

NO. COA 20-305

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

**PLAINTIFF-APPELLEE TOWN OF APEX'S RESPONSE TO
BRIEF OF *AMICUS CURIAE***

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**PLAINTIFF-APPELLEE TOWN OF APEX’S RESPONSE TO
BRIEF OF *AMICUS CURIAE***

Plaintiff-Appellee the Town of Apex (“Town”), pursuant to N. C. R. App. P. 28(i)(6), respectfully submits this Brief in response to the *Amicus Curiae* Brief of the North Carolina Advocates for Justice and John Locke Foundation (“Amicus parties”). The arguments contained herein are limited to a concise rebuttal of the arguments presented by the Amicus parties in their *Amicus Curiae* Brief (“Amicus Brief”), filed herein on 1 July 2020.

INTRODUCTION

The Amicus parties ignore the procedure posture of this declaratory judgment action and ignore the actual rulings of Judge O’Neal and Judge Collins. The Amicus parties attempt to prematurely interject a constitutional issue into the Court’s consideration of a Rule 12(b)(6) motion to dismiss, and attempt to lead this Court to address issues that are untimely raised and foreclosed by the landowner’s own conduct and by the procedure posture of the case. In their zeal to have this Court alter and reverse settled North Carolina condemnation law, they advocate for the Court reaching substantive legal issues that do not arise on the pleadings and are not properly before the Court.

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 Amicus parties’ adoption of *res judicata* to support their assertions 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, the Amicus parties’ and 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, the Amicus parties erroneously mischaracterizes the installation of a sewer line as an unconstitutional taking. And such arguments do not support a *res judicata* or prior action pending finding (R pp 40-44). In addition, the Amicus parties’ endorsement of Rubin’s purported constitutional claims should also be rejected because the Town deposited and thereby paid compensation prior to the 27 July 2015 inverse taking. (R pp 12-14).

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 the 2015 original 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 the Amicus parties' arguments that the Town's declaratory judgment action should be dismissed.

FACTS RELEVANT TO THE AMICUS ARGUMENTS

A complete recitation of the facts is contained in the Town's Appellee Brief filed herein. The Town includes herein certain facts relevant to addressing the arguments raised by the Amicus parties.

The Town filed a condemnation action to acquire a 40-foot wide sewer easement across a narrow portion of Rubin's property. Rubin filed an Answer to the Complaint requesting dismissal of the Condemnation Complaint, but did not request injunctive relief.

At an "all other issues" evidentiary hearing, 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," declaring it a nullity (R pp 8-14). 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" and did not hold that title is reverted back to Rubin.

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. (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. During construction, bore pits were dug on each side of Rubin's property on 20 July 2015, the casing was inserted on 27 July 2015, and the sewer line was installed on 29 July 2015. No manholes were dug or are currently on 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-foot 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). 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).

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 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).

Despite the Amicus parties' mischaracterization, 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 but in the brief 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.

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 trial 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).

ARGUMENT

I. AMICUS PARTIES' CONSTITUTIONAL ARGUMENTS DO NOT ARISE ON THE ORDERS ENTERED HEREIN.

The Amicus parties ignore the procedural posture of the 2019 case and the issue raised by Rubin in her motion to dismiss. The critical issue at this point is just whether the Town stated a claim for which relief can be granted under the Declaratory Judgment Act. Based on settled law, they did. 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. As properly alleged 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 on 27 July 2015 constituted a physical invasion of Rubin's property and inverse condemnation of the Easement. 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. *Walker v. City of Charlotte*, 268 N.C. 345, 150 S.E.2d 493 (1966). Further, judicial declaration of plaintiffs' right to an easement over the lands of the defendants is authorized by the Declaratory Judgment Act. *Hubbard v. Josey*, 267 N.C. 651, 148 S.E.2d 638 (1966).

The Amicus parties want the Court to essentially find that Rubin's constitutional rights will be violated if this declaratory judgment action proceeds. This is not the case. First, there has not been an adjudication of the parties' rights in the installed sewer line. 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. 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. N. C. R. Civ. P. 7(b)(1); *In re McKinney*, 158 N.C. App. 441, 581 S.E.2d 793 (2003); N. C. R. Civ. P. 65(d); *Woodlief, Shuford NC Civil Practice and Procedure* § 65:7 (2017). The Judgment in the original condemnation action adjudicates a different easement than is at issue herein. 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.

Since the Town's declaratory judgment action is based on the inversely condemned sewer easement, Rubin has not filed an answer, and the trial court has not addressed the inversely condemned sewer easement on the merits, any reference to Rubin's purported constitutional rights is premature.

Further, the defense of *res judicata* does not implicate any constitutional issue herein. The Amicus parties erroneously assert that the Judgment in 15-CVS-5386 has prospectively permanently established the lack of a public purpose to acquire a sewer easement across Rubin's property. The law, however, is to the contrary. And as more fully argued in the Town's Appellee Brief filed herein, *res judicata* does not apply to bar the Town's declaratory judgment action. *City of Charlotte v. Rouso*, 82 N.C. App. 588, 589, 346 S.E.2d 693, 694 (1986).

Finally, constitutional issues do not arise on the preliminary injunction entered to maintain the *status quo* during the pendency of this action.

II. JUDGE COLLINS' ANALYSIS OF THE INSTALLED SEWER LINE AS AN INVERSE TAKING DOES NOT INVOKE CONSTITUTIONAL ISSUES

Judge Collins properly analyzed the facts and circumstances pled by the Town in the declaratory judgment amended complaint as sufficiently to establish that an inverse condemnation has occurred, including describing the modified underground sewer easement that was taken by inverse condemnation. The Amicus parties ignore the procedural posture that is this ruling on a Rule 12(b)(6) motion to dismiss – not a decision on the merits. If remanded, the inverse condemnation will be analyzed by the trial court – and after a decision on the merits, issues raised by the Amicus parties and Rubin may be proper for review by this Court.

The Amicus parties cite 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 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 and the Town's declaratory judgment action must proceed.

Also, the Town made a just compensation deposit prior to inversely condemning the sewer easement on 27 July 2015. Under *Knick v Twp. of Scott*, the United States Constitution is only triggered if the Town

attempted a taking without paying just compensation. 139 S.Ct. 2162 (2019). The Town did not violate Defendant's Fifth Amendment rights because the Town paid compensation prior to the taking. *Id.* Rubin has not pled any other constitutional right or violation herein.

The Amicus parties allege that the inverse condemnation was not for a public use or benefit. However, this issue does not arise on the pleading herein and the Amicus parties' reliance on this issue is premature and misplaced. Further, 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). It would be upon remand that the trial court would consider whether public use and benefit are relevant considerations under *Wilkie*. The Town certainly believes *Wilkie* stands for the proposition that an inverse condemnation remedy is not dependent upon taking or using for a public use. But regardless, the trial court will determine how to apply *Wilkie* if the case is remanded. For instance, if the trial court determines the public use or benefit must be shown with the inversely condemned sewer easement on 27 July 2015, the trial court can review the facts and circumstances surrounding that

taking. This again is where the cases the Town cites under *res judicata* become relevant.

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, the passage of time, change in ownership, removal of the “private taint”, and new evidence of necessity provide basis to avoid application of *res judicata*. The underground sewer easement inversely condemned by the Town differs from the easement contemplated in the original condemnation action. These considerations and change in facts is precisely sort of change in circumstances appellate courts have identified as necessary to avoid application of the doctrine of *res judicata*.

If ultimately determined to be relevant by the trial court in spite of the *Wilkie* case, the trial court would also consider the analysis as to public use or benefit in the Supreme Court’s opinions in *Carolina Telephone & Telegraph Co v. McLeod*, 321 N.C. 426, 364 S.E.2d 399 (1988)(the provision of service to a single user satisfies the public purpose requirement) and *Charlotte v. Heath*, 226 N.C. 750, 754, 40 S.E.2d 600, 603 (1946)(approved sewer line extended to small group of property

owners), as well as this Court's opinions in *City of Asheville v. Resurgence Develop. Co., LLC*, 230 N.C. App. 80, 84, 748 S.E. 751, 755 (2013) (approved sewer line extension and easement for new development); *Tucker v. Kannapolis*, 159 N.C. App. 174, 179, 582 S.E.2d 697, 700 (2003) (approved extending sewer line to newly annexed property for future residential development owned by one private developer); *Stout v. City of Durham*, 121 N.C. App. 716, 468 S.E.2d 254 (1996) (approved providing sewer to land for private development). And of course, the U.S. Supreme Court has found that the use of eminent domain power for economic development satisfies the public use requirement of the Fifth Amendment. *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005). But regardless, it's premature as the trial court has not reached the issue on the merits, and no constitutional issues are implicated on Judge Collins' orders herein.

Thus, the baseless assertion in the Amicus Brief that the Town violated the Federal and State Constitutions by installing the underground sewer line regarding Judge Collins' orders should be rejected.

III. THE AMICUS PARTIES' POLICY ARGUMENTS MISS THE MARK.

The Amicus parties baselessly assert that affirming the orders appealed herein means that condemnors will employ inverse condemnation as an “end run” around filing direct condemnation actions. Such use of inverse condemnation is impractical, excessively costly and unlikely due to the substantial increase in fees and costs to be incurred by a condemnor in the acquisition of utility easements. Those fees and costs include the attorney’s and expert witness fees of the affected landowner. Such fees and costs will frequently exceed compensation paid for the utility easement acquired. When a condemnor physically invades a landowner’s property not under a condemnation complaint, the landowner has an inverse condemnation claim. The Amicus parties’ position to limit the applicability of and right to bring a claim for inverse condemnation, and seek attorney’s fees, is surprising.

Contrary to the assertions of the Amicus parties, the Town has not filed an inverse condemnation action in the 2019 case. Inverse condemnation is a claim and action available only to Rubin. Given Rubin’s attempts to have the sewer line removed, the Town’s filing of a declaratory judgment action asking the court to declare the parties’

rights in the easement is a legal, acceptable and reasonable way to proceed. Certainly given the reliance on the sewer line of at least 50 residential homes located in the Town, the Town's declaratory judgment lawsuit is the proper way to address the parties' dispute.

No issues have been pled by Rubin or adjudicated in the declaratory judgment action filed by the Town. Consequently, none of the issues argued in the Amicus Brief are properly before this Court. Significantly, the Amicus parties' assertion of a lack of a public purpose for the inverse taking is not plead, and therefore in the current procedural posture of the declaratory judgment action no such issue exists. Judge Collins' orders merely allow the action the action to proceed to hearing on the merits. As such, the declaratory judgment action cannot be fairly characterized as a "second bite at the apple". Further, the declaratory judgment action is about the existence of the sewer line and the resulting inverse condemnation – issues not addressed by Judge O'Neal.

CONCLUSION

For the reasons stated herein and in the Town's Appellee brief filed herein, the Town of 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, counsel for the Appellee certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is less than 3,750 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 parties 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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