Nos. COA 20-304, 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.	Case No. COA 20-304 From Wake County 15-CVS-5836
TOWN OF APEX, Plaintiff-Appellee, v. BEVERLY L. RUBIN, Defendant-Appellant.	Case No. COA 20-305 From Wake County 19-CVS-6295

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MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL RESPONSE

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At oral argument in these related cases, the panelists asked Ms. Rubin's counsel to address three cases not cited or discussed in the parties' briefs. Specifically, the panel asked for Ms. Rubin's position on *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986), as well as two cases quoted therein, *Schloss v. State Highway & Public Works Commission*, 230 N.C. 489,

53 S.E.2d 517 (1949), and *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963).

Upon further review of these cases, Ms. Rubin believes a supplemental brief on these cases may assist the Court in deciding this case.

Of course, a party to an appeal has a procedural right to submit a bare citation to additional authority, identifying the issue to which it applies, pursuant to Rule 28(g) of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 28(g). Under the circumstances here, however, such a non-substantive filing would be of no use to the Court. For that reason, Ms. Rubin files this motion, asking for the Court's leave to submit a brief response to the questions raised by the panel. If this motion is granted, Ms. Rubin does not intend to burden the Court with an additional filing, but rather asks that this Court allow the submission below to serve as a brief response to the panel's inquiries.[1]

ARGUMENT

Clark, *Schloss*, and *Shingleton* do not prevent the courts from granting Ms. Rubin relief against the Town of Apex, for several reasons. These cases dealt with the State and its agencies, not municipalities. Further, the cases

[1] The panel has the authority to allow such a supplemental filing, of course. *See* N.C. R. App. P. 2, 37(a); *Piazza v. Kirkbride*, 246 N.C. App. 576, 594–95, 785 S.E.2d 695, 707 (2016) (allowing post-argument motion for leave to file supplemental brief), *aff'd as modified*, 372 N.C. 137, 827 S.E.2d 479 (2019).

speak to *statutory* violations rather than the *constitutional* violations at issue here. Were it otherwise, *Clark* would be irreconcilable with later precedent expressly permitting injunctions against governmental entities. Finally, even if *Clark* could not be distinguished, federal law provides the remedy which Ms. Rubin seeks.

First, *Clark* deals with the scope of sovereign immunity enjoyed by the State and State agencies, not the lesser governmental immunity that applies to municipalities. For towns, it has long been the law that "[t]he court has power to restrain a municipal corporation's threatened wrongful acts." *Hall v. Morganton*, 268 N.C. 599, 601, 151 S.E.2d 201, 202 (1966). Nor has the Town ever argued otherwise—either below or in these appeals. *See Lambert v. Town of Sylva*, 259 N.C. App. 294, 301, 816 S.E.2d 187, 193 (2018) (holding that a municipality must *itself* "raise [the] defense [of governmental immunity] or it is waived; the trial court cannot raise it for the defendant"); N.C. R. App. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

Second, the *Clark* Court considered only torts and violations of statutory authority. The parties had agreed that the taking at issue exceeded the government's "statutory power of eminent domain." *Clark*, 316 N.C. at 485, 342 S.E.2d at 838. *Clark* held that, since the taking was for a private purpose, and

the government lacked *statutory* authority for such takings, there was no claim against the government. The court did not address the constitutional infirmities of the government's conduct.

As this panel noted at oral argument, there is a legal fiction at the heart of *Clark*. *Clark*, following *Schloss* and *Shingleton*, held that government entities are creatures of statute, so they technically lack the power to exceed their statutory authority. *Id.* at 486, 342 S.E.2d at 838 ("[DOT] is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. It can commit no actionable wrong." (quoting *Schloss*, 230 N.C. at 492, 53 S.E.2d at 519)). Thus, when the state does damage to property, the landowner cannot "restrain the commission of a tort" by the government, since the government could not have exceeded its power. *Id.* (quoting *Shingleton*, 260 N.C. at 458, 133 S.E.2d at 188). Instead, the landowner has a remedy against "public officers" and private parties. *Id.*

This case is different. The trial court's final judgment did not find that a tort was committed or that the Town merely violated a statute. Rather, the trial court determined that the Town's quick-take condemnation violated the state and federal constitutions. That difference is dispositive.

When ***constitutional*** violations occur, courts ignore the fiction applied in *Clark*, and they deny the government the shield of sovereign or governmental immunity. Indeed, that is the central teaching of *Corum v. University of*

North Carolina ex rel. Governors, 330 N.C. 761, 413 S.E.2d 276, (1992). *Corum*, which was decided after *Clark*, expressly recognizes that a constitutional claim may proceed ***directly*** against the governmental entity, without naming a public official as the defendant: "[O]ne whose state constitutional rights have been abridged has a *direct claim against the State* under our Constitution." *Corum*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (emphasis added).

When the *Clark* line of cases stated that there could be no claim against the government for statutory violations and torts, it was merely summarizing the law of sovereign immunity.[2] And that reasoning makes sense for tort claims and statutory claims against the State. But there is no immunity against constitutional violations. *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 356 (2009) ("[*Corum*] clearly establish[ed] the principle that sovereign immunity could not operate to bar direct constitutional claims."); *id.* at 339, 678 S.E.2d at 355 ("[W]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." (quoting *Corum*, 330 N.C. at 786, 413 S.E.2d at

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[2] "It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute." *Can Am S., LLC v. State*, 234 N.C. App. 119, 125, 759 S.E.2d 304, 309 (2014) (quoting *Welch Contracting, Inc. v. N.C. Dep't of Transp.,* 175 N.C. App. 45, 51, 622 S.E.2d 691, 695 (2005)).

292)). *Cf. Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App. 401, 418, 808 S.E.2d 488, 501 (2017) ("Furthermore, because Plaintiffs are suing under both the statutory framework of [N.C. Gen. Stat. § 136-111], as well as the constitutional framework of takings, sovereign immunity provides no bar to Plaintiffs' suit against NCDOT.").

Because *Clark*'s fiction does not apply to constitutional violations, courts have repeatedly upheld injunctions against the state and its municipalities when they have violated or threaten to violate the constitution. *See, e.g.*, *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 647-48, 599 S.E.2d 365, 396 (2004) ("[T]his affirms the trial court's ruling that the State must act to correct those deficiencies that were deemed by the trial court as contributing to the State's failure of providing a *Leandro*-comporting educational opportunity."); *Malloy v. Cooper*, 356 N.C. 113, 118, 565 S.E.2d 76, 79 (2002) ("[A]n Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees." (quoting *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957))); *Sneed v. Greensboro City Bd. of Ed.*, 299 N.C. 609, 619, 264 S.E.2d 106, 114 (1980) ("Until the waiver policy is sufficiently revised, however, the injunction prohibiting defendants from charging or collecting fees should remain in effect."). *Cf. Goldston v. State*, 361 N.C. 26, 32, 637 S.E.2d

876, 880 (2006) ("A taxpayer's right to seek equitable relief to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.,—is well settled.").

These cases give effect to the promise in our constitution that "every person for an injury done him in his lands . . . shall have a remedy." N.C. Const. art. I, § 18; *see also Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 618, 89 S.E.2d 290, 296 (1955) ("When the provision of a Constitution . . . points out no remedy, and no statute affords one, for the invasion of the right of property thus secured, the provision is self-executing, and the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." (internal quotations omitted)). Ms. Rubin has patiently awaited the fulfillment of that promise.

Ultimately, this case presents an issue that has not been well addressed by the courts because it was thought to be unthinkable: what is the remedy for an unconstitutional taking when a municipality refuses to restore private property to its original condition? In fact, there are many acceptable answers to that question. The courts have a toolbox full of ways to compel compliance

from a lawless municipality. Whether the court labels the remedy as an injunction, an ejectment, a writ of mandamus, or otherwise, the end result should be the same: the Town must be ordered to end its occupation of Ms. Rubin's property.

And if our state constitution is deemed too weak to protect the rule of law, then the Court should turn to federal law for the right remedy. The Town's continued silence about the outcome under federal law is a concession that this door remains open. The trial court erred, at a minimum, for ignoring that door altogether.

Finally, the panel also asked whether courts have endorsed the issuance of injunctive relief requiring the government to take affirmative action to undo a failed taking. Ms. Rubin directs the Court to two cases cited in her appellant's brief, *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985), abrogation on other grounds recognized by *Tucker v. City of Kannapolis*, 582 S.E.2d 697, 159 N.C. App. 174 (2003) and *In re Rapp*, 621 N.W.2d 781, 784 (Minn. Ct. App. 2001). Other cases have acknowledged the same principle. *See, e.g.*, *Honolulu Mem'l Park, Inc. v. City & Cty. of Honolulu*, 436 P.2d 207, 210-11 (Haw. 1967) ("Under these circumstances, ejectment is the proper remedy for restoration to the appellee of that part of its premises from which it has been ousted, notwithstanding the power of eminent domain vested in the [municipality]."); *Gulf Lines Connecting R.R. of Ill. v. Golconda N. Ry.*, 125 N.E.

357, 360 (Ill. 1919) ("When an illegal entry upon private land under color of the power of eminent domain is attempted, it will be restrained by a court of equity without regard to the usual conditions for the exercise of equitable jurisdiction."); *see also* Doc. Ex. (COA20-304) 22-25 (collecting authorities).

This the 5th day of March, 2021.

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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 post-age-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 5th day of March, 2021, addressed as follows:

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