

NORTH CAROLINA COURT OF APPEALS

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

CONDITIONAL PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Defendant-Appellant Beverly Rubin respectfully petitions this Court under Appellate Rule 21 to issue a writ of certiorari—if necessary—to review the trial court’s two orders entered on 21 January 2020. (R pp 102-11.)

The parties agree that this Court has appellate jurisdiction over a related appeal, at docket number 20-304. And the primary issues on appeal in this case are identical to the issues in the other case already before this Court. So they should be heard together.

In fact, this Court already has appellate jurisdiction in this case. As explained in Ms. Rubin’s merits briefs and in her opposition to the Town’s motion to dismiss, the appeal of the interlocutory orders in this case is proper because

the trial court's preliminary injunction order and order denying Ms. Rubin's motion to dismiss both affect Ms. Rubin's substantial rights that would be lost without an immediate appeal.

Out of an abundance of caution, however, Ms. Rubin conditionally asks that this Court exercise its supervisory authority and issue a writ of certiorari to review the trial court's orders in this appeal if it believes that appellate jurisdiction is lacking here. Whatever procedural route the Court deems best, Ms. Rubin asks that this Court review and reverse the orders entered below.

PROCEDURAL AND FACTUAL BACKGROUND

Ms. Rubin incorporates by reference the procedural and factual background detailed in her opening merits brief previously filed in this case.

In short, the Town filed a direct condemnation action (the 2015 action) against Ms. Rubin for a sewer easement, and the Town constructed the sewer pipe across Ms. Rubin's land while the case was pending. A final judgment was then entered by the Honorable Elaine M. O'Neal, superior court judge, against the Town, determining that the taking was unconstitutional. After the judgment was upheld on appeal, Ms. Rubin filed a motion with the trial court seeking enforcement of the judgment because the Town had not removed the sewer pipe. The Town responded with a Rule 60 motion, asking for relief from the judgment.

The Town did not stop there but further responded by filing a new lawsuit in the fall of 2019. The Town's 2019 action seeks a declaration that the Town owns a sewer easement across Ms. Rubin's land, despite the prior judgment, and an injunction against Ms. Rubin preventing interference with the easement.

The parties then filed competing motions in the 2019 case. Ms. Rubin filed a motion to dismiss the second lawsuit as duplicative: the prior judgment is *res judicata*, or, the parties' pending post-remand motions meant that the 2019 action should be dismissed under the prior action pending doctrine. Ms. Rubin likewise argued that the legal theories allegedly supporting the 2019 complaint failed to allege a genuine controversy. The Town also moved for a preliminary injunction in the 2019 case, seeking to enjoin Ms. Rubin's interference with the sewer pipe during the litigation.

All four of these pending motions—two in each case—were heard simultaneously by a different trial judge, the Honorable G. Bryan Collins. Judge Collins denied each of Ms. Rubin's motions and granted each of the Town's. Ms. Rubin has appealed both the orders entered in the 2015 case, and the Town agrees that this Court has jurisdiction over those appeals. Ms. Rubin has also appealed both of the orders entered in the 2019 case, but the Town has moved to dismiss the appeal of the orders in the 2019 case for lack of jurisdiction.

REASONS WHY THE WRIT SHOULD ISSUE

As explained in the detailed response to the Town's motion to dismiss and in Ms. Rubin's merits reply brief, this case is properly before the Court, and therefore the Court can review the orders in the 2019 case. Nevertheless, if the Court were to find that these orders are not properly before the Court for any reason, then this case warrants certiorari review to address the errors in the trial court's orders.

This Court can issue the writ of certiorari "in aid of its own jurisdiction or in exercise of its general power to supervise and control the proceedings of any of the other courts of the General Court of Justice." N.C. Gen. Stat. § 7A-32(b); *see also* N.C. Const. art. IV, § 12(1) (providing that the Court "may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts"). The purpose of the writ is to "review and examine into proceedings of lower tribunals and to ascertain their validity and correct errors therein." *Wilson Realty Co. v. City & Cty. Planning Bd.*, 243 N.C. 648, 655, 92 S.E.2d 82, 87 (1956). Procedurally, Appellate Rule 21 permits the Court to issue its writ of certiorari "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals" when, among other reasons, "no right of appeal from an interlocutory order exists." N.C. R. App. P. 21(a)(1).

In deciding to issue the writ, this Court “should turn to the common law to aid in exercising its discretion.” *State v. Ledbetter*, 371 N.C. 192, 196, 814 S.E.2d 39, 42 (2018). Certiorari review is appropriate in a wide variety of circumstances—including to “prevent fragmentary and partial appeals,” *Pelican Watch v. U.S. Fire Ins. Co.*, 323 N.C. 700, 702, 375 S.E.2d 161, 162 (1989), and to review an interlocutory order that is otherwise not appealable, *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). In particular, certiorari is appropriate when “[t]he issue is strictly a legal one and its resolution is not dependent on further factual development.” *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 872 (1983).

Moreover, “the appellate courts of this State in their discretion may review an order of the trial court, not otherwise appealable, when such review will serve the expeditious administration of justice or some other exigent purpose.” *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975). The expeditious administration of justice warrants certiorari review where there are related orders for which appellate review is sought, but only some of the orders are immediately reviewable as of right. *See, e.g., Radcliffe v. Avenel Homeowners Ass’n*, 248 N.C. App. 541, 551, 789 S.E.2d 893, 901-02 (2016) (“However, because of the factually overlapping nature of Plaintiff’s claims, we elect in the interest of judicial economy to exercise [certiorari review over the related orders].”); *State v. Dorman*, 225 N.C. App. 599, 628, 737 S.E.2d 452,

471 (2013); *Jessee v. Jessee*, 212 N.C. App. 426, 431, 713 S.E.2d 28, 33 (2011) (“[G]iven the interrelated nature of Defendants’ twin challenges to the trial court’s order, we conclude that we should exercise [certiorari review].”); *Mkt Am., Inc. v. Lee*, 809 S.E.2d 32, 36 (2017).

In addition to the strength of Ms. Rubin’s arguments showing error committed below—as described in her merits briefs—certiorari review is also appropriate here because the 2015 and 2019 cases are not just interrelated but inextricably linked. Indeed, the Town itself alleged that the jurisdictional basis of this 2019 case rests on the “controversy” created by the parties’ dueling, post-remand motions in the 2015 case, and the complaint *in this case* even incorporated those motions *from the other case* “by reference.” (R p 87.) Moreover, the trial court’s preliminary injunction order *in this case* also relied on the motions *in the 2015 case* to establish a controversy. (R p 107.) And the Town repeats the same point throughout its merits brief in this case. Resp. Br. at 23, 39, 42-43.

Any comparison of the parties’ merits briefs in these two appeals confirms the same point. Large swaths of arguments are repeated verbatim in each of the parties’ appellate briefs. Likewise, much of the language in the trial court’s orders in the 2019 and 2015 cases is identical. At a minimum, each appeal raises the following issues:

- Did the final judgment in the 2015 case require the Town to restore Ms. Rubin's land as it existed before the Town attempted its taking?
- Do the state and federal constitutions require the Town to restore Ms. Rubin's land as it existed before the Town attempted its taking?
- Is just compensation ever an adequate remedy for a taking that lacks a public purpose?
- After the final judgment was entered, was Ms. Rubin free to remove the sewer pipe herself?
- Could the Town "moot" Ms. Rubin's constitutional rights by completing the construction of the sewer line?
- Does an unconstitutional quick-take retroactively become an inverse condemnation to the landowner's detriment?

Because these and other issues are identical between the cases, any resolution of the 2015 case is likely to be dispositive of the 2019 case. Thus, this Court should ensure that like cases are treated alike by reviewing them all at once.

CONCLUSION

For the foregoing reasons, Ms. Rubin respectfully requests that the Court issue its writ of certiorari—if necessary—to review the orders entered by the trial court.

ATTACHMENTS

Copies of the orders to be reviewed have already been submitted to this Court as part of the record on appeal. (R pp 102-11.)

This the 5th day of February, 2021.

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Electronically submitted

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion was served on the opposing party by placing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 5th day of February, 2021, addressed as follows:

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