NO. COA 20-304 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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

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PLAINTIFF-APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL RESPONSE

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NOW COMES Plaintiff-Appellee Town of Apex ("Town"), by and through counsel, and respectfully submits this response to the Motion for Leave to Submit Supplemental Response filed herein by the Defendant-Appellant Beverly L. Rubin ("Rubin") on 5 March 2021. The motion contains the brief Rubin is asking the Court to suspend the rules to allow her to file. Further, Rubin used the motion/brief to reargue and further respond to other issues from the oral argument – attempting to have another bite at the apple. This leaves the Town in the position of having to respond to the brief and these additional arguments. Therefore, the

Town requests the Court consider this response in its consideration of Rubin's appeals herein.

I. Rubin's U.S. and N.C. constitutional claims have already been addressed by the trial court/Judge O'Neal.

In trying to distinguish *Clark v. Asheville Contracting Co., Inc.*, 316 N.C. 475, 342 S.E.2d 832 (1986), Rubin misstates the status of her U.S. and N.C. constitutional claims and how they were addressed by the trial court. The constitutional issues in the 2015 case were raised and decided therein. Rubin raised U.S. and N. C. constitutional claims in her answer in the 2015 case, asking the trial court to protect her U.S. and N.C. constitutional rights in the trial court's judgment. (R. p. 20)("…Further, it is specifically admitted that the Town of Apex does not have the right to take any property interest of Beverly L. Rubin under the General Statutes in North Carolina and the North Carolina Constitution and Unites States Constitution…"). When Rubin filed a notice and requested a N.C. Gen. Stat. § 136-108 hearing to determine all issues except just compensation, she specifically placed the U.S. and N.C. constitutions and her claims thereunder before Judge O'Neal at the Section 108 hearing.

(R. p. 25).[1] Judge O'Neal chose to rule with Rubin and protect her U.S. and N.C. constitutional rights by dismissing the Town's condemnation claim as null and void and awarded damages in the form of attorney's fees and costs (consistent with Rubin's claim to the Town prior to filing her answer that she would seek "damages" if the Town proceeded with construction within the easement (R. p. 24)). Judge O'Neal specifically cited the U.S. and N.C. constitutions and Rubin's rights thereunder in ruling for Rubin (R. pp. 33-39, Finding of Fact 3, Conclusion of Law 5).

Rubin has already had her U.S. and N.C. constitutional rights addressed and protected by the trial court – through dismissal and damages in the form of attorney's fees. Rubin got exactly what she asked for in asserting constitutional rights (after all, Rubin's attorneys drafted Judge O'Neal's Judgement). In fact, Rubin was so focused on damages as her remedy that she even included two separate paragraphs in the Judgment about the award of attorney's fees (R. p. 38, ¶¶ 3, 4). Judge

[1] At the time Rubin filed this motion, she had actual notice that the sewer line had been installed on her property approximately 9 months earlier. Rule 15(a) and (d) of the Rules of Civil Procedure and N.C. Gen. Stat. § 136-108 gave Rubin an avenue to address the sewer line's installation before Judge O'Neal.

O'Neal chose not to protect Rubin's U.S. and N.C. constitutional rights by granting a permanent injunction, granting revesting of the property, or ordering that the property be free and clear of a sewer pipe. Since Rubin did not ask for any relief other than dismissal and damages to protect her constitutional rights, Judge O'Neal did not award any other relief. (R. pp. 33-39)

Rubin did not ask Judge O'Neal to clarify her judgment, reconsider the relief ordered, and did not appeal the O'Neal Judgment. Judge Collins essentially affirmed Judge O'Neal's method for protecting Rubin's U.S. and N.C. constitutional rights – and properly refused to exercise his discretion to order a new extraordinary equitable injunctive remedy that Judge O'Neal did not order. The trial court has already "fashioned a remedy" for Rubin's U.S. and N.C. constitutional claims. Rubin cannot now before the Court of Appeals, or before Judge Collins for that matter, argue that the remedies ordered by Judge O'Neal to protect her constitutional rights are not sufficient – Rubin does not get a second bite

at the apple on the remedy chosen to protect her U.S. and N.C constitutional rights.[2]

II. Rubin cannot assert a *Corum* Claim – and *Corum* would not automatically result in the trial court ordering injunctive relief.

Rubin's argument that the O'Neal Judgment is self-executing and does not need to be interpreted in order for Judge Collins or this Court to order an injunction should be rejected. Rubin has no right to an injunction under the O'Neal Judgment in the 2015 case. Even the primary case Rubin points to in her motion/brief, *Corum v. University of North Carolina Through Bd. of Governors*, 330 N.C. 761, 413 S.E.2d 276 (1992), rejects this position. *Corum* does not provide Rubin any relief herein.

First, Rubin did not raise *Corum* or make a *Corum* claim or claim for a common law remedy before Judge O'Neal or Judge Collins. (Aug. 2016 T pp 1-110, Jan. 2017 T pp1-89, May 2019 T pp 1-84, and Jan. 2020

[2] Judge Collins' ruling is consistent with this Court's opinion in *City of Wilson v. Batten Family LLC*, 226 N.C. App 434, 740 S.E.2d 487 (2013). Rubin must raise and resolve ***any and all issues*** other than just compensation at a Section 108 hearing. Rubin knew of the sewer line's existence and was required to bring any issue she had with the sewer line's installation and existence on her property before the Court.

T pp 1-126). As such, Rubin cannot raise or advance a *Corum* claim on appeal as a basis to review Judge Collins' orders or as a basis for this Court to order an injunction. "A contention not raised in the trial court may not be raised for the first time on appeal." *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 160, 394 S.E.2d 698, 700 (1990) (Chapter 40A condemnation case); N.C. R. App. P. 10(a)(1); See also *State v. Roache,* 358 N.C. 243, 291, 595 S.E.2d 381, 412 (2004)("Constitutional arguments not raised at trial are not preserved for appellate review." (citing *State v. Call,* 349 N.C. 382, 410, 508 S.E.2d 496, 514 (1998)).

Second, Rubin cites no case where the Court applied or recognized a *Corum*/common law remedy claim in a Chapter 136 condemnation action to grant permanent injunctive relief. In *Sale v. State Highway & Public Works Comm.*, the Supreme Court used a *Corum*-type/common law remedy claim to allow the landowner to file an action ***"at law" to recover for damages*** for the failure of the State Highway Commission to perform certain obligations it contracted to do as a part of its right of way consideration/acquisition – related to several buildings on the property. 242 N.C. 612, 620-621, 89 S.E.2d 290, 297-298 (1955). But

Rubin cites no North Carolina authority to support her position – and certainly no case where an appellate court has come in after final judgment and awarded a different remedy than the remedy ordered by the trial judge, when the movant did not ask for such relief before final judgment.

Third, even if a *Corum* claim were available here, it would not automatically result in the trial court ordering permanent injunctive relief. In *Corum*, where the plaintiff asserted U.S. and N.C. constitutionally protected free speech rights in the face of an employment termination, the plaintiff sought preliminary and permanent injunctive relief, other equitable relief (reinstatement), and monetary damages. *Id*. at 769, 413 S.E.2d at 282.[3] The *Corum* court recognized that "***it's only in the absence of a state remedy*** that one who claims their state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* [Emphasis supplied]. Again, Rubin did not argue to Judge O'Neal, or Judge Collins for that matter, that she does

[3] Unlike Rubin, the plaintiff in *Corum* pled preliminary and permanent injunctive relief and therefore the trial court addressed this relief.

not have a state statutory remedy. She cannot now argue the remedies of Chapter 136 – ordered by Judge O'Neal – are inadequate. *Town of Chapel Hill v. Burchette*, at 160, 394 S.E.2d at 700. In fact, dismissal of the condemnation claim and damages are the very remedies that Rubin asked for.

The Supreme Court in *Corum* rejects Rubin's argument that an injunction or revesting of title free and clear of a sewer line is "self executing" or would flow automatically from the dismissal of the condemnation claim and complaint in Judge O'Neal Judgment or from a *Corum* claim. The only self-executing right a landowner has is just compensation under N.C. Gen. Stat. § 136-104. In discussing what remedy the common law would provide to protect constitutional rights, the *Corum* Court stated:

> "What that remedy will require, if plaintiff is successful at trial, will depend on the facts of the case…It will be a matter for the trial judge to craft the necessary relief….such redress ***could*** consist of, *inter alia*, reinstatement to his prior status or a comparable status, with or without loss of wages. Various rights that are protected by our Declaration of Rights ***may require greater or lesser relief*** to rectify the violation of such rights, depending on the right violated ***and the facts of the particular case***." [Emphasis supplied].

Id. at 784, 413 S.E.2d at 290-291.

The *Corum* Court also states that if a trial court is going to craft a common law remedy, it must "recognize two critical limitations":

> "First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of it inherent constitutional power."
>
> "Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government – in appearance of fact – by seeking the least intrusive remedy available and necessary to right the wrong."

Id., citing *In re Alamance County Court Facilities*, 329 N.C. 84, 100-101, 405 S.E.2d 125, 133 (1991).

Rubin raised her U.S. and N.C. constitutional rights before Judge O'Neal, and Judge O'Neal protected them by ordering the condemnation claim dismissed and awarding damages in the form of attorney's fees and costs. If Rubin had argued to Judge O'Neal that no state statutory remedy existed (which she didn't) and asked Judge O'Neal to order permanent injunctive relief as a common law remedy (which she didn't), Judge O'Neal would have first determined if statutory remedies existed, then gone through the analysis in *Corum* applying the two limitations discussed above, and likely would have reached the same conclusion and remedies as ordered herein. There is no case recognizing a common law

right of injunction against a condemnor to remove utilities or facilities. No remedy is automatic, predetermined or presupposed under *Corum*, the U.S. and N.C. constitutions, or under the common law – it is a trial court decision and a discretionary one at that.

Further, the Supreme Court in *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018) reversed the Court of Appeals for ordering on remand a *Corum* claim/common law remedy claim in a case involving a taking by a condemnor not for a public purpose. Justice Ervin writing for unanimous Supreme Court rejected a *Corum* type/common law remedy claim (which was raised by the landowner before the trial court – unlike here) to address a physical invasion / taking by a condemnor that lacked a public purpose. Justice Ervin held that the statutory inverse condemnation remedy is the proper remedy – N.C. Gen. Stat. § 40A-42 (the equivalent of N.C. Gen. Stat. § 136-111) – which allowed for the payment of just compensation.

But we have digressed into a hypothetical discussion. Since Rubin did not raise *Corum* or make a *Corum* claim or claim for a common law remedy before Judge O'Neal or Judge Collins, Rubin cannot raise or

advance a *Corum*/common law remedy claim on appeal as a basis to review Judge Collins' orders or as a basis for this Court to order an injunction. *Town of Chapel Hill v. Burchette*, at 160, 394 S.E.2d at 700.

III. *Clark* and *Schloss* provide this Court separate and parallel support for Judge Collins' Orders.

Clark and *Schloss v. State Highway & Public Works Commission,* 230 N.C. 489, 53 S.E.2d 517 (1949) provide this Court separate and parallel support for Judge Collins' Orders. Although Rubin argues *Clark* does not apply to municipalities, in this case the Town proceeded under Chapter 136 and has the same rights and authority as the North Carolina Department of Transportation ("NCDOT"). Rubin argues neither case addresses constitutional rights, but *Schloss* does – the *Schloss* plaintiff claimed the defendant's ordinance is "the taking of property without due process of law" – a constitutional claim. *Id.* at 491, 53 S.E.2d at 517. In both *Clark* and *Schloss*, the plaintiffs requested permanent injunctive relief – so the trial court addressed (but rejected) it.[4] Also, *Clark*

[4] Again, this is consistent with the numerous cases cited by Rubin and the Town in this case – the landowners who want the remedy of injunctive relief when they challenge the right to take actually plead preliminary and permanent injunctive relief and therefore the trial court addressed this relief. Rubin did not do so in this case.

recognized that if the trial court were to order injunctive relief [against a private party/contractor], the court "must consider the relative convenience-inconvenience and the comparative injuries to the parties...some findings of fact should be made in this regard before ordering the removal of material." *Id*. at 488, 42 S.E.2d at 839. Judge O'Neal did not order injunctive relief in the protection of Rubin's constitutional rights, which is why she did not make findings regarding injunctive relief.

Further, eminent domain is an inherent power of the government and does not arise on the constitution. The sovereign immunity concepts addressed in *Clark* and *Schloss* were recently discussed and supported by this Court in the Chapter 136 condemnation case of *Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App. 401, 808 S.E.2d 488 (2017), cited by Rubin in her motion/brief. In *Beroth Oil*, this Court noted the following about the waiver of sovereign immunity in Chapter 136 condemnation cases:

> "Because the General Assembly has established the statutory framework conferring rights to landowners when the State has exercised its eminent domain power, the State has implicitly waived sovereign immunity to the extent of the rights afforded in

> Chapter 136 of our General Statutes. Ferrell [v. Department of Transp.], 334 N.C. 650, 655, 435 S.E.2d 309, 313 (1993) Therefore, to the extent the plaintiffs *sub judice* are within this framework through which the State pays just compensation for a taking, sovereign immunity is waived."

Id. at 415-416, 808 S.E.2d at 499.

Clark, *Schloss* and *Beroth Oil* all provide independent support for Judge Collins' orders herein. But the Court does not have to resolve all the nuances between sovereign immunity and Chapter 136 condemnations in this appeal – that could have been a question for Judge O'Neal had Rubin raised it or for this Court had Rubin appealed Judge O'Neal's Judgment – but she did neither.

IV. Judge Collins' Orders should be affirmed.

The grounds Rubin raised to support her requested relief before Judge Collins, writ of mandamus, inherent authority, and N.C. Gen. Stat. § 136-114, are discretionary determinations for the trial judge. Judge Collins did not abuse his discretion in refusing to grant permanent injunctive relief, a remedy that Judge O'Neal did not order and a remedy Rubin did not raise until 3 ¾ years after the sewer line was installed. Judge Collins raised several independent grounds to support his decision

not to exercise discretion and grant Rubin an extraordinary equitable remedy, any one of which individually supports his discretionary decisions. Further, Judge Collins properly granted the Town's motion for relief from judgment – to provide prospective relief to the Town from Rubin's attempt to use the Judge O'Neal Judgment to advance her permanent injunction and self-help arguments.[5]

We recognize that the facts herein are unique – specifically because the way the landowner chose to plead and request relief herein. As is evident from the numerous reported cases cited by Rubin and the Town, every other landowner that challenged the right to take pled injunctive relief and moved for the trial court to address it – so the trial court addressed it. And in many cases, the landowner also moved for the Court to order revesting, taking the property free and clear of any encroachments, and other similar relief. All of which would impact how a condemnor proceeds. Rubin did not request this relief.

[5] Rubin mischaracterized Judge Collins discussion of mootness at oral argument. Judge Collins discussion of mootness was in the context of his consideration of the Town's motion for relief from judgment and the prospective application of the O'Neal Judgment **not** his denial of Rubin's motion to enforce judgment. (R. pp 162-168; 155-161).

Judge Collins crafted a remedy for Rubin in his orders through his analysis of the *Wilkie* case, application of settled North Carolina law that a physical invasion by a condemnor is a taking, and that Rubin would be entitled to just compensation under Chapter 136 and the *Wilkie* case. Rubin does not have a self-help remedy – for N.C. Gen. Stat. § 136-111 does not recognize a self-help right for a landowner against a physical invasion by a condemnor. Rubin continues to ignore that she has a statutory remedy of just compensation for the inverse taking resulting from the installation of the sewer line. But the remedy exists nonetheless.

Affirming Judge Collins' orders will not change how condemnors approach condemnations – condemnor-initiated condemnation actions will still be brought with the intent that they serve the public use and benefit. Affirming Judge Collins' orders will not overturn constitutional protections for landowners in condemnation cases. Judge O'Neal had already "fashioned a remedy" for Rubin's U.S. and N.C. constitutional claims, remedies Rubin requested. Judge Collins recognized that and ruled consistent with Judge O'Neal's Judgment, and refused to order an extraordinary equitable permanent injunctive remedy after final

judgment that Judge O'Neal did not order. Judge Collins did not abuse his discretion and his orders should be affirmed.

V. Conclusion

Accordingly, the Town respectfully requests the Court affirm Judge Collins' Orders entered herein.

Respectfully submitted, this the 15th day of March 2021.

/s/ David P. Ferrell
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **PLAINTIFF-APPELLEE'S RESPONSE TO APPELLANT'S MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL RESPONSE** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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This the 15th day of March, 2020.

/s David P. Ferrell
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