V. Town's Declaratory Judgment/Inverse Condemnation Action.

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 pp 104-111, Concl. of Law ¶ 9). 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 pp 104-111, Concl. of Law ¶ 9). The existing sewer line is the only sewer line or facility touching or connecting the subdivision to Town sewer service. (R pp 104-111, Concl. of Law ¶ 10).

There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots. (R pp 104-111, Concl. of Law ¶ 10).

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 the Declaratory Judgment/Inverse Condemnation Complaint on 13 May 2019 (R pp 3-15), 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. (R p 15-35). Acknowledging Rubin's inverse condemnation claim is now time-barred, the Town amended its Declaratory Judgment/Inverse Condemnation Complaint on 30 August 2019, waiving the Town's defense of the statute of limitations as a bar to Rubin's claim for just compensation. (R pp 83-90). The Town requested that the Court, pursuant to N.C. Gen. Stat. § 1-259 and/or 136-114, grant supplemental relief and order that a jury trial be held on the issue of the amount of compensation due Rubin for the inverse taking by the Town of the 10-foot wide underground sewer

easement under Rubin's property. (R pp 83-90). The Town's action is not an inverse condemnation action; for condemnors cannot file such actions. The Town's action is to have the court declare that the sewer easement and line exist on Rubin's property pursuant to the Town's power of eminent domain and based on the effect of Judge O'Neal's Judgment, and Rubin has a right to just compensation for the easement taken. (R pp 83-90). The right to compensation is Rubin's to request/enforce or not.

Rubin filed a motion to dismiss the amended complaint. In her brief in support of the motion, Rubin did not raise constitutional concerns in response to the Town's motion. (R pp 40-77; 91-96). Rubin did not file a response to the Town's motion for a preliminary injunction.

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

The parties' 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 81-82). 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 in the 2015 case – 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). [3] Judge Collins denied Rubin's motion to dismiss and granted the Town's motion for preliminary injunction enjoining Rubin from interfering with the sewer line which lies eighteen feet beneath a narrow portion of her property. (Jan. 2020 T. 123:17-23). These rulings in the 2019 allow the state court to determine the rights taken in the easement by the Town and how much just compensation Rubin is due for the Town's inverse taking of property rights in the easement. (R pp 102-103; 104-111).

Rubin filed notices of appeal for all four orders on 29 January 2020, including attempting to appeal the interlocutory orders in the 2019 case. (R pp 112-114).

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[3] After deliberating on the motions in the 2015 case for over a week, Judge Collins denied Rubin's motion to enforce judgment and granted the Town's motion for relief from judgment. (R pp 155-167).

ARGUMENT

I. STANDARD OF REVIEW

"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 1-29 in Judge Collins' Order granting the Town's motion for preliminary injunction. These findings are therefore binding on appeal. *Id.*

II. COURT SHOULD DISMISS RUBIN'S APPEAL – THESE ORDERS ARE NOT APPEALABLE

The Town filed a Motion to Dismiss Rubin's appeal of the two interlocutory orders, which has been referred to the panel. Neither of Judge Collins' orders involve a substantial right that would be lost, prejudiced, or less than adequately protected if an immediate appeal is not permitted. The orders do not finally adjudicate any rights whatsoever but simply serve to continue the action. *Veazey v. City of Durham,* 231

N.C. 357, 362, 57 S.E. 2d 377, 381 (1950). 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 over 5 years now cannot be interfered with. As such, neither affects a substantial right nor are they immediately appealable.

Rubin's response to the Town's motion to dismiss this appeal misstates the issues on appeal herein and in 15-CVS-5836, conflates the right to take with title in 15-CVS-5836, and completely ignores the two-step test for an immediate appeal. The context of the Court's review of the motions in the 2015 case (discretionary rulings denying a motion to enforce judgment and granting a motion to grant prospective relief from the judgment) is different from the issues on appeal herein (whether declaratory judgment action fails to state a claim and the granting of a motion for a preliminary injunction to maintain the *status quo*). Also, contrary to what Rubin says, title is not the issue in either appeal.

The motions filed by the parties in 15-CVS-5836 tacitly concede the existence of a final judgment entered therein. No answer has been filed herein so no issues yet arise on the pleadings. Assertions that there is a risk of inconsistent jury verdicts or judgments is mere speculation.

Rubin's statement that both appeals present the same issues is incorrect, and ignores the fundamental difference between a direct and inverse condemnation. This declaratory judgment action arises on different facts and conduct of the Town not addressed in 15-CVS-5836. 15-CVS-5836 is a direct condemnation in which taking for a public purpose is an essential element. The declaratory judgment action herein involves an inverse condemnation claim occurring in 27 July 2015 in which a taking for a public purpose is not an element. A condemnation, whether direct or indirect, is analyzed on the date of taking. For the inverse taking herein, it is the date of the physical invasion – 27 July 2015. The issues adjudicated in 15-CVS-5836 are not the same issues requested to be adjudicated herein.

Rubin completely ignores the two-step test to establish the right to an immediate appeal. *Miller v. Swann Plantation Development Co., Inc.*,

101 N.C. App. 394, 395, 399 S.E.2d 137, 139 (1991). From motion to dismiss appeal Rubin does not argue that she will lose any substantial rights if she is not allowed to immediately appeal. She fails to even argue that there exists error which must be corrected before final judgment. Rubin's failure to make such an argument is a tacit acknowledgment that she can appeal from a final judgment herein and thereby correct any error. As such, Judge Collins' orders do not involve a substantial right that would be lost, prejudiced, or less than adequately protected if an immediate appeal is not permitted, and Rubin's improper appeal of these orders should be dismissed.

III. THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO DISMISS.

The Town properly stated a claim for which relief can be granted under the Declaratory Judgment Act and therefore Rubin's motion to dismiss was properly denied by Judge Collins. The complaint herein requests declaratory and injunctive relief as to the parties' rights in and to an easement for an underground sewer line installed on Rubin's property by the Town. The effect of Judge O'Neal's Judgment in the 2015 case is that the Town's installation of the sewer line beneath the narrow

portion of Rubin's property constituted a physical invasion of Rubin's property and inverse condemnation of the Easement. Rubin's sole remedy is the payment of just compensation for the easement inversely condemned.

A. Complaint alleges an actual controversy between the parties regarding rights in and to the Easement

The Town's amended complaint alleges that by constructing the underground sewer line coupled with the effect of Judge O'Neal's Judgment, the Town physically invaded Rubin's property and inversely condemned the Easement on 27 July 2015. Town thereby acquired the Easement and has the right to continue the maintenance and use of the underground sewer line therein. Rubin asserts that she is entitled to an order requiring the Town to remove the sewer line. Rubin has formally sought such an order by written motion filed on 10 April 2019 in the original condemnation action. Consequently, a genuine controversy exists between the Town and Rubin as to their respective rights and duties in and to the Easement.

Rubin's attempt to request relief under the Declaratory Judgment Act in the 2015 case to remove the sewer line forecloses her ability to

oppose the Town's request for relief under the Declaratory Judgment Act herein to protect that same sewer line. (R pp 60-65, ¶¶ 12-16).

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 cause of action for a declaratory judgment. *Walker v. City of Charlotte,* 268 N.C. 345, 150 S.E.2d 493 (1966). A motion to dismiss for failure to state a claim is not appropriate where complaint alleges a justiciable controversy. *Id.*

B. Declaratory Judgment Act is available to adjudicate the rights of parties to an Easement

In *Hubbard v. Josey,* 267 N.C. 651, 148 S.E.2d 638 (1966) our Supreme Court held that judicial declaration of plaintiffs' right to an easement over the lands of the defendants is authorized by the Declaratory Judgment Act. Our Supreme Court further reversed the dismissal of a declaratory judgment action on a demurrer (motion to dismiss) on the grounds that "a declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing." *Id.* at N.C. 639. As such, "a judgment of nonsuit may

not be entered." *Id.* citing *Board of Managers etc. v. City of Wilmington*, 237 N.C. 179, 194, 74 S.E.2d 749 (1953).

C. *Res judicata* does not bar Town's claim for declaratory judgment as to rights of parties to Easement

The doctrine of *res judicata* precludes the relitigation of claims. *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011). *Res judicata* applies when a party establishes that a previous action resulted in a final judgment on the merits, that the same cause of action is involved, and that the same parties are involved–or parties in privity with the original parties. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004). *Res judicata*, or claim preclusion, "prevents the relitigation of all matters that were or should have been adjudicated in the prior action." *Id.*

The doctrine of *res judicata* does not apply to the Town's claims in the captioned declaratory judgment action. The Town claims a sewer easement by inverse condemnation. The 2015 action does not address the installation of the sewer line or the inverse condemnation of the sewer easement. As is outlined in more detail in the Town's Appellee Brief in the 2015 case, Rubin did not plead or request injunctive relief, and Judge

O'Neal's Judgment does not revest the property or grant Rubin a permanent injunction or order the Town to remove the sewer line. Based on the Town's pleading the Judgement adjudicates the right to take a different easement in a direct condemnation. The Town is not attempting to use the original condemnation action to support this inversely condemned modified sewer easement. The Judgment does not even acknowledge that the sewer line was installed in July 2015, that it serves lots in a residential subdivision, or other important details that would be relevant to the trial court's consideration. Moreover, the issue as to whether installation of the sewer line constitutes an inverse condemnation was not determined by the Judgment. So although the parties are the same in the two actions, the claims are not.

Further, the Town's claim is properly brought in a declaratory judgment action because Judge O'Neal's Judgment cannot be read as a to contain a permanent injunction ordering the Town to remove the sewer line. N. C. R. Civ. P. 7(b)(1); N. C. R. Civ. P. 65(d); *In re McKinney,* 158 N.C. App. 441, 581 S.E.2d 793 (N.C. App. 2003); *Woodlief, Shuford NC Civil Practice and Procedure* § 65:7 (2017); *State Highway Commission v.*

Thornton, 271 N.C. 227, 240-241, 156 S.E.2d 248, 258-259 (1967). [4]

Rubin cites no case that would foreclose the trial court's consideration of the Town's physical invasion as an inverse taking under the facts and circumstances of this case. The facts and circumstances of this case are there is no pending condemnation and there exists a sewer line 18 feet beneath a narrow portion of Rubin's property, that was not previously addressed by Judge O'Neal. With the original condemnation complaint declared "null and void", it is as if it 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."). As such, there is a physical invasion not covered by a pending condemnation complaint. A physical invasion by a public condemnor 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)("In its simplest form, a taking always has been found in cases involving 'a permanent physical occupation.'"); *Concrete Machinery Co. Inc. v. City of Hickory*, 134 N.C. App. 91, 517 S.E. 2d 155 (1999)(City's construction of new sewer

[4] These arguments are outlined in more detail in the Town's Appellee Brief in the 2015 Case, Argument II., B.

line outside pre-existing easement constituted a taking for which remedy was compensation); *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). Since the Judgment does not address the inversely condemned sewer line, *res judicata* cannot apply.

Condemnations are unique in the application of the doctrine of *res judicata*. Only a handful of courts have considered this issue. However, all courts which have considered application of the doctrine have identified condemnation actions to be unique in application of *res judicata* – particularly when the outcome of a prior claim hinges on public use.

A North Carolina appellate case addressing application of the doctrine of *res judicata* in a condemnation found that *res judicata* did not apply to a subsequent condemnation action. The North Carolina Court of Appeals held that a city's condemnation claim is not barred by *res judicata* on the same property when it was not based on the same facts. *City of Charlotte v. Rousso*, 82 N.C. App. 588, 589, 346 S.E.2d 693, 694 (1986). In *Rousso*, the city sought to condemn a lot on Charlotte's South Tryon Street for a public park. *Id.* at 588, 346 S.E.2d at 694. The owner

of the lot argued the condemnation claim was precluded by the doctrine of *res judicata* due to the dismissal of a prior condemnation claim for the same property. *Id.* The Court of Appeals held that *res judicata* did not apply because the new condemnation action was "not based upon the same facts." *Id.* at 588-89, 346 S.E.2d at 694.

In the prior condemnation action, the city sought to condemn the property and lease portions of it for retail businesses "which, of course is not a public purpose." *Id.* at 589, 346 S.E.2d at 694. After the trial court dismissed the prior action for lack of public use, the city developed a new plan to convert the lot into a public park and brought a new condemnation claim. *Id.* The Court of Appeals noted this new claim–to convert the lot into a public park–was "free of the illegal taint that caused the earlier case to fail." *Id.* The Court of Appeals held a prior judgment "does not bar a re-litigation of the same issue when new facts occur that alter the legal rights of the parties in regard to the issue." *Id.* (citing *Flynt v. Flynt*, 237 N.C. 754, 75 S.E.2d 901 (1953)). The court reasoned that while the prior dismissal would preclude the city condemning the

land for "commercial or business purposes," it did not bar the city from condemning the land for a public purpose, a park. *Id.*

The Town has sufficiently pled facts to establish that an inverse condemnation has occurred, including describing the modified underground sewer easement that was taken by inverse condemnation. The Supreme Court of North Carolina has held that an inverse condemnation remedy is not dependent upon taking or using for a public use. *Wilkie v City of Boiling Spring Lakes*, 371 N.C. 540, 809 S.E.2d 853 (2018). No issues arise on the pleadings since Rubin has not answered the amended complaint. Regardless of what Rubin contends herein or may ultimately contend in the trial court related to public use or benefit of the inversely condemned sewer easement, the Town has sufficiently pled changed circumstances (or that the circumstances are not relevant under *Wilkie*) to defeat Rubin's *res judicata* argument at the Rule 12(b)(6) stage.

Other jurisdictions have considered the application of the doctrine of *res judicata* to a subsequent condemnation claim. The Supreme Court of Montana held that a prior, failed condemnation action did not preclude

a subsequent condemnation action when numerous new facts created a "change in circumstances" as to the necessity of the condemnation. *City of Missoula v. Mountain Water Co.*, 378 P.3d 1113, 1126 (Mont. 2016). In *Mountain Water*, the City of Missoula first sought to condemn a privately owned system providing potable water to the city in the 1980s, and once the action was denied by the Court, sought to condemn the water system again some 30 years later. *Id.* at 1118. The Supreme Court of Montana identified new facts regarding the ownership of the water system, profit motives, operating expenses, public opinion, and local and state regulations constituted a "change in circumstances" sufficient to overcome the preclusive effects of the prior failed action. *Id.* at 1127.

The Supreme Court of North Dakota held that a "substantial reduction" in acreage sought and the "mere passage of time" provided sufficient basis to overcome the preclusive effects of a prior failed condemnation. *Oakes Mun. Airport Auth. v. Wiese*, 265 N.W.2d 697, 701 (N.D. 1978). In *Oakes*, a municipal airport authority's initial condemnation action sought 75 acres to construct a new airport. *Id.* at 698. The court found the action lacked i public use or public necessity

and dismissed the action. *Id.* Approximately eight months later the airport authority brought a new action, seeking only 38 acres plus a 9-acre easement. *Id.* The trial court in the subsequent action found it to be res judicata by the prior condemnation action and dismissed the subsequent claim, which the airport authority appealed. *Id.* at 699.

The Supreme Court of North Dakota held that while res judicata may apply to condemnation actions, "the doctrine is not readily applicable" to cases when the "condemning authority had failed to prove a public use or public necessity." *Id.* at 700. The court noted that condemnation actions involving public use "possess a unique character" and that "as time . . . changes may occur which would add new and important factors to be considered" as to whether the public use and necessity of the condemnation. *Id.*

The court noted that the subsequent condemnation action was for approximately half of the acreage originally sought, and that such a "substantial reduction" may have a "decisive impact" on redetermination. *Id.* Further, the court noted the fact several months had passed, and that "[f]rom this mere passage of time, changes in the use and requirements"

may occur, impacting the result of a redetermination. *Id.* Based on the reduction of property sought and the passage of time – providing opportunity for changes in use or necessity to occur – the court held the doctrine of *res judicata* did not apply. *Id.*

In a concurring opinion, Justice Pederson noted that the applying *res judicata* in condemnations becomes "impossible, unfair or impractical to apply," particularly in inverse condemnation. *Oakes,* 265 N.W.2d at 702 (Pederson, J., concurring). The justice noted that when – as in inverse condemnation – condemned property immediately vests, courts commonly have no authority to divest the property, and such proceedings should not be barred by res judicata, and further limited to the issue of damages only. *Id.*

Appellate courts considering the application of *res judicata* to condemnation actions have identified changes in facts including a reduction in the property sought, new evidence of intended use, change in ownership, removal of the "private taint", and new evidence of necessity provide basis to avoid application of *res judicata.*

Although under the *Wilkie* case, the facts regarding public use or benefit surrounding the 27 July 2015 inverse taking are not relevant, regardless, the passage of time has changed the facts supporting public use. The Town's underground sewer easement identified in the declaratory judgment in 19-CVS-6295 is a "substantial reduction" from that initially sought in the direct condemnation in 15-CVS-5836.[5] The 10-foot underground easement is also far less intrusive than a 40-foot surface easement. The owner of the Riley's Pond subdivision changed prior to the installation of the sewer line. (R S (I) pp 212-227). The underground sewer easement inversely condemned differs from the easement contemplated in the original condemnation action. Currently, some 50 residential homes receive public sewer service through the sewer line installed under Ms. Rubin's property. (R pp 18-26, ¶16, 35). This change in facts is precisely sort of change in circumstances appellate courts have identified as necessary to avoid application of the doctrine of

[5] In both *City of Chicago v. Midland Smelting Co.*, 385 Ill. App. 3d 945, 960, 896 N.E.2d 364, 379 (2008). and *Oakes*, the property rights sought in the subsequent action was approximately half of that originally sought, with both courts finding this constituted a new fact.

res judicata. If ultimately determined to be relevant by the trial court in spite of the *Wilkie* case (See discussion in Section II, D below), these and other changes in facts that would be presented during the trial court's consideration of the declaratory judgment action would be reviewed by the trial court in a public use or benefit analysis.

For the reasons stated herein, *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).

D. The critical facts affording the basis for dismissal of the original condemnation are not relevant to the existence of the Easement acquired by inverse condemnation

In *Wilkie*, Justice Ervin framed the issue as whether the landowners were entitled to seek compensation under the state's inverse condemnation statutes where the physical invasion of their property by a municipality was for a private purpose. 371 N.C. 540, 809 S.E.2d 853 (2018). Justice Ervin, writing for a unanimous Supreme Court, held that the landowner does have a claim for compensation pursuant to the inverse condemnation statutes. The condemnor in *Wilkie* had raised the lake level flooding and physically invaded landowners' property. The

landowners brought an inverse condemnation lawsuit and also specifically raised certain constitutional claims. At an all other issues hearing, the trial court held that the taking "was for private use", held the landowners' property was taken without just compensation being paid, and that the landowners had proven their inverse condemnation claim. *Id*. at 542. The trial court ordered the case to proceed to the just compensation phase. The condemnor appealed and argued that inverse condemnation does not lie unless the property is taken for a public use or purpose. *Id*. at 542. The Court of Appeals agreed, and reverse the trial court's determination that an inverse condemnation had occurred.

The Supreme Court held that the plain meaning of the reference to entities that have eminent domain power for public use and benefit in N.C. Gen. Stat. § 40A-3(b) and (c) contained in N.C. Gen. Stat. § 40A-51(a) is to specify the entities against whom a statutory inverse condemnation claim can be asserted and nothing more. *Id*. at 548, 809 S.E.2d at 859. The Supreme Court finds that compensation is allowed even if the property could not have been acquired by eminent domain. As a result, the Supreme Court reversed the Court of Appeals' ruling and

specifically held that public use or benefit are not necessary for a landowner to maintain an inverse condemnation claim and seek just compensation. *Id*. Since the public use or benefit determination is not necessary for the analysis of the Town's inverse condemnation, the critical facts affording the basis for dismissal of the direct condemnation in 15-CVS-5836 are not relevant to the existence of the Easement acquired by inverse condemnation. But regardless, the Town's pleading establishes that *res judicata* does not apply and Rubin's Rule 12(b)(6) motion to dismiss was properly denied.

E. No prior condemnation action is pending

A final judgment has been entered in the original condemnation action. All appeals from the final judgment have been exhausted. The Judgment has rendered the complaint and declaration of taking a nullity. As a result, no prior condemnation action is currently pending.

An action is pending for the purpose of abating a subsequent action between the same parties for the same cause from the time of the issuance of the summons until its final determination by judgment. *McDowell v. Blythe Brothers Co.,* 236 N.C. 396, 72 S.E. 2d 860 (1952). A

prior action is no longer pending for purposes of abatement after its determination by final judgment. *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 387 S.E. 2d 168 (1990).

Rubin cites seven cases in her brief in support of her defense of prior pending action. Only one of those cases cited involves a condemnation action. Rubin cites only one case—an unpublished Connecticut trial court opinion regarding child support—to justify her assertion that a prior pending action exists. North Carolina law is to the contrary. *LMSP, LLC v. Town of Boone,* 260 N.C.App. 388, 818 S.E.2d 314 (2018)(a prior action is pending until its final determination by judgment.)

The one condemnation case Rubin cites, *Dep't of Transportation v. Stimpson,* 258 N.C.App. 382, 813 S.E.2d 634 (2018), is inapplicable because no final judgment had been entered in the prior pending inverse condemnation in *Stimpson*. In *Stimpson* the trial court allowed the North Carolina Department of Transportation ("NCDOT") to file its direct condemnation claim as a counterclaim in the pending inverse condemnation action. Rubin admits in paragraph 5 of her Motion to Enforce Judgment in the 2015 case that the Judgment is a final

judgment. Since the Judgment is final, the prior action pending doctrine does not apply to abate the captioned declaratory judgment action.

In addition, this declaratory judgment action regarding the underground sewer line installed on 27 July 2015 is not the same cause litigated in the prior direct condemnation action. Rubin's filing of her Motion to Enforce Judgment in the prior action is a recognition that there is a genuine controversy between the parties relating to the installed sewer pipe. Rubin's post-judgment motion does not change the analysis and does not "reopen" the prior final Judgment. The post-judgment motion filed in the prior direct condemnation action is actually an impermissible motion in the cause which seeks an interpretation of the Judgment. *Home Health and Hospice Care, Inc v. Meyer,* 88 N.C. App. 287, 362 S.E.2d 870 (1987). Such a motion is not a pending action.

In the light most favorable to the Town, a genuine controversy exists between the Town and Rubin as to their respective rights and duties in and to the Easement. The complaint alleges a claim for declaratory relief because there is a genuine controversy between the parties. Therefore a motion to dismiss for failure to state a claim is not

appropriate and should be denied. The asserted defenses of *res judicata* and prior pending action do not arise on the facts pleaded in the complaint as amended. Moreover, the Declaratory Judgment Act affords jurisdiction to adjudicate the rights and duties of the parties in and to the Easement. As such, Judge Collins did not err in denying Rubin's motion to dismiss the complaint and his order should be affirmed.

IV. THE COURT DID NOT ERR IN GRANTING THE TOWN'S MOTION FOR PRELIMINARY INJUNCTION

Rubin did not file a response to the Town's motion for preliminary injunction and did not raise before the trial court the issues she now raises in opposition to the preliminary injunction (Jan 2020 T, p 57:8-14). "[I]ssues and theories of a case not raised below will not be considered on appeal" *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E. 2d 634, 641 (2001). As such, Rubin's arguments against the preliminary injunction must fail, and Judge Collins' preliminary injunction should be affirmed.

Further, Rubin does not contest Findings of Fact 1-29 and thus these findings are binding on appeal. *In re Schiphof, supra.* Rubin does not contest the irreparable harm element of Judge Collins' grant of an

injunction, and focuses solely on the likelihood of success on the merits prong. Regardless, Judge Collins properly issued the preliminary injunction to maintain the *status quo* during the pendency of the action.

N.C. Gen. Stat. § 1-485 provides the following applicable grounds for granting a preliminary injunction:

> (1) to preserve the status quo by restraining the commission or continuation of an act which would produce injury to the plaintiff during the litigation;
>
> (2) to prevent a party from taking some action during the litigation regarding the subject of the action which would render the judgment ineffectual.

"Generally, a preliminary injunction will be issued only where: (1) the plaintiff is able to show a likelihood of success on the merits of the case and (2) the plaintiff is likely to sustain irreparable harm, or, in the opinion of the court, the injunction is necessary to protect the plaintiff's rights during the course of litigation. " *A.E.P. Industries v. McClure,* 308 N.C. 393, 302 S.E.2d 754 (1983). However, where as in the present case, the principal relief sought is an injunction, the North Carolina Supreme Court has consistently held that a preliminary injunction must issue. *Id. a*t N.C. 408. The Supreme Court stated the applicable rule of law as

follows: "We hold that where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no 'legal' (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation." *Id. a*t N.C. 410.

In addition, an injunction will lie to prevent irremediable injury or threatened injury to or destruction of property rights. *Town of Clinton v. Ross,* 226 N.C. 682, 689, 40 S.E.2d 593 (1946).

A. The Town is Likely to Succeed on the Merits of its Claim

The Town's Declaratory Judgment Complaint alleges an actual controversy between parties regarding rights in and to the Easement and sewer line inversely condemned by the Town. By the construction of the sewer line, coupled with the effect of Judge O'Neal's Judgment, the Town physically invaded Rubin's property and inversely condemned a sewer easement on 27 July 2015. Town contends that it has thereby acquired

the Easement and is therefore entitled to maintain the underground sewer line that serves 50 residential homes in place. Rubin asserts that she is entitled to an order requiring the Town to remove the sewer line. Rubin has formally sought such an order by written motion filed on 10 April 2019 in the Town's direct condemnation (15-CVS-5636). Consequently, a genuine controversy exists between the Town and Rubin as to their respective rights and duties in and to the Easement and existing sewer pipe.

The sufficiency of a complaint in a declaratory judgment action is determined by whether or not a plaintiff is entitled to a declaration of rights at all. Even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy, he states a cause of action for a declaratory judgment. *Walker v. City of Charlotte,* 268 N.C. 345, 150 S.E.2d 493 (1966). The Declaratory Judgment Act is available to adjudicate the rights of the parties in the sewer easement and sewer pipe. *Hubbard v. Josey,* 267 N.C. 651, 148 S.E.2d 638 (1966) (judicial declaration of right to easement over lands of defendant authorized by

Declaratory Judgment Act). As such, Judge Collins properly found that the Town is likely to succeed on the merits of its claim.

B. Town is likely to sustain irreparable harm

Removal of the underground sewer line will violate those easement rights obtained on or about 27 July 2015 and result in irreparable harm to the Town because the sewer line currently serves approximately fifty (50) residential homes and/or lots that will lose sewer service. No legal (as opposed to equitable) relief is available to the Town in that money damages are not an available remedy to the Town regarding its sewer easement or sewer line.

C. Issuance of preliminary injunction is necessary for the protection of the Town's rights during the course of the litigation

The uncontested evidence before the trial court establishes that 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 pp 104-111, Concl. of Law ¶ 9). 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 pp 104-111, Concl. of Law ¶ 9). The existing sewer line is the only sewer line or facility touching or connecting the subdivision to Town sewer service. (R pp 104-111, Concl. of Law ¶ 10). There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots. (R pp 104-111, Concl. of Law ¶ 10). [6]

The preliminary injunction was necessary to protect the Town's interest and the homeowners and citizens of the Town living in the Riley's Pond subdivision, maintaining the *status quo*, during the pendency of this action. If the sewer line is removed prior to the adjudication of the Town's easement rights, the Town will be denied the benefit of a favorable adjudication. Moreover, these residents of the Town will be denied sewer service.

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[6] Rubin states that she has been willing to work with the Town on relocation of the sewer line. Actually, she has just wanted it removed from her property and she's advocated locating it on her neighbors' property. Further, the sewer pump station concept that Rubin has advocated for would still have a sewer line crossing this same narrow portion of her property, albeit in a location closer to Olive Chapel Road. (Aug. 2016 T. 53:10-24; Jan 2017 T. 37:8-14).

D. Issuance of a preliminary injunction is appropriate under Supreme Court precedent

A preliminary injunction is necessary to protect the Town and its residents during the course of the litigation. *AEP Industries, Supra* at N.C. 410. The relief sought by the Town is equitable in nature—i.e. an injunction. Denial of a preliminary injunction would effectively foreclose adequate relief to the Town. The decision to grant or deny the preliminary injunction in effect results in a determination on the merits. The Town has made a showing that a preliminary injunction is necessary for the protection of its easement rights during the course of the litigation. *Id.*

Issuance of a preliminary injunction during the pendency of the captioned declaratory judgment action will maintain the *status quo* and protect the rights of the parties. Rubin will suffer no inconvenience from the underground sewer pipe remaining in place during the pendency of the action. The Town's easement rights will be preserved pending the litigation of the parties' rights on the merits.

CONCLUSION

For the reasons stated herein, Apex respectfully requests that the Court of Appeals affirm the order denying Rubin's motion to dismiss and affirm the order granting the Town's motion for preliminary 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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