No. COA 22-440 TWELTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

WILLIAM T. SANDERS, Plaintiff – Appellant / Cross-Appellee, v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Defendant – Appellee / Cross-Appellant,	)	From: Cumberland County Case No. 18CVS7897

****

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE BY INTERNATIONAL RIGHT OF WAY ASSOCIATION

****

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS: International Right of Way Association respectfully moves the Court, pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, for leave to file the accompanying brief as amicus curiae in support of the Defendant-Appellee / Cross-Appellant North Carolina Department of Transportation.

Both the motion and the brief are being filed within the time limits allowed for the Defendant-Appellee / Cross-Appellant to file its brief.

In support of its motion, amicus curiae shows the Court the following:

1. Nature of Interest of Amicus Curiae: International Right of Way Association (hereinafter "IRWA") is a non-profit, tax-exempt organization under 501(c)(6) of the Internal Revenue Code. IRWA was established in 1934 as a not-for-profit association and has over 7,000 member right-of-way professionals across 15 countries. Right-of-way professionals are individuals who work to develop and construct infrastructure projects such as acquisition agents, project managers, attorneys, engineers, surveyors, appraisers, and relocation agents. IRWA's purpose is to improve people's quality of life through infrastructure development. Recognized as a leading education provider in the industry, IRWA achieves its purpose primarily by educating right-of-way professionals in ethics and best practices so that infrastructure projects are developed ethically and efficiently. IRWA members dedicate themselves to a course of conduct which manifests respect, confidence,

and trust on the part of the general public and all parties in the right-of-way process.

Those interests are served where the process is clear and understandable to all involved. The process is clear and understandable where the condemnation case between a landowner and the condemning authority for a particular project serves as a complete and final vehicle for the disposition of any and all claims between the parties for that project. Plaintiff's claim imperils that concept and the finality of judgments, as they now seek to relitigate claims which were compensated by a consent judgment in Cumberland County Case No. 10 CVS 6982 (the "2011 Consent Judgment"). Budgets are critically important to right-of-way projects, and all of the stakeholders in right-of-way projects need to know, that when the condemnation case between the landowner and the condemning authority for the project is settled, they can rely on that settlement as having disposed of all claims between the parties existing up to that point.

2. Reasons Why the Brief is Desirable: IRWA's members are involved in right-of-way projects across the country and around the world. IRWA's brief attempts to assist the Court by sharing perspective

on the issues of law involved from an entity made up of right-of-way professionals who deal with settling such claims as a core part of their profession. IRWA is uniquely qualified to assert arguments in this matter given that its membership are professionals who deal with identifying who can make condemnation claims, and the settlement of condemnation claims, on a daily basis across the United States and around the world. Given the far-reaching consequences this case could have on infrastructure projects, this Court should hear from the organization of professionals whose mission it is to improve people's quality of life through infrastructure development.

3. Issues of Law to be Addressed: IRWA's proposed brief explores the law of res judicata as it applies to consent judgments, and the *in rem* nature of the claim and the Plaintiff's lack of standing stemming therefrom.

4. IRWA's Position on Those Issues: The Court should rule that the Consent Judgment and res judicata bar Plaintiff's inverse condemnation claim, and, if it reaches the issue, that Plaintiff has no standing to bring any claim regarding property which he does not own.

For these reasons, amicus curiae respectfully request that the Court allow this motion for leave and accept for filing the accompanying amicus brief.

Respectfully submitted, this the 1st day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE BY INTERNATIONAL RIGHT OF WAY ASSOCIATION on counsel for the parties by depositing a copy, contained in a first-class postage paid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, priority delivery, addressed as follows:

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BRIEF OF AMICUS CURIAE INTERNATIONAL RIGHT OF WAY ASSOCIATION[1]

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[1] No person or entity other than the amicus curiae and its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

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BRIEF OF AMICUS CURIAE
INTERNATIONAL RIGHT OF WAY ASSOCIATION

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STATEMENT OF FACTS

The Statement of the Facts set forth in the North Carolina Department of Transportation's Defendant-Appellee/Cross-Appellant Brief is incorporated herein by this reference. However, the primary facts are that NCDOT already filed a Complaint and Declaration of Taking with regard to the subject property, and that Plaintiff and NCDOT

entered into a consent judgment (hereinafter "the 2011 Consent Judgment") in which Plaintiff agreed, in pertinent part, that "the sum of FIFTEEN MILLION EIGHT HUNDRED THOUSAND ($15,800,000.00) DOLLARS … is just compensation pursuant to Article 9, Chapter 136, of the North Carolina General Statutes … for any and all damages caused by the acquisition for the construction of Transportation Project I.D.# 34817.2.8 (U-2519CB), Cumberland County; and for the past and future use thereof by the Department of Transportation, its successors and assigns, for all purposes for which the Department of Transportation is authorized by law to subject the same." In the case at bar Plaintiff now attempts to recover additional damages arising out of the filing of the 1992 and 2006 Map Act corridor maps, which Plaintiff admits in the Complaint were recorded pursuant to the same project referenced in the 2011 Consent Judgment.

INTEREST OF AMICUS CURIAE

The International Right of Way Association (hereinafter "IRWA") is a global, member-led organization of dedicated professionals within the right-of-way industry. Right-of-way professionals are individuals who work to develop and construct infrastructure projects such as acquisition

agents, project managers, attorneys, engineers, surveyors, appraisers, and relocation agents. IRWA was established in 1934 as a not-for-profit association. IRWA is a non-profit, tax-exempt organization under 501(c)(6) of the Internal Revenue Code. IRWA's purpose is to improve people's quality of life through infrastructure development. Recognized as a leading education provider in the industry, IRWA achieves its purpose primarily by educating right-of-way professionals in ethics and best practices so that infrastructure projects are developed ethically and efficiently. IRWA members dedicate themselves to a course of conduct which manifests respect, confidence, and trust on the part of the general public and all parties in the right-of-way process.

Those interests are served where the condemnation case between a landowner and the condemning authority for a particular project serves as a complete and final vehicle for the disposition of any and all claims between the parties for that project. Plaintiff's claim imperils that concept and the finality of judgments, as they now seek to relitigate claims which were compensated in the 2011 Consent Judgment. Budgets are critically important to right-of-way projects, and all of the stakeholders in right-of-way projects need to know that when the

condemnation case between the landowner and the condemning authority for the project is settled, that they can rely on that settlement as having disposed of all claims between the parties existing up to that point.

Although the 2011 Consent Judgment disposes of this matter, if the Court were to reach this further point, the case at bar also offers an opportunity to clarify whether the claim to just compensation in an inverse condemnation action in North Carolina conveys with the subject property or not, and thus whether someone must own the subject property at the time they file suit in order to maintain an action for inverse condemnation in North Carolina.

ARGUMENT

This Court should dismiss Plaintiff's claim as a matter of law because it is barred by the 2011 Consent Judgment and the doctrine of res judicata. Furthermore, Plaintiff lacks standing to bring an inverse condemnation claim for land he no longer owns.

I. PLAINTIFF'S INVERSE CONDEMNATION CLAIM IS BARRED BY THE 2011 CONSENT JUDGMENT AND RES JUDICATA.

There is no question that this case involves the same parties, the same tract of property, and the same claim, i.e., just compensation for the acquisition for the construction of the same project, as the condemnation case which resulted in the 2011 Consent Judgment. Res judicata precludes relitigating a prior final judgment involving the same issues and parties. *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 84, 398 S.E.2d 628, 631 (1990), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991). "The purpose of the doctrine of res judicata is to protect litigants from the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 417, 442 S.E.2d 94, 97 (1994); *see ACC Constr. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 261-62, 769 S.E.2d 200, 207 (2015) ("[T]he doctrine of res judicata works in conjunction with other legal and equitable doctrines that preserve the integrity and finality of judgments by prohibiting collateral attacks . . . ." (*citing, e.g., State v. Cortez*, 229 N.C. App. 247, 263, 747 S.E.2d 346, 358 (2013).

Consent judgments are entitled to res judicata effect. *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 105-06, 258 S.E.2d 379, 387

(1979), *cert. denied*, 299 N.C. 120, 261 S.E.2d 923 (1980). North Carolina courts apply contract law interpretive principles to the interpretation of consent judgments. "A consent judgment is the contract of the parties entered upon the record with the sanction of the court." *Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 334, 564 S.E.2d 259, 265 (2002). "A consent judgment is a court-approved contract subject to the rules of contract interpretation. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (internal citations omitted). Thus, a court first looks to the plain language of the consent judgment. *See Minor v. Minor*, 70 N.C. App. 76, 79, 318 S.E.2d 865, 867 (1984), *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984) ("Where the language of the contract is plain and unambiguous, the construction of the agreement is a matter of law . . . ."). Parol evidence as to the parties' intent will not be considered by the court where the language is unambiguous. *First-Citizens Bank & Trust Co. v. 4325 Park Rd. Assocs.*, 133 N.C. App. 153, 156, 515 S.E.2d 51, 54 (1999), *disc. review denied*, 350 N.C. 829, 539 S.E.2d 284 (1999).

The 2011 Consent Judgment states that the payment of the settlement funds by NCDOT was, in pertinent part, "just compensation pursuant to Article 9, Chapter 136, of the North Carolina General Statutes … for any and all damages caused by the acquisition for the construction of Transportation Project I.D.# 34817.2.8 (U-2519CB), Cumberland County; and for the past and future use thereof by the Department of Transportation, its successors and assigns, for all purposes for which the Department of Transportation is authorized by law to subject the same." That language is not ambiguous. *See Walton*, 342 N.C. at 881-82 ("Parties can differ as to the interpretation of language without its being ambiguous, and we find no ambiguity here."). Courts construe such language consistent with its plain-language meaning. *Fin. Servs. Of Raleigh, Inc. v. Barefoot*, 163 N.C. App. 387, 395, 594 S.E.2d 37, 43 (2004); *Cleveland Constr., Inc. v. Ellis-Don Constr., Inc.*, 210 N.C. App. 522, 535, 709 S.E.2d 512, 523 (2011) ("Consistent with the order's plain language, we believe that 'all claims' means precisely that: 'all claims.'"); *Battle v. Clanton*, 27 N.C. App. 616, 621, 220 S.E.2d 97, 101 (1975) ("We hold that the subject release, by its express terms, provided for the discharge and release of all other tortfeasors from all

other claims resulting from the subject release[.]"). Courts have interpreted such language broadly and have found that even claims that were not mentioned in the settlement agreement – and claims that the parties were not aware of at the time – were covered, for example, as follows:

> It is immaterial that neither the Release nor the Mediation Settlement Agreement specifically mentions the claim at issue in this case or that the possible existence of this claim never arose during the mediation. As our Supreme Court has held: "[t]he language in a release may be broad enough to cover all demands and rights to demand or possible causes of action, a complete discharge of liability from one to another, whether or not the various demands or claims have been discussed or mentioned, and whether or not the possible claims are all known."

Weaver v. St. Joseph of the Pines, Inc., 187 N.C. App. 198, 208-09, 652 S.E.2d 701, 709-10 (2007) (quoting *Merrimon v. Postal Telegraph-Cable Co.*, 207 N.C. 101, 105-06, 176 S.E. 246, 248 (1934)). The language of the 2011 Consent Judgment is sufficiently broad to discharge NCDOT from liability for any damages arising from the acquisition for the project on the subject property. *See Weaver*, 187 N.C. App. at 208-09; *Merrimon*, 207 N.C. at 105-06. In this case, the facts underlying the current negative easement claims were already in existence and the claims were known at the time of the settlement negotiations that led to the consent judgment.

This further supports the argument that the present claims are barred by the general language in the consent judgment, which specifically covers past use of the property by NCDOT.

Even if this honorable Court were to find that the negative easements were not within the scope of the 2011 Consent Judgment, Plaintiff's current cause of action nonetheless remains barred because res judicata bars not only the claims pleaded in the prior action, but also those claims that could, might, or should have been pleaded. *See Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 84, 398 S.E.2d 628, 631 (1990), *disc. review denied*, 328 N.C. 570, 403 S.E.2d 509 (1991). "Strict identity of issues, however, is not absolutely required and the doctrine of res judicata has been accordingly expanded to apply to those issues which could have been raised in the prior action, but were not." *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712, 306 S.E.2d 513, 515 (1983). Res judicata also extends to matters "which in the exercise of due diligence could have been presented for determination in the prior action." *Gaither Corp. v. Skinner*, 241 N.C. 532, 535-36, 85 S.E.2d 909, 911 (1955).

The general rule is that all of a party's damages from a single occurrence must be recovered in one action. *Chrisalis Properties, Inc.*, 101 N.C. App. at 88. In *Chrisalis*, the defendant failed to pay rent to the plaintiff, and so the plaintiff initiated a summary ejection action. *Id.* at 82. The magistrate ruled in the plaintiff's favor and awarded the plaintiff costs to re-lease the property. *Id.* Later, the plaintiff initiated a second action seeking damages for unpaid rent, taxes, and maintenance fees. *Id.* at 83. Even though there was a state statute allowing lessors to bring separate actions to recover possession and past-due money under the lease, the court found that res judicata prevented the plaintiff from bringing the second action. *Id.* at 84-88. The court held that "the damages for future rents would have been ascertainable at the time of the summary ejectment proceeding and the claim should have been raised at that time." *Id.* at 88. Plaintiff's present claim is analogous. Plaintiff seeks compensation for the acquisition of his property for the construction of the exact same project which was the subject of the case which gave rise to the 2011 Consent Judgment. It is the same subject tract regardless, and the facts underlying the present claim were ascertainable and known at the time of the settlement negotiations. *See id.* Thus, even if Plaintiff's

claim were not covered by and compensated in the 2011 Consent Judgment – which it was – his claim is still barred by the doctrine of res judicata because Plaintiff should have raised this claim in the previous case. *See id.* [2]

II. PLAINTIFF LACKS STANDING TO BRING AN INVERSE CONDEMNATION ACTION FOR LAND WHICH PLAINTIFF NO LONGER OWNS.

Although the res judicata argument above bars the entire case, if the Court were to reach this issue, Plaintiff's claim must fail for lack of standing as to those portions of the subject property which he no longer owns.

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[2] *See also Claud-Chambers v. City of W. Haven*, 79 Conn. App. 475 (2003) ("In the present case, the plaintiffs received just compensation through the condemnation proceedings and chose not to challenge the value assigned to the property during those proceedings. Furthermore, they failed to challenge the valuation pursuant to General Statutes § 8–132. If the plaintiffs were unsatisfied with the compensation that they received, an appeal should have been taken during the compensation process. The plaintiffs' inverse condemnation claim would serve only to relitigate the issues that were resolved in the eminent domain action. We agree with the statement of the defendants, made in their brief, that 'the fact that the plaintiffs chose not to pursue their remedies pursuant to ... §§ 8–129 to 8–133 is fatal to their claim.'"); *Russo v. Town of East Hartford*, 4 Conn. App. 271 (1985) (finding no justification for separate inverse condemnation case subsequent to condemnation case).

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626, S.E.2d 55, 57 (2002). Condemnation proceedings are actions *in rem*. *Redevelopment Com. of Greensboro v. Hagins*, 258 N.C. 220, 225, 128 S.E.2d 391, 395 (1962). Inverse condemnation actions are consequently considered *in rem* or *quasi in rem* proceedings because such actions depend on the complainant's interest in the land. *See id.* "To prevail on their inverse condemnation claim, plaintiffs must show that their 'land or compensable interest therein has been taken.'" *Beroth Oil Co. v. N.C. DOT*, 367 N.C. 333, 340, 757 S.E.2d 466, 472 (2014) (citing N.C.G.S. § 136-111). For inverse condemnation claims against the Department of Transportation, remedies are available only to those persons whose "land or compensable interest therein" has been taken. N.C. Gen. Stat. § 136-111; *National Advertising Co. v. North Carolina DOT*, 124 N.C. App. 620, 623, 478 S.E.2d 248, 249 (1996) (holding that inverse condemnation claim failed because of lack of an interest in the property taken).

Plaintiff seeks to recover additional damages from Map Act restrictions on the property for the period between NCDOT's recordation of the 1992 Corridor Map, and when NCDOT finally acquired portions of the property in fee simple. The portions of the property that NCDOT acquired in fee simple, Plaintiff no longer owns and did not own at the commencement of this suit.

The North Carolina Supreme Court has held that the right to bring a claim like the one at bar passes with title to the land. *See Caveness v. Raleigh, C. & S. R. Co.*, 172 N.C. 305, 305, 90 S.E. 244, 247 (1916). If a landowner does not assert a claim for damages while he owns the land, then his right to do so transfers with the fee to the subsequent owner. *Id.* When Plaintiff transferred portions of the subject property to NCDOT in fee simple, he also transferred to NCDOT his right to assert a claim for the taking or damaging of those portions of the property. *See id.*

Other states also explicitly require that the plaintiff retain an ownership interest in the property at the time of the action to have standing. *See, e.g.*, *Twp. of Montville v. MCA Assocs., L.P.*, 2008 N.J. Super. Unpub. LEXIS 1830, at *18 (App. Div. 2008), *cert denied*, 197 N.J. 14, 960 A.2d 744 (2008) ("In our view, [the appellant] lacks standing to

assert its inverse condemnation claim because it did not have title to the property when it filed the complaint."). These courts reason that a litigant must have a "sufficient stake" and "real adverseness" with the subject matter of the litigation, and that the property interest requirement satisfies those concerns. *In re N.J. Bd. Of Pub. Utils.*, 200 N.J. Super. 544, 556, 491 A.2d 1295 (App. Div. 1985). In the subject case, the Plaintiff no longer has any interest whatsoever in the property transferred to NCDOT in the prior condemnation actions, said transactions being finalized by consent judgments. Therefore, Plaintiff has no stake remaining in that property or any true adverseness between the Plaintiff and NCDOT as to that property.

The trial court's determination that Plaintiff's inverse condemnation claim is barred as to property already acquired in fee simple by NCDOT is correct and should be upheld.

CONCLUSION

The Court should rule that the Consent Judgment bars Plaintiff's inverse condemnation claim, and that the Plaintiff has no standing to bring any claim regarding property which he does not currently own. Any other outcome endangers the finality of judgments and public trust in the

right-of-way process. The question would remain open in landowners' minds whether they actually received just compensation or whether there was more they could receive. Such a result would encourage costly and duplicative litigation and damage the ability of public and quasi-public entities to plan and budget for vital infrastructure projects.

Respectfully submitted, this the 1st day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Amicus Curiae certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is fewer 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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