No. COA20-305 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

TOWN OF APEX,

Plaintiff-Appellee,

v.

BEVERLY L. RUBIN,

Defendant-Appellant.

From Wake County
19-CVS-6295

****

RESPONSE TO MOTION TO DISMISS

****

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INTRODUCTION

In 2015, the Town tried to take Ms. Rubin's land. Judge Elaine M. O'Neal, now Bushfan, entered a final judgment finding that the Town lacked a public purpose to do so—the *sine qua non* of permissible government conduct under our state and federal constitutions.

The Town refused to accept that judgment, but it was upheld after reconsideration, after appeal to this Court, and after the Town's failed petition for discretionary review to the Supreme Court.

That should have been the end of it. But the Town told Ms. Rubin that it had no intention of allowing her to enjoy title to her property. They even

threatened her with criminal prosecution should she interfere with the sewer pipe they had installed across her front yard.

Ms. Rubin did the only thing she could do—she went back to the superior court and asked for it to order the Town to comply with the final judgment. In response, the Town filed another lawsuit—this one—asking the court to declare that the Town had the right to take Ms. Rubin's property after all. The Town then filed a corresponding Rule 60 motion in the 2015 case, asking for similar relief.

In the two cases, the Town advanced theories that have no precedent anywhere in the country and are anathema to principles of constitutional law older than the Town itself. In short, the Town asked the superior court to hold that the government doesn't need a public purpose to take private property after all, and that the only remedy ever available is just compensation.

In a series of overlapping orders entered in the two cases, the superior court—via a different judge—accepted the Town's sophistry, adopting 24 pages of rulings drafted by the Town.

The Town concedes that two of those orders—the ones entered in the 2015 case—are immediately appealable, but now argues that the other two—the ones entered in the 2019 case—are not. But there is no reason for this Court to fracture the two intertwined appeals. Controlling case law already

provides for appellate jurisdiction here. The two orders entered in this case affect *three* substantial rights.

First, Ms. Rubin has a substantial right in the title to her property. In 2015, the Town filed a condemnation action so that it could enrich a private developer. The court ruled that the condemnation was unconstitutional, declared the Town's claim to Ms. Rubin's property to be "null and void," and dismissed the complaint. The Town responded to that loss with a new lawsuit seeking exactly the same thing—a declaration that it lawfully owns Ms. Rubin's property.

This time, a different superior court judge decided that the Town's new lawsuit, over the same issues, could proceed. And, in the meantime, the trial judge enjoined Ms. Rubin from enjoying her fee-simple title to the property during the lawsuit. The trial court's two orders determined that the Town has title to Ms. Rubin's property. As this Court's cases have explained, such orders impacting title to real property are immediately appealable.

Second, Ms. Rubin has a substantial right to avoid inconsistent judgments. The appeal in the companion case—which is an appeal from the Town's original condemnation action—presents the same issues as in this appeal. If this appeal is dismissed, there is a real chance that the same issues in the two cases will reach conflicting ends because they are being decided by different courts.

Finally, Ms. Rubin has a substantial right to avoid duplicative litigation. That's the reason for the doctrines of res judicata and prior action pending—defenses that Ms. Rubin raised against the Town's second, redundant lawsuit. Ms. Rubin should not be forced to litigate issues in this case back in superior court, when those same issues are before this Court in the companion case. When the Town filed its 2019 case, that new case was either abated under the prior action pending doctrine, or barred by the final judgment in the original case. Either way, the 2019 case can't proceed, and Ms. Rubin shouldn't be forced to keep litigating it below.

Any one of these reasons is independently sufficient for this Court to have appellate jurisdiction. For any or all of them, the Town's motion should be denied.

BACKGROUND

This saga began over five years ago. A private land developer and the Town of Apex entered into a deal to take Ms. Rubin's land away from her. Our courts rejected their scheme as unconstitutional, but the Town refuses, to this day, to give Ms. Rubin her property back.

The Town has sought to take Ms. Rubin's home first through a condemnation action, and then through a declaratory-judgment action. Appeals in both cases are pending before this Court. The Town seeks to dismiss Ms. Rubin's appeal from Town's later-filed case, even though the two cases pre-

sent the same issues to this Court, and even though the orders affect Ms. Rubin's substantial rights.

A. The Town Strikes a Deal to Steal Ms. Rubin's Land.

A private developer, Bradley F. Zadell, wanted to enhance the value of vacant land he owned next to Ms. Rubin's homestead by connecting it to the Town sewer system. Mr. Zadell was hoping to "flip" the land, selling it at a premium once it had sewer access. He tried to convince Ms. Rubin to sell her land—or an easement across it—to him. Ms. Rubin refused. So Mr. Zadell and his company Parkside Builders contracted with the Town to use its condemnation powers to install a sewer line bisecting Ms. Rubin's property.

Ms. Rubin has been living at her Wake County home since 2010. (5-23-19 T p 6, 63.) At that time, her home was in a rural part of Wake County. Then, and now, her home was not in Apex. Like many others in her area, Ms. Rubin has always used a septic system instead of sewer. (R S (I) p 144.)

Mr. Zadell, a real estate speculator, had dreams to develop the countryside around Ms. Rubin's home. In 2012 and 2013, he began buying up and developing land around her home. (R S (I) pp 212-19.) Since the surrounding properties did not have sewer access, Mr. Zadell bought all of these properties cheaply. (R S (I) 143-45).

But the empty land Mr. Zadell was buying would be worth much more if it had sewer access. The cheapest way for Mr. Zadell to run sewer to the

vacant land was to install a sewer pipe that would bisect Ms. Rubin's rural homestead. (R S (I) 144-45.) He repeatedly asked Ms. Rubin to sell her land, or at least an easement, to him, but she refused. *Town of Apex v. Rubin*, 262 N.C. App. 148, 149, 821 S.E.2d 613, 614 (2018), *review denied*, 372 N.C. 107, 825 S.E.2d 253 (2019).

Unable to get what he wanted through negotiation, Mr. Zadell turned to compulsion. Mr. Zadell went to the Town of Apex, "pressuring" it to use its eminent domain power to condemn a sewer easement across Ms. Rubin's property. (R p 9 (finding no. 9 of judgment).) The Town eventually relented. Mr. Zadell, through his company Parkside Builders, signed a contract with the Town in which they agreed to pay all just compensation, expenses, costs, and attorney's fees that the Town would incur in acquiring a sewer easement across Ms. Rubin's home. (R p 10.)

B. The Courts Reject the Town's Unconstitutional Taking.

On 30 April 2015, the Town filed a direct condemnation action (the "2015 case") against Ms. Rubin. (R p 3.) The Town estimated the compensation due to Ms. Rubin as $10,771. (R p 83.) Shortly after the complaint was filed, Mr. Zadell sold the vacant property for a $2.5 million profit. (R p 10.)

On 7 July 2015, Ms. Rubin answered, contesting the Town's ability to use its eminent domain power for the financial gain of a private developer. (R pp 54-56.) Ms. Rubin asked the court to declare that the Town's taking

was illegal. (R p 55.) The answer also warned the Town that, if it began construction of its sewer pipe while the case was pending, the risk was on the Town if the taking turned out to be unconstitutional. (R p 55.)

The Town ignored the warning and constructed the sewer pipe anyway, while its condemnation action was pending, using its statutory "quick-take" powers. (R p 84; 5-23-19 T p 6.) The pipe bisects Ms. Rubin's property, creating significant development challenges should Ms. Rubin or a subsequent owner later choose to subdivide the property. (R S (I) 145.) The Town had the option of installing a sewer pipe that wouldn't interfere with Ms. Rubin's property, but it instead chose a more disruptive option because that was cheapest for the Town. (R S (I) 144-45.)

On 1 August 2016, the Honorable Elaine M. O'Neal, superior court judge, conducted an evidentiary hearing on whether the Town's taking was unconstitutional because it lacked a public purpose. (R p 8.) Afterward, on 18 October 2016, Judge O'Neal entered a final judgment, concluding that "[t]he paramount reason for the taking of the sewer easement is for a private interest and the public's interest [is] merely incidental." (R p 12.) The court determined that the Town's taking violated the state and federal constitutions. Thus, the judgment declared the Town's claim to Ms. Rubin's property to be "null and void." (R p 13.)

After the Town lost, rather than appeal, it filed a motion for reconsideration, purportedly under Rules 59 and 60 of the Rules of Civil Procedure. The trial court found the motion improper and meritless and denied it on 24 January 2017. *Rubin*, 262 N.C. App. at 150, 821 S.E.2d at 615.

On 30 January 2017, the Town then gave notice of appeal from the final judgment and the denial of its reconsideration motion. *Id.* But because the Town's motion for reconsideration was improper, it did not toll the time for the Town to appeal from the final judgment. This Court, therefore, dismissed the appeal as untimely on 16 October 2018, in a published opinion. *Town of Apex v. Rubin*, 262 N.C. App. 148, 153, 821 S.E.2d 613, 616 (2018), *review denied*, 372 N.C. 107, 825 S.E.2d 253 (2019). The Court went further, though, and noted "for [the Town's] benefit" that it had also reviewed the merits, and found no error in the superior court's judgment. *Id.* at 153 n.2, 821 S.E.2d at 617 n.2.

The Town then petitioned our Supreme Court for discretionary review of this Court's decision. The petition was denied, and the case was remanded to superior court.

C. The Town Refuses to Return Ms. Rubin's Property and End Its Occupation.

Throughout the appeal, the Town refused to return Ms. Rubin's property and end its occupation. In fact, it threatened to throw Ms. Rubin in jail if

she removed the sewer pipe. Response at 17, *Rubin v. Town of Apex*, No. 410P18 (N.C. Dec. 3, 2018), *available at* https://www.ncappellatecourts.org/show-file.php?document_id=238460.

So, on the same day the case was remanded, Ms. Rubin moved to enforce the final judgment. (R p 60.) Rather than respond to that motion, the Town instead filed a new, duplicative action against Ms. Rubin on 13 May 2019. (R p 3.) In that action (the "2019 case"), the Town has asked that the superior court declare that *the Town* was the rightful the owner of the sewer easement and that Ms. Rubin's sole remedy for the taking is just compensation. (R pp 87-88.) After the complaint was amended, Ms. Rubin moved to dismiss it because the action's legal theory was flawed, and it was also barred by either res judicata or the prior action pending doctrine. (R pp 91-93.) The Town also moved to enjoin Ms. Rubin from interfering with the sewer pipe, even though the superior court had already concluded that its installation was unconstitutional. (R p 18.) Meanwhile, the Town moved to vacate the final judgment in its original case. (1-9-20 T p 4.)

With Judge O'Neal having retired from the bench, all the motions in both cases were heard at the same time by the Honorable G. Bryan Collins. Judge Collins denied both of Ms. Rubin's motions and granted both of the Town's. Judge Collins:

- denied Ms. Rubin's motion to enforce the final judgment in the original condemnation action, Ex. A;
- granted the Town's motion to vacate Judge O'Neal's final judgment in the original condemnation action, Ex. B;
- denied Ms. Rubin's motion to dismiss the Town's new, 2019 lawsuit (R pp 102-03); and
- granted the Town a preliminary injunction, ordering Ms. Rubin not to remove the sewer pipe that the Town unconstitutionally installed on her property (R pp 104-11).

Ms. Rubin appeals from all of these orders. The appeal of the orders entered in the 2015 case is docketed with this Court as case number 20-304. This case—docket number 20-305—is particular to the appeal from the orders entered in the 2019 case.

ARGUMENT

I. The Orders Affect a Substantial Right Because They Concern Ms. Rubin's Title to Real Property and the Existence of an Easement by Condemnation.

In the 2015 case, Judge O'Neal determined that the Town had no claim to a sewer easement across Ms. Rubin's property. In this 2019 case, however, a different judge disregarded that ruling and found that an easement existed after all. Under settled law, such an order affecting title to real property and finding the existence of an easement is immediately appealable.

As a threshold matter, the Town's latest theory—and the orders on appeal in both cases adopting it—are predicated on a fundamental misunderstanding of basic principles of condemnation law.

In a direct-condemnation action, the government seeks prospective permission from the court to exercise the power of eminent domain and take private property. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168 (2019) (distinguishing between direct and inverse condemnation); 11A *McQuillen's The Law of Municipal Corporations* § 32:164 (3d ed.) (same). In an inverse-condemnation action, on the other hand, the landowner commences litigation and asks the court to provide a remedy for a taking that has already occurred. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 552, 809 S.E.2d 853, 861-62 (2018).

Here, the Town filed a direct-condemnation action—the 2015 case—seeking to take a sewer easement across Ms. Rubin's property. After the Town's taking was declared unconstitutional, title returned to Ms. Rubin. But then the Town filed its 2019 action. Styled as a "declaratory judgment" action, it asserts that the Town's exercise of its quick-take power during the 2015 action constituted an "inverse condemnation." (R pp 5-7.) But only landowners can file inverse-condemnation actions, not condemnors. N.C. Gen. Stat. § 136-111; *Wilkie*, 370 N.C. at 552, 809 S.E.2d at 861-62.

The Town's inverse-condemnation theory makes no sense, as Ms. Rubin's merits brief will show. But for purposes of appellate jurisdiction, the Town's theory squarely places this case into the category of condemnation cases that get immediate appellate review. Just like the 2015 action, the question here is whether the Town has title to a sewer easement across Ms. Rubin's land.

As this Court and our Supreme Court have held, "the possible existence of an easement . . . is a question affecting title." *City of Charlotte v. BMJ of Charlotte, LLC*, 196 N.C. App. 1, 7, 675 S.E.2d 59, 63 (2009) (quoting *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005)). And interlocutory orders that affect title, affect substantial rights, creating the right to "immediate review." *Id.*[1]

In *City of Charlotte*, the trial court's dismissal of a landowner's counterclaims to the government's direct-condemnation action was immediately appealable. *Id.* at 6, 675 S.E.2d at 63. The counterclaims asserted that the government did not possess an easement across the landowner's property. *Id.* The order dismissing those counterclaims was interlocutory, but because the

[1] "A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar,* 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009).

order necessarily "raise[d] the question of whether or not an easement exists, the order [was] immediately reviewable." *Id.* at 8, 675 S.E.2d at 63.

The 2019 case raises the same question. The operative complaint alleges that the Town has taken a sewer easement across Ms. Rubin's home. (R pp 84-85.) The Town asks for a declaration that it owns that sewer easement. (R p 87.) The trial court's preliminary-injunction order accepted the Town's theory, determining that the Town "likely" does have an easement and enjoining Ms. Rubin from exercising her fee-simple title to the land. (R pp 106, 109, 111.) Ms. Rubin sought to dismiss the complaint because the 2015 action had already finally determined that the Town's asserted easement didn't exist—there was no genuine controversy about that. (R pp 93, 102.) But Judge Collins denied that motion because he determined that the easement did exist.

The rule applied in *BMJ* and *Stagecoach* is not limited to traditional condemnation actions. That rule has often been extended outside the condemnation context to other interlocutory orders affecting title. For instance, an interlocutory summary-judgment order accepting one party's claim to title over another is immediately appealable. *Watson v. Millers Creek Lumber Co.*, 178 N.C. App. 552, 554-55, 631 S.E.2d 839, 840-41 (2006) (relying on *Stagecoach*). Likewise, there's a right to immediate review when an interlocutory order requires the conveyance of title on a specific-performance theory.

Phoenix Ltd. P'ship of Raleigh v. Simpson, 201 N.C. App. 493, 499, 688 S.E.2d 717, 721-22 (2009) (relying on *Watson*). And interlocutory orders for default and summary judgment—in an action to set aside a deed—were immediately appealable because they concerned "title." *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 284, 716 S.E.2d 67, 70 (2011) (relying on *Watson*).[2]

The orders in this case are in the heartland of title cases that receive immediate appellate review. The Town has used the declaratory-judgment mechanism to create its own cause of action—a made-up action for compelled inverse condemnation. Whatever the label, the Town wants a judgment awarding it title to an easement across Ms. Rubin's property, in exchange for Ms. Rubin receiving compensation.[3] That's indistinguishable from a condemnation case.

The orders entered in the 2019 case affect Ms. Rubin's substantial right to title in her own property. For that reason, she has a right to immediate

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[2] The Town ignores this line of cases. Instead, it asks the Court to follow a case involving a dispute between private landowners over the existence of an easement. Mot. Dismiss at 20. But this is a case about the taking of an easement by the government. *BMJ*, *Stagecoach*, and the cases that follow them all hold that orders involving title—even easements—in the condemnation context are immediately appealable.

[3] As will be explained in Ms. Rubin's opening briefs in these two cases, the remedy for an unconstitutional taking is *never* just compensation. The remedy is the return of the illegally taken property.

appellate review of these orders, to be heard alongside the virtually identical orders already before the Court in the 2015 case.

II. Because the Orders in the 2019 Case Rejected Ms. Rubin's Res Judicata Defense, They Risk Inconsistency with the Orders on Appeal in the 2015 Case and Warrant Immediate Review.

Ms. Rubin raised res judicata as a defense to the 2019 case, because the 2019 case seeks to relitigate whether the Town has an easement across Ms. Rubin's property. That issue was already finally determined in the 2015 case. And because that issue is on appeal to this Court from the orders entered in the 2015 case, there is a real risk of inconsistency if this Court fails to exercise its appellate jurisdiction over the 2019 case. In fact, if Ms. Rubin prevails in her appeal in the 2015 case, the orders entered in the 2019 case are *necessarily* erroneous.

In general, litigants have a right to immediate appellate review of interlocutory orders that create "the possibility of inconsistent verdicts" on the same issues. *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 38, 626 S.E.2d 315, 320 (2006). That right to immediate review is especially important in cases like this, which raise the defense of res judicata. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009); *Reid v. Town of Madison*, 145 N.C. App. 146, 147, 550 S.E.2d 826, 827 (2001).

Litigants "have a substantial right to avoid litigating issues that have already been determined by a final judgment." *Turner*, 363 N.C. at 558, 681

S.E.2d at 773. When a litigant "makes a colorable assertion" that a second lawsuit is barred by res judicata, an interlocutory order rejecting the assertion of res judicata is immediately appealable. *Id.*; *see also Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 35, 738 S.E.2d 819, 823 (2013) (exercising appellate jurisdiction over an interlocutory order denying a summary-judgment motion because the "defendant's motion raised a colorable claim of collateral estoppel"); *Gray v. Fed. Nat'l Mortg. Ass'n*, 830 S.E.2d 652, 656 (N.C. Ct. App. 2019) (same), *review denied*, 839 S.E.2d 853 (N.C. 2020).

Ms. Rubin's assertion of res judicata—in her motion to dismiss and in opposition to the Town's motion for preliminary injunction—was more than just colorable.

Under the doctrine of res judicata (or claim preclusion), "a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties." *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)). Res judicata bars relitigation of "every ground of recovery or defense which was actually presented or which could have been presented in the previous action." *Id.* at 7, 719 S.E.2d at 93 (quoting *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336-37 (1988)). The estoppel effect extends to "to all relevant and material mat-

ters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Id.* (quoting *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985)).

It is beyond dispute that the 2015 action resulted in a final judgment between the same parties as those in this 2019 case. (R pp 8-13.) The issues overlap as well. In the 2015 case, the final judgment determined that the Town could *not* have a sewer easement across Ms. Rubin's property. (R p 13.) In the 2019 case, the central question is whether the first judgment was wrong—the question is again whether the Town can have the sewer easement. (R pp 87-88.)

The Town says its new lawsuit is about the amount of just compensation due to Ms. Rubin. But that issue was subsumed in the prior judgment. Our state and federal constitutions are clear that *no amount* of just compensation can remedy a taking that lacks a public purpose. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005) ("[I]f government action is found to be impermissible—for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."); *State Highway Comm'n v. Thornton*, 271 N.C. 227, 241, 156 S.E.2d 248, 259 (1967) ("It is not a sufficient answer that the landowner will be paid the full value of

his land. It is his and he may not be compelled to accept its value in lieu of it unless it is taken from him for a public use."); *State Highway Comm'n v. Batts*, 265 N.C. 346, 361, 144 S.E.2d 126, 137 (1965) (holding that, where a condemnation proceeding is found to lack a public purpose, the trial court must issue "an injunction permanently restraining [the government] from proceeding with the condemnation and appropriation of [the landowner's] lands").

As a result, the judgment in the 2015 case conclusively determined that compensation could not make Ms. Rubin whole.

After the remand of the 2015 case, the only thing left for the Town to do was to follow the law and end its occupation of Ms. Rubin's land. Instead, the Town has chosen to relitigate the propriety of its taking in a second lawsuit. It sought an injunction that would allow it to keep what doesn't belong to it. That relief is exactly the opposite of what was determined in the first case. This redundancy is exactly what res judicata prohibits.

In addition, because the 2015 case is also pending on appeal before this Court, there is a real risk of inconsistency between the outcome of that appeal and the orders on appeal in this one. Indeed, the Town admits that the orders from the 2015 case are properly on appeal to this Court. Mot. Dismiss at 9-10. If Ms. Rubin prevails on appeal in the 2015 case, then the parties will be under conflicting orders. Ms. Rubin will be subject to a preliminary

injunction in the ongoing 2019 case, but the mandate of this Court in the 2015 case will mean that the sewer pipe can be removed.[4]

There is no reason to provoke these kinds of conflicts between the orders of the superior courts and the mandates of our appellate courts. The issues raised in the Town's redundant lawsuit are the same as in its last lawsuit. This Court should exercise its appellate jurisdiction over this case and ensure one, consistent judgment.

III. The Trial Court's Rejection of the Prior Action Pending Doctrine Creates a Right to an Immediate Appeal.

When the 2015 case was remanded to the trial court, Ms. Rubin moved to enforce the judgment. And when the Town responded with its 2019 action, Ms. Rubin moved to dismiss on two alternative grounds, at least one of which must logically be true. Either:

(1) the final judgment entered in the 2015 case was, in fact, "final," and barred the 2019 case because of *res judicata*; or

(2) the 2015 action was still alive because of Ms. Rubin's pending motion to enforce the judgment, in which case the *prior action pending* doctrine abated the 2019 action.

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[4] It is also possible that this Court could *affirm* the orders currently on appeal in the 2015 case but that the 2019 case could end in a final judgment favorable to Ms. Rubin. That scenario, too, would subject the parties to conflicting orders.

The 2015 action was either final or pending. There are no other possibilities. Still, Judge Collins rejected both defenses, treating the 2015 action like a zombie action: too alive for res judicata and too dead for prior action pending. Judge Collins's rejection of the prior action pending doctrine independently justifies appellate jurisdiction.

A trial court's rejection of an assertion of the prior action pending doctrine creates a ***categorical*** right to immediate appellate review. *Johnston v. Johnston*, 256 N.C. App. 476, 808 S.E.2d 463, 465 (2017); *State Dep't of Health & Human Servs., Div. of Med. Assistance v. Armstrong ex rel. Gibbs*, 203 N.C. App. 116, 121, 690 S.E.2d 293, 296 (2010); *Gibbs v. Guilford Tech. Cmty. Coll.*, 149 N.C. App. 972, 563 S.E.2d 99 (2002); *Stevens v. Henry*, 121 N.C. App. 150, 154, 464 S.E.2d 704, 707 (1995); *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983).

That categorical rule applies here. Ms. Rubin expressly raised the prior action pending doctrine in her motion to dismiss and in opposition to the Town's motion for a preliminary injunction. (R p 93; Doc. Ex. 10; 5-23-19 T p 42-43.)

And even though likelihood of success is not a requirement for appellate jurisdiction, Ms. Rubin's assertion of the doctrine is meritorious. Under the prior action pending doctrine, a prior pending lawsuit between the same parties over substantially the same issues abates a later filed lawsuit. *Clark*

v. Craven Reg'l Med. Auth., 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990). "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Shoaf v. Shoaf*, 219 N.C. App. 471, 475-76, 727 S.E.2d 301, 305 (2012) (quoting *Jessee v. Jessee*, 212 N.C. App. 426, 438, 713 S.E.2d 28, 37 (2011)).

As explained above in the argument on res judicata, the 2015 and 2019 cases present substantially the same parties, subject matter, issues, and relief demanded. Both cases ask the same question: Does the Town have a sewer easement across Ms. Rubin's property, or does the Town have to end its unconstitutional occupation of her property? That's the question presented by the parties' motions in the 2019 case, as well as the parties' post-remand motions in the 2015 case (i.e., Ms. Rubin's motion to enforce the judgment, and the Town's motion to vacate the judgment).

In fact, to show that a "genuine controversy" existed sufficient to support the 2019 declaratory-judgment action, the trial court had to *refer* to the prior pending 2015 action. In its preliminary injunction order, the trial court stated:

> 12. Defendant asserts that she is entitled to an order requiring the Town to remove the sewer pipe. Defendant has formally sought such an order by written

> motion filed on 10 April 2019 in the original condemnation action having case number 15-CVS-5636.
>
> 13. Consequently, a genuine controversy exists between the Town and Defendant as to their respective rights and duties in and to the sewer easement and existing sewer pipe.

(R p 107.)

Ultimately, Ms. Rubin's merits brief will further explain her res judicata and prior action pending defenses to the 2019 case. But what matters here is what's obvious when comparing the 2019 and 2015 cases: the issues in the two cases are identical and should be heard together.

CONCLUSION

For any or all of the three reasons set out above, this Court has appellate jurisdiction over the orders entered in the 2019 case. The Town's motion to dismiss ignored every one of these authorities. The 2015 and 2019 cases are inseparable. They should be finally resolved together by this Court.

This the 1st day of June, 2020.

FOX ROTHSCHILD LLP

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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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VERIFICATION

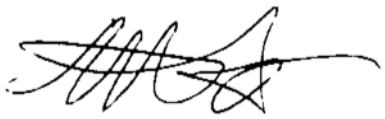
I, Matthew Nis Leerberg, being duly sworn, depose and say:

1. I am an attorney in the law firm of Fox Rothschild LLP and counsel to Defendant-Appellant Beverly L. Rubin.

2. Attached to this response brief are true and correct copies of the two final orders from the companion case, docketed in this Court as case number COA20-304.

I affirm, under the penalties for perjury, that the foregoing representations are true.

This the 1st day of June, 2020.



Matthew Nis Leerberg

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing motion was served on the opposing party by placing a copy, in a first-class postage-paid wrapper, into a depository under the exclusive custody of the United States Postal Service, this 1st day of June, 2020, addressed as follows:

David P. Ferrell
Norman W. Shearin
Nexsen Pruet, PLLC
4141 Parklake Avenue, Suite 200
Raleigh, NC 27612

/s/ Matthew Nis Leerberg
Matthew Nis Leerberg

EXHIBIT A

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15-CVS-5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN, Defendant.	**ORDER DENYING DEFENDANT'S MOTION TO ENFORCE JUDGMENT AND ALTERNATIVE PETITION FOR WRIT OF MANDAMUS**

THIS CAUSE coming on for hearing and being heard on January 9, 2020 by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the January 6, 2020 Civil Session of Wake County Superior Court upon motion of the Defendant Beverly L. Rubin ("Defendant" or "Rubin") to enforce judgment and alternative petition for writ of mandamus ("Motion"). Plaintiff Town of Apex ("Plaintiff" or "Town") was represented by David P. Ferrell of Nexsen Pruet, PLLC; the Defendant was represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP. It appearing to the Court from a review of the pleadings, the judgment, legal memoranda and arguments of counsel for the parties, that the Motion should be DENIED. The Court makes the following:

FINDINGS OF FACT

1. Defendant asks the Court to enforce the 18 October 2016 Judgment by entering an order requiring the Town to permanently remove the sewer line the Town installed under Defendant's property.

2. The only relief granted to Defendant by the Judgment filed herein on 18 October 2016 ("Judgment") is the dismissal of the Town's condemnation claim as null and void on the grounds that the paramount reason for the taking of the sewer easement described in the complaint was for a private purpose and the public's interest was merely incidental. The Judgment rendered the complaint and declaration of taking herein a nullity.

3. The Judgment does not order the Town to perform any specific act, including but not limited to removal of the underground sewer line.

4. Defendant did not plead any claim for relief entitling her to the relief requested in the Motion. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. Defendant did not request injunctive relief from the Court prior to the installation of the sewer line to prevent construction, did not request injunctive relief to close or remove the sewer line in her answer, and did not request injunctive relief to close or remove the sewer pipe at the all other issues hearing before the Court.

5. Although the sewer pipe had been installed for approximately one year prior to the all other issues hearing and the Court received testimony and evidence regarding the installation of the sewer pipe at the all other issues hearing, the Judgment does not address the actual installation, maintenance and use of the sewer pipe under Defendant's property and does not require removal.

6. The captioned action is not a declaratory judgment action.

7. The Judgment does not order the Town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure.

8. The Judgment does not require the return or delivery of real property as per N.C. Gen. Stat. § 1-302.

9. Defendant has failed to establish that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly defined, positive legal duty to remove it.

10. Defendant's request for enforcement of the Judgment is not procedural in nature and does not relate to the mode or manner of conducting this action as contemplated in N.C. Gen. Stat. § 136-114, but is essentially a request for mandatory injunctive relief.

11. On or about 27 July 2015 the Town constructed an underground sewer line 18 feet under the entire width of a narrow portion of Rubin's property. The bore method was employed so as not to disturb the surface of Defendant's property, and to eliminate the necessity to access the surface of her property to install or maintain the sewer pipe. 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 Defendant's property, the casing was inserted then the sewer pipe was installed. No manholes were dug or are currently on the Defendant's property. A 10-foot wide Town underground sanitary sewer easement was sufficient given the use of the bore method by the Town.

12. Given the Court's dismissal of the original condemnation complaint as null and void, the installation of the underground sewer line was a physical invasion and taking of Defendant's property by the Town not subject to a condemnation complaint, and thus was an inverse condemnation of an underground sewer easement.

13. A determination of the extent of the Town's rights in its inversely condemned easement would be determined in a separate proceeding.

14. The sewer line was installed prior to the entry of the Judgment, remains in place and in use, and serves approximately fifty (50) residential homes and/or lots in the Riley's Pond

Subdivision, a duly annexed, rezoned, and approved single-family residential subdivision within the Town's limits.

Based upon the foregoing FINDINGS OF FACT, the Court draws the following:

CONCLUSIONS OF LAW

1. The Judgment does not afford to Defendant any of the relief which she seeks in the Motion. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

2. The Judgment does not order the Town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure.

3. The Judgment does not require the return or delivery of real property as per N.C. Gen. Stat. § 1-302.

4. A declaratory judgment action may not be commenced by a motion in the cause. Supplemental relief under N.C. Gen. Stat. § 1-259 is unavailable to Defendant in this action. *Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C.App. 257, 362 S.E.2d 870 (1987)

5. The Town cannot be held in contempt for failing to remove the underground sewer line. The Judgment does not expressly or specifically order removal. In addition, the Motion fails to satisfy the statutory requirement that it be supported by a sworn statement or affidavit. *See* N.C. Gen. Stat. § 5A-23(a1).

6. N.C. Gen. Stat. § 136-114 is not a valid basis for the Court to order removal of the sewer pipe under the facts and circumstances of this case. Defendant's request for enforcement of the Judgment is not procedural in nature and does not relate to the mode or manner of conducting this action, but is essentially a request for mandatory injunctive relief.

7. A writ of mandamus is inappropriate because Defendant has failed to show that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly

defined, positive legal duty to remove it. Mandamus is appropriate to compel the performance of a ministerial act but not to establish a legal right. *Meares v. Town of Beaufort*, 193 N.C. App. 49, 667 S.E.2d 224 (2008); *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938).

8. The Court has the inherent authority to enforce its own orders. However, the Court is not authorized to and refuses to expand this Judgment beyond its terms, read in additional terms, and/or order mandatory injunctive relief that Defendant did not request or plead. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

9. Regardless of the Court's authority, the Court does not read the Judgment the way Defendant suggests and the Court does not agree the Judgment expressly or implicitly requires removal of the sewer line. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. The Court will not now require the Town to remove the sewer line.

10. " '[I]nverse condemnation [ ]' [is] a term often used to designate 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *Wilkie v City of Boiling Springs,* 370 N.C. 540, 552, 809 S.E.2d 853, 861-862 (2018)(quoting *City of Charlotte v. Spratt*, 263 N.C. 656, 662-663, 140 S.E. 2d 341,346 (1965)).

11. Given the Court's dismissal of the condemnation complaint as null and void, the installation of the underground sewer line by the Town on 27 July 2015 was a taking of Defendant's property by the Town that was not subject to a condemnation complaint, and thus was an inverse condemnation of an underground sewer easement. N.C. Gen. Stat. Section 136-111;

N.C. Gen. Stat. Section 40A-51; *Wilkie v City of Boiling Springs,* 370 N.C. 540, 809 S.E.2d 853 (2018); *McAdoo v. City of Greensboro,* 91 N.C. App. 570, 372 S.E.2d 742 (1988).

12. As our North Carolina Supreme Court held, public use or purpose is not an element of an inverse condemnation claim. The inverse condemnation remedy is not dependent upon taking or using for a public use. *Wilkie v. City of Boiling Spring Lakes,* 370 N.C. 540, 809 S.E.2d 853 (2018).

13. Defendant's allegations that the condemnation complaint resulted in a constitutional violation and Defendant's comments about fairness do not support or provide a basis for the granting of the Motion. Further, the Supreme Court in *Wilkie*, in spite of addressing constitutional issues with condemnations, held that a landowner has a claim for just compensation regardless of whether a taking is for a public or private purpose. The Supreme Court did not state that the landowner had a claim for permanent injunctive relief. Where there is an adequate remedy at law, injunctive relief, which is what Defendant seeks, will not be granted.

14. Defendant has an adequate remedy at law—i.e. compensation for inverse condemnation. N.C. Gen. Stat. Section 136-111; N.C. Gen. Stat. Section 40A-51; *McAdoo v. City of Greensboro,* 91 N.C. App. 570, 372 S.E.2d 742 (1988). The Town's pending declaratory judgment action with case number 19 CVS 6295 provides Defendant an avenue to pursue her remedy at law for the inverse condemnation of the sewer easement – compensation.

15. As such, the Court declines to enforce the Judgment as Defendant requests and declines to issue a writ of mandamus.

IT IS THEREFORE ORDERED that the Defendant's Motion to Enforce Judgment and

Alternative Petition for Writ of Mandamus be and is hereby DENIED.

This the 17th day of January, 2020.

G. Bryan Collins
Superior Court Judge Presiding

EXHIBIT B

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
WAKE COUNTY	15-CVS-5836
TOWN OF APEX, Plaintiff, v. BEVERLY L. RUBIN, Defendant.	**ORDER GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT**

THIS CAUSE coming on for hearing and being heard on January 9, 2020 by the Honorable G. Bryan Collins, Superior Court Judge Presiding at the January 6, 2020 Civil Session of Wake County Superior Court upon the motion of the Plaintiff Town of Apex ("Plaintiff" or "Town") for relief from judgment pursuant to Rule 60 of the Rules of Civil Procedure, specifically to grant the Town relief from the prospective application of the Judgment as it relates to a challenge or objection to the existence of the underground sewer pipe and corresponding inversely condemned easement on Defendant's property, including Defendant's request for removal of the underground sewer pipe ("Motion"). Plaintiff was represented by David P. Ferrell of Nexsen Pruet, PLLC; the Defendant was represented by Kenneth C. Haywood and B. Joan Davis of Howard, Stallings, From, Atkins, Angell & Davis, P.A. and Matthew Nis Leerberg of Fox Rothschild LLP. It appearing to the Court from a review of the motion, the pleadings, and legal memoranda and arguments of counsel for the parties, that, in the Court's discretion, the Motion should be GRANTED. The Court makes the following:

FINDINGS OF FACT

1. Defendant asks the Court to rely on the 18 October 2016 Judgment and require the Town to permanently remove the sewer line the Town installed under Defendant's property.

2. The only relief granted to Defendant by the Judgment filed herein on 18 October 2016 ("Judgment") is the dismissal of the Town's condemnation claim as null and void on the grounds that the paramount reason for the taking of the sewer easement described in the complaint was for a private purpose and the public's interest was merely incidental. The Judgment rendered the complaint and declaration of taking herein a nullity.

3. The Judgment does not order the Town to perform any specific act, including but not limited to removal of the underground sewer line.

4. Defendant did not seek injunctive relief in the original condemnation action, did not seek an injunction before the sewer pipe was installed, did not request injunctive relief at the all other issues hearing, and the Judgment did not include an award of injunctive relief.

5. Prior to the entry of the Judgment the Town had constructed, using the bore method, an underground sewer line across Defendant's property. 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 ("Project"). The casing was inserted and physically invaded Rubin's property on 27 July 2015. By the installation of the underground sewer line on or about 27 July 2015, the Town physically invaded Defendant's property and thereby inversely condemned an underground sewer easement.

6. Although the sewer pipe had been installed for approximately one year prior to the all other issues hearing and the Court received testimony and evidence regarding the installation of the sewer pipe at the all other issues hearing, the Judgment does not address the actual

installation, maintenance and use of the sewer pipe under Defendant's property and does not require removal.

7. The sewer line was installed prior to the entry of the Judgment, remains in place and in use, and serves approximately fifty (50) residential homes and/or lots in the Riley's Pond Subdivision, a duly annexed, rezoned, and approved single-family residential subdivision within the Town's limits.

8. The Town is not seeking relief from the Judgment as it relates to the application of the Judgment to the original condemnation complaint. The Town requests the Court exercise its discretion under Rule 60 and grant the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer pipe and corresponding inversely condemned easement on Defendant's property.

9. When the trial court entered the Judgment, the Town had already constructed the sewer pipe and taken the sewer easement by inverse condemnation. When the easement was taken on 27 July 2015, all rights therein were acquired by the Town.

10. The issue of whether the Town could maintain a sewer line across Defendant's property no longer existed at the time that Judgment was entered. Defendant did not seek an injunction prior to construction and the Town had already constructed the sewer easement.

11. Further, the Judgment found the original condemnation complaint null and void and dismissed it; it is as if it was never filed. Therefore, the Town physically invaded Defendant's property to construct a public sewer pipe on 27 July 2015 without a condemnation action – which under North Carolina law is an inverse taking.

12. Defendant alleges that the Town took the sewer easement on her property for a private purpose and thus lacked authority to take her property. However, public purpose is not an

element of inverse condemnation. Moreover, Town acquired ownership of the sewer easement on 27 July 2015 prior to entry of the Judgment.

Based upon the foregoing FINDINGS OF FACT, the Court draws the following:

CONCLUSIONS OF LAW

1. "Where a final judgment or order has been entered in a particular case, Rule 60(b) will nevertheless allow for a party to obtain relief from that judgment or order '[o]n motion and upon such terms as are just[.]'" *N.C. Dept. of Trans. v. Laxmi Hotels of Spring Lake, Inc.*, 817 S.E.2d 62, 69 (2018) (citing N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017)).

2. Rule 60(b) provides that "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: … (4) [t]he judgment is void…(6) [a]ny other reason justifying relief from the operation of the judgment." "'The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.'" *Id.* at 71 (citing *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971)).

3. It is just and equitable to allow the Town relief from the prospective application of the Judgment as it relates to the underground sewer pipe and corresponding easement.

4. Defendant's failure to seek and obtain injunctive relief prior to the construction of the sewer pipe and the Town's acquisition of the sewer easement by inverse condemnation renders the Judgment moot as to the installation of the sewer pipe and corresponding easement. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

5. The Judgment's dismissal of the condemnation proceeding had no effect on the rights inversely taken. *Nicholson v. Thom*, 236 N.C.App. 308, 317, 763 S.E.2d 772, 779 (2014) (Issue is moot when question in controversy is no longer at issue).

6. At the time of entry of the Judgment, the question of whether the Town had the authority to condemn the sewer easement described in the original condemnation action was moot – specifically as to the installation of the sewer pipe and inversely condemned easement.

7. Since the Judgment against the Town is moot, the Court grants the Town relief from the prospective application of the Judgment as it relates to the existence of the underground sewer pipe and corresponding easement on Defendant's property.

8. The Judgment is void as it relates to the installed sewer pipe and corresponding easement because the trial court did not have jurisdiction over theses issues at the time of the entry of the Judgment. The issue of whether the Town could maintain a sewer line across Defendant's property no longer existed at the time that Judgment was entered. Defendant did not seek an injunction prior to construction and the Town had already constructed the sewer easement. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).

9. Further, the Judgment found the original condemnation complaint null and void and dismissed it; it is as if it was never filed. Therefore, the Town physically invaded Defendant's property to construct a public sewer pipe on 27 July 2015 without a condemnation action – which under North Carolina law is an inverse taking.

10. Prior to the entry of the Judgment on 18 October 2016, the Town had already inversely taken and owned the sewer easement across Defendant's property on 27 July 2015. Since the sewer easement had been inversely taken prior to the entry of the Judgment, the court lacked subject matter jurisdiction to enter the Judgment to the extent the Judgment is interpreted to negatively affect the installed sewer pipe and corresponding easement.

11. The absence of jurisdiction means the Judgment is void. A void judgment is a legal nullity. *Clark v. Carolina Homes*, 189 N.C. 703, 128 S.E.2d 20 (1925); *Woodleif, Shuford NC*

Civil Practice and Procedure § 60:7 (2017). "A lack of jurisdiction or power in the court entering the judgment always avoids the judgment." *Clark v. Carolina Homes, supra.* at 23.

12. Since the Judgment against the Town is void as to Defendant's challenge to the installed sewer pipe and corresponding easement, the Town should be granted the prospective relief from the Judgment pursuant to Rule 60(b)(4).

13. In addition, the Town is given prospective relief from the judgment pursuant to Rule 60(b)(6), as Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. *McNeil v. Hicks,* 119 N.C. App. 579, 580-81, 459 S.E.2d. 47, 48 (1995).

14. In the Judgment, the Court stated that the paramount reason for the taking of the sewer easement described in the complaint was for a private purpose and the public's interest was merely incidental. However, prior to entry of judgment, the Town had already constructed the sewer pipe and acquired the sewer easement by inverse condemnation.

15. In 2018, the North Carolina Supreme Court reversed the Court of Appeals and ruled that public use or purpose is not an element of an inverse condemnation claim. *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018). Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. *McNeil v. Hicks*, 119 N.C.App. 579, 580-81, 459 S.E.2d 47, 48 (1995); *Hamby v. Profile Products*, LLC, 197 N.C.App 99, 676 S.E.2d 594 (2009)).

16. As a result of the *Wilkie* decision from the Supreme Court, the legal basis for the Judgment no longer exists to the extent the Judgment is interpreted to negatively affect the installed sewer pipe and corresponding easement. Defendant alleges that the Town took the sewer easement on her property for a private purpose and thus lacked authority to take her property. However,

public purpose is not an element of inverse condemnation. Moreover, Town acquired ownership of the sewer easement on 27 July 2015 prior to entry of the Judgment. All easement rights in the property transferred to the Town and were owned by it prior to entry of Judgment. Consequently, Town should be granted relief from Judgment.

17. Further, *Thornton* provides that no injunctive relief is available to Defendant. Defendant's only remedy is provided for at law. *Id.* at 236, 240. Before the Supreme Court reversed the Court of Appeals in *Wilkie,* it appeared Defendant may not have an avenue to receive compensation for the inverse taking. But the Supreme Court reversal and ruling clarified that Defendant has a remedy at law – compensation for the inverse condemnation of the sewer easement, as public use or benefit is not a requirement to maintain an inverse condemnation claim. *Wilkie.* Defendant has an adequate remedy at law—i.e. compensation. N.C. Gen. Stat. § 136-111; N.C. Gen. Stat. § 40A-51; *McAdoo v. City of Greensboro,* 91 N.C. App. 570, 372 S.E.2d 742 (1988).

IT IS THEREFORE ORDERED that, in the Court's discretion, the Plaintiff's Motion for Relief from Judgment is hereby GRANTED, and

IT IS FURTHER ORDERED that the Judgment shall not have any prospective application as it relates to a challenge or objection to the existence of the underground sewer pipe and corresponding inversely condemned easement on Defendant's property, including Defendant's request for removal of the underground sewer pipe.

This the 17th day of January, 2020.

G. Bryan Collins
Superior Court Judge Presiding