No. TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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TOWN OF APEX,	)	
	)	
Plaintiff-Appellee,	)	From Wake County
v.	)	15-CVS-5836
	)	COA20-304
BEVERLY L. RUBIN,	)	2021-NCCOA-187
	)	
Defendant-Appellant.	)	

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TOWN OF APEX,	)	
	)	
Plaintiff-Appellee,	)	From Wake County
v.	)	19-CVS-6295
	)	COA20-305
BEVERLY L. RUBIN,	)	2021-NCCOA-188
	)	
Defendant-Appellant.	)	

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PLAINTIFF-APPELLEE'S PETITION FOR DISCRETIONARY REVIEW UNDER N.C. GEN. STAT. § 7A-31 AND RULE 15 IN COA20-304 AND COA20-305

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PLAINTIFF-APPELLEE'S PETITION FOR DISCRETIONARY REVIEW UNDER N.C. GEN. STAT. § 7A-31 AND RULE 15 IN COA20-304 AND COA20-305

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Plaintiff-Appellee Town of Apex ("Town" or "Apex"), by and through counsel, pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-31, hereby respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgments of the Court of Appeals filed 4 May 2021 in COA20-304 and COA20-305. The Town requests that the issues identified herein be certified for review by this Court on the basis that they involve legal principles of major significance to the jurisprudence of the State, they have significant public interest, and certain rulings appear likely to be in conflict with decisions of the Supreme Court.

SUMMARY OF PETITION

These Petitions for Discretionary Review are combined for presentation to the Supreme Court because the Court of Appeals makes findings, conclusions and rulings in the COA20-304 case that are restated and applied in the COA20-305 case. The Town supports the Court of Appeals' affirming Judge Collins' denial of Rubin's Motion to Enforce Judgment and alternative, Petition for Writ of Mandamus in the COA20-

304 case, and does not petition this Court related to the ultimate decision to affirm Judge Collins' ruling. This Petition involves decisions by the Court of Appeals to strike certain findings and conclusions from Judge Collins' Order, and to make certain rulings related to inverse condemnation, an alleged trespass claim, and mandatory injunctive relief; that were made in the COA20-304 case and applied in the COA20-305 case. Although the Town may have been able to preserve and present these issue to the Court by only filing a Petition in COA20-305, the Town files this Petition in COA20-304 out of an abundance of caution. The Court of Appeals' reversal of Judge Collins' Order granting the Town's Motion for Relief from Judgment in the COA20-304 case is not the subject of this Petition.

The Town supports the Court of Appeals' affirming Judge Collins' denial of Rubin's Motion to Dismiss in the COA20-305 case, and does not petition this Court related to the ultimate decision to affirm Judge Collins' ruling. This Petition involves decisions by the Court of Appeals to strike certain findings and conclusions from Judge Collins' Order, and to make certain rulings related to inverse condemnation, an alleged

trespass claim, and mandatory injunctive relief; that were made in the COA20-304 case and applied in the COA20-305 case. The Court of Appeals' affirming Judge Collins' Preliminary Injunction in the COA20-305 case is not the subject of this Petition.

STATEMENT OF THE FACTS

Development of residential subdivisions occurred in the areas of Apex, Wake County, North Carolina, around and in close proximity to the Rubin's tract. The property to the immediate west of Rubin's property is known and referred to as Arcadia West, which is a residential subdivision tract ("Arcadia West"). The property to the immediate east of Rubin's property was formerly known and referred to as Arcadia East, but is now referred to as Riley's Pond, which also is a residential subdivision tract ("Riley's Pond").

1. Original Condemnation Action

Prior to the Town Council's adoption of a resolution to file the Original Condemnation Action and prior to the filing of the Original Condemnation Action, the Riley's Pond subdivision property was properly, voluntarily annexed, rezoned, the subdivision plat was

approved by the Town. (R p 42, ¶ 6-7, 9-10).[1] With voluntary annexation, the Town had the right to serve the Riley's Pond property with Town utilities including sewer service. N.C. Gen. Stat. § 160A-31(e). (R pp 43-44, ¶ 11).

The Town determined that gravity sewer service ran to a point just on the other side of the narrow portion of Rubin's property from the Riley's Pond subdivision, in the Arcadia West residential subdivision, at a point approximately 151 feet from the Riley's Pond tract. (R p 60). The location was driven in large part by the topography of the property. (R p 31). To extend sewer from this gravity sewer tap point, the Town would have to cross this narrow-width portion of Rubin's property (R S (I) p 317).

On 3 March 2015, after the Town Attorney's attempt to purchase an easement from Rubin was unsuccessful, the Town Council adopted a resolution authorizing the condemnation of the 40-foot wide sewer easement across Rubin's property. (RS (I) pp 232-235). Ms. Rubin was

[1] Unless otherwise noted, references to the appellate record are from the COA20-304 case.

notified of the Town's decision on 5 March 2015. (R pp 63-64; 68). Rubin did not seek injunctive or other relief in the trial court prior to the Town's filing of its condemnation complaint approximately two (2) months after the resolution was adopted.

On 30 April 2015, the Town filed the Original Condemnation Action herein (R. pp 3-9), and deposited their $10,771 compensation estimate for the taking of a 40-foot wide, 151 feet long sewer easement – which amount is still held by the Clerk for Rubin. (R pp 12-13).

Several weeks after filing, Rubin's attorney sent the Town a letter stating Rubin intended to contest the right to take and "will be filing a motion to be heard by the Court on an expedited basis" and that "if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim for damages." [emphasis supplied]. (R p 72). Rubin did not state that she requested or expected the sewer line to be removed, or that she would seek injunctive relief. (R p 72).

The Town responded through counsel, requesting that if Rubin intended to bring a motion, to do so soon. (R pp 69-71). Counsel for the

Town and Rubin exchanged correspondence, and ultimately counsel for the Town re-stated the request for Rubin to bring the motion soon. (R pp 69-71). At no point did counsel for Rubin state that they intended to bring a claim for injunctive relief, either preliminary or permanent, to prevent the sewer line from being constructed. (R pp 69-71)

Rubin subsequently filed an Answer to the Complaint on 8 July 2015, requesting dismissal of the Condemnation Complaint, but did not request any injunctive relief. (R pp 20-24). Also, at no point did Rubin file "a motion to be heard…on an expedited basis." On 8 April 2016, almost a year after the Original Condemnation Complaint was filed, Rubin filed a motion for an "all other issues" hearing, and the only issue raised was the Town's right to take Rubin's property for the sewer easement plead in the Original Condemnation Complaint. (R pp 25-26). Again, Rubin did not plead or request permanent injunctive relief.

2. Judgment in the Original Condemnation Action.

An "all other issues" evidentiary hearing was conducted by the Honorable Elaine M. O'Neal on 1 August 2016. (Aug. 2016 T). A final judgment was entered in on 18 October 2016 ("Judgment"). (R pp 33-39).

The Court found that the paramount reason for the taking of the sewer easement described in the Original Condemnation Complaint was for a private purpose and the public's interest was merely incidental. (R pp 33-39;).

The Judgment dismissed the Town's claim for an acquisition of a forty (40) foot wide sewer easement across Rubin's property as "null and void." (R pp 33-39). The Judgment rendered the Complaint and Declaration of Taking a nullity. (R pp 33-39), with the effect of which is as if it had not been filed. Although the Court heard evidence that the sewer line had been installed across Rubin's property approximately a year before the all other issues hearing was held, including evidence from Rubin, Rubin did not request the sewer line be removed and the Judgment did not require removal of the sewer line. (R pp 33-39). The Judgment did not find that sewer line was installed pursuant to "quick take." The Judgment did not hold that title is reverted back to Rubin free and clear of the sewer line. In fact, the Judgment simply states that the "[Town's] claim [in its Original Condemnation Complaint] to [Rubin's] property by Eminent Domain is null and void." (R pp 33-39).

The Town filed a post-judgment Rule 59 and 60 motion, which was denied by Judge O'Neal after an in-person hearing.[2] (R pp 40-100; 101-102; Jan. 2017 T). Importantly, in the over 3 months from the entry of the Judgment to the denial of the Town's Rule 59 and 60 motion, Rubin did not ask Judge O'Neal to address the sewer line remaining on her property, did not ask Judge O'Neal to clarify her Judgment, and otherwise did nothing to advance the arguments in Court she now, several years later, makes, that the Judgment required removal and it would be unconstitutional for the sewer line to remain. (Jan. 2017 T).

The Town appealed Judge O'Neal's Judgment and Order denying the Town's post-judgment motions to this Court. (R pp 103-106). The Town did not seek a stay of the Judgment in the trial court or Court of Appeals. The Town's prior appeal was resolved on procedural grounds (holding the Town's post-judgment Rule 59 motion did not toll the time to appeal). *Town of Apex v. Rubin*, 262 N.C. App. 148, 821 S.E.2d 613 (2018). The Court's inclusion of a footnote classified as "dicta" related

[2] Rubin misstates Judge O'Neal's ruling – Judge O'Neal denied the motion but did not find it "improper" or "meritless."

solely to the original condemnation complaint, not the existence of the sewer easement acquired by inverse condemnation on 27 July 2015. The Town filed a Petition for Discretionary Review and asked the Supreme Court.

3. Effect of Judgment and Installation of the Sewer Line

In July 2015, after Rubin filed her answer and did not plead or request injunctive relief, and prior to the entry of the Judgment in the Original Condemnation Action, the Town modified the sewer easement necessary to serve the Riley's Pond subdivision. The Town decided, in part as a courtesy to Rubin, to use the "bore method" to construct and install a sewer line under the narrow portion of Rubin's property, so as not to disturb the surface of her property. (R pp 29-32).

Different in easement size and scope, 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 Rubin's property on 20 July 2015, the casing was inserted on 27 July 2015, and the sewer line was installed on 29 July 2015. (R pp 145-149; Doc. Ex. 16) No manholes were dug or are

currently on Rubin's property. (R p 157, ¶ 11). The physical invasion and taking occurred on or about 27 July 2015. (R p 146, ¶3). A 10-foot wide Town underground sanitary sewer easement ultimately was a sufficient easement given the change in the way the Town chose to install the sewer line (bore method). (R p 157, ¶ 11). Further, the Town was able to avoid taking any access or similar rights in the surface of Rubin's property. The surface of Rubin's property was not disturbed during construction, and the Town will not to have to access the surface of her property in the future to maintain or service the sewer line.

On 22 February 2016, the Town accepted as complete the sewer line, and it became a part of the Town's public sanitary sewer system. (R pp 145-149; Doc. Ex. 16). The sewer line remains in place, is in use, and serves approximately 50 residential homes and/or lots located in a properly annexed, rezoned and approved subdivision in the Town. (R pp 157-158, ¶14; 164, ¶7; Doc. Ex. 17). Further, the Town-owned sewer line was designed and constructed with the capacity to serve yet to be developed properties beyond the subdivision. (R pp 29-32; 145-149).

The Town's sewer easement serves an entire subdivision within the Town. Removal of the sewer line and the corresponding interruption in public sewer service to residents of the Town would cause significant, immediate and irreparable harm. (R S (II) 477, ¶ 25). If the sewer line is disabled or removed, the approximately 50 residential homes and/or lots would lose their connection to the Town's public sanitary sewer system. (R S (II) 477, ¶¶ 25-26). The existing sewer line is the only sewer line or facility touching or connecting the subdivision to Town sewer service. (R S (II) 477, ¶ 27). There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots. (R S (II) 477, ¶ 28).

4. Rubin's Post-Installation and Post-Condemnation Action Attempts to have the Sewer Line Removed

Approximately 3 ¾ years after the installation of the sewer line and after the entry of the Judgment in the condemnation action, Rubin filed a motion on 10 April 2019, seeking a mandatory injunction to remove the sewer line. (R. p 122-139). Rubin's motion, entitled Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus, was filed

herein (R. p 122-139). This was Rubin's first request for injunctive relief to the trial court. (R p 163, ¶4).

On 30 August 2019, the Town filed a Motion for Relief from Judgment asking the Court to hold that the 18 October 2016 Judgment that Rubin has used to support all her claims herein shall not be used prospectively to challenge the construction, maintenance and operation of the sewer line and easement under her property. (R p 145-149).

5. Declaratory Judgment Action Filed to Protect the Citizens of Apex

The Town's sewer easement serves an entire subdivision within the Town. Removal of the sewer line and the corresponding interruption in public sewer service to residents of the Town would cause significant, immediate and irreparable harm. (COA20-304, R pp 104-111). If the sewer line is disabled or removed, the approximately 50 residential homes and/or lots would lose their connection to the Town's public sanitary sewer system. (COA20-304, R pp 104-111). The existing sewer line is the only sewer line or facility touching or connecting the subdivision to Town sewer service. (COA20-304, R pp 104-111). There are

no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots. (COA20-304, R pp 104-111).

In order to protect the Town's interest and the homeowners and citizens of the Town living in the Riley's Pond subdivision, as well as to maintain the status quo, the Town filed the Declaratory Judgment/Inverse Condemnation Complaint on 13 May 2019 (COA20-304, R pp 3-15), along with a Verified Motion for Preliminary Injunction to enjoin Rubin from taking any action to remove or disturb the sewer line and easement on her Property during the pendency of the action. (COA20-304, R p 15-35). Acknowledging Rubin's inverse condemnation claim is now time-barred, the Town amended its Declaratory Judgment/Inverse Condemnation Complaint on 30 August 2019, waiving the Town's defense of the statute of limitations as a bar to Rubin's claim for just compensation. (COA20-304, R pp 83-90). The Town requested that the Court, pursuant to N.C. Gen. Stat. § 1-259 and/or 136-114, grant supplemental relief and order that a jury trial be held on the issue of the amount of compensation due Rubin for the inverse taking by the Town of the 10-foot wide underground sewer easement under Rubin's property.

(COA20-304, R pp 83-90). The Town's action is not an inverse condemnation action; for condemnors cannot file such actions. The Town's action is to have the court declare that the sewer easement and line exist on Rubin's property pursuant to the Town's power of eminent domain and based on the effect of Judge O'Neal's Judgment, and Rubin has a right to just compensation for the easement taken. (COA20-304, R pp 83-90). The right to compensation is Rubin's to request/enforce or not.

Rubin filed a motion to dismiss the amended complaint. In her brief in support of the motion, Rubin did not raise constitutional concerns in response to the Town's motion. (COA20-304, R pp 40-77; 91-96). Rubin did not file a response to the Town's motion for a preliminary injunction.

6. Judge Collins' Orders and Rubin's Failed Forum Shopping Attempt

The pending motions were heard by the Honorable G. Bryan Collins on 23 May 2019. (May 2019 T.) At the hearing, Judge Collins announced that he was considering taking the matters in both the 2015 case and the 2019 case under advisement and would like to order the parties to mediation. The Town stated that they would be glad to mediate (May 2019 T. p. 69:8-9); Rubin said she would only agree to mediate if the Town

brings "a satchel [of money] with them when they come…" to the mediation (May 2019 T. p 78:11-15). Ultimately, Judge Collins took the matters under advisement, and ordered the parties to mediation. (R pp 143-144). After two separate days of mediation which resulted in an impasse, Judge Collins scheduled a subsequent hearing on pending motions which occurred on 9 January 2020. (Jan. 2020 T.).

Prior to the 9 January 2020 hearing, and while the parties' motions were under advisement with Judge Collins, Rubin forum shopped by filing a lawsuit in federal court, Eastern District of North Carolina, on 1 October 2019, against the Town and other parties, essentially requesting the same relief that she requests from the state court – a mandatory injunction to remove the sewer line. *Rubin v. Town of Apex, et. al.*, EDNC, file no. 5:19-cv-449-BO. Rubin filed the federal court lawsuit only after the state court mediation on 7 August 2019 resulted in an impasse and did not settle on terms acceptable to Rubin. The Town filed a motion to dismiss Rubin's forum shopping complaint which was granted by the Honorable Terrence W. Boyle on 27 March 2020. Id., at Doc. 47.

With the 23 May 2019 and 9 January 2020 hearings, Judge Collins conducted in-court hearings totaling approximately 4 ½ hours on the parties' motions. (May 2019 T.; Jan. 2020 T.). At the conclusion of the 9 January 2020 hearings, Judge Collins took the motions in the 2015 and 2019 cases under advisement. (Jan. 2020 T. 123:17-23). After deliberating on the motions for over a week, Judge Collins denied Rubin's motion to enforce judgment and granted the Town's motion for relief from judgment. Judge Collins' orders (collectively referred to herein as the "Order") were entered on 21 January 2020 (R pp 155-167).

7. Appeals to the Court of Appeals

Rubin filed notices of appeal for all four orders on 29 January 2020. Oral argument occurred in these appeals on 24 February 2021. On 4 May 2021, the Court of Appeals filed its published opinions in the COA20-304 and COA20-305 cases.

In the COA20-304 case, the Court of Appeals affirmed Judge Collins' denial of Rubin's Motion to Enforce Judgment and alternative, Petition for Writ of Mandamus. However, the Court of Appeals struck and reversed certain findings and conclusions from Judge Collins' Order,

and made certain rulings related to inverse condemnation, an alleged trespass claim, and mandatory injunctive relief (as discussed in detail below). These findings and conclusions were made in the COA20-304 case and applied in the COA20-305 case. The Court of Appeals reversed Judge Collins' Order granting the Town's Motion for Relief from Judgment.

In the COA20-305 case, the Court of Appeals affirmed Judge Collins' denial of Rubin's Motion to Dismiss. However, the Court of Appeals struck certain findings and conclusions from Judge Collins' Order, and made certain rulings related to inverse condemnation, an alleged trespass claim, and mandatory injunctive relief that were carried forward from the COA20-304 case (as discussed in detail below). The Court of Appeals affirmed Judge Collins' grant of a Preliminary Injunction.

The Court of Appeals issued its mandate on 24 May 2021. Apex now respectfully files their Petition for Discretionary Review within the requisite 15-day period.

REASONS WHY CERTIFICATION SHOULD ISSUE

I. The Court of Appeals' decisions involve legal principals of major significance to the jurisprudence of the State and they have significant public interest.

A. The Court of Appeals erroneously held that a trespass action lies against a municipal condemnor for a physical invasion resulting from their use of the power of eminent domain.

The Court of Appeals opinions are significant to the jurisprudence of the State because the Court of Appeals has held that a trespass action (which was not previously pled by the landowner) lies against a municipal condemnor for a physical invasion resulting from their use of the power of eminent domain. The Court of Appeals allows this trespass action to be brought in a subsequent, separate lawsuit as opposed to requiring this calim to be raised by the landowner in the original condemnation action. It appears the Court of Appeals' finding of a trespass and rejection of an inverse taking was a means to an end to allow Rubin a chance to seek mandatory injunctive relief to attempt to have the sewer line removed – a remedy she failed to seek in the condemnation

action. Nevertheless, a physical invasion by a condemnor is a taking – and the Court of Appeals ruling is a departure from this precedent.

The Court of Appeals acknowledges that the Town's physical invasion 18 feet under the surface of Rubin's property to install a sewer line was pursuant to its power of eminent domain – and specifically pursuant to the eminent domain powers granted to the North Carolina Department of Transportation found in N. C. Gen. Stat 136-103, *et. seq.* (2019) as per the Town's Charter. (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶6, Ft Nt 1, ¶21)(App. p.1). The Town acted properly in exercising its inherent power of eminent domain and properly followed the statutory authority and procedures granted by N. C. Gen. Stat 136-103, *et. seq.* (2019) in installing the sewer line on Rubin's property. (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶7, Ft Nt 2, ¶21). (R pp 3-9). Given the Court of Appeals' finding that the Town properly installed the sewer line pursuant to Chapter 136, it is inconsistent and incorrect for the Court of Appeals to now find that the Town trespassed on Rubin's property due to the existence of the sewer line. After all, the first element of a trespass claim is "an unauthorized and therefore unlawful entry" onto the land of

another, *Matthews v. Forrest*, 235 N.C. 281, 69 S.E. 2d 553 (1952), and the Court of Appeals held that the Town was authorized and lawfully entered Rubin's property to install the sewer line.

In creating a new claim for trespass against a municipal condemnor, the Court of Appeals has ignored settled condemnation law and precedent. A taking always has been found in cases involving "a permanent physical occupation" by a condemnor exercising its power of eminent domain. *Beroth Oil Co. v. N.C. Dept. of Transp.*, 367 N.C. 333, 341, 757 S.E. 2d 466, 473 (2014). This Court defined a "taking" in *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E. 2d 101, 109 (1982) as "appropriating or injuriously affecting [private property] in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." (See also *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950)). It has been held that there is no common law right to bring an action for nuisance or trespass against a city. The remedy, if any, is inverse condemnation. *Long,* at 198. (See also *McAdoo v. City of Greensboro,* 91 N.C.App. 570, 573, 372 S.E.2d 742, 744 (1988), "[a]n [property] owner has no common-law right to bring a

trespass action against a city."). The *McDowell* (1893) and *Lloyd* (1915) opinions cited by the Court of Appeals were issued before the legislature enacted the inverse condemnation statues and are not authority to support a trespass claim herein.

Most recently, this Court in *Wilkie v. City of Boiling Spring Lakes* had the choice to allow a trespass claim, *Corum* claim, and/or some other claim for a landowner against a physical invasion by a municipality that lacked a public purpose, and this Court applied the state's condemnation statutes, specifically its inverse condemnation statutes, to the municipality's action. 370 N.C. 540, 809 S.E.2d 853 (2018). The *Wilkie* case precludes the Court of Appeal's attempts to create a trespass claim for Rubin.

Despite this precedent, the Court of Appeals rejects the physical invasion as a taking, and concludes that a trespass claim lies. The Court of Appeals appears to reason that since the condemnation complaint was ultimately dismissed due to the trial court's ruling that the existing public interest was only incidental to the private interest, the sewer line existing under the property as a taking was essentially converted into a

trespass. This ruling is not supported by Supreme Court precedent or by the plain language of the Judgment herein.

The Court of Appeals' conclusion is erroneously based in part on the premise that an inverse condemnation does not lie when the condemnor has filed a condemnation complaint. (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶54). N. C. Gen. Stat. §136-111 states that this section applies "when land or a compensable interest therein has been taken by …. the Department of Transportation *and no complaint and declaration of taking has been filed*." [Emphasis supplied]. However, the appellate courts have recognized that this language does not prevent an inverse condemnation claim when a condemnation complaint has been filed. See *Department of Transportation v. Bragg*, 308 N.C. 367, 371, 302 S.E. 2d 227, 230 (1983)(In a case where water runoff and drainage from a project was permanent, a property owner may initiate a proceeding to receive just compensation for inverse condemnation of his property pursuant to N.C. Gen. Stat. § 136-111, or when a partial taking under N.C. Gen. Stat. § 136-103 has been instituted, the principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse

condemnation in the ongoing proceedings); *North Carolina Dept. of Transportation v. Cromartie*, 214 N.C. App. 307, 311-12, 716 S.E. 2d 361, 365 (2011)(the Court rejected an argument by NCDOT that the landowner had no right to bring an inverse condemnation claim when a condemnation complaint had been filed for a land area outside and unauthorized in the condemnation complaint – the language of N.C. Gen. Stat. § 136-111 did not prevent the separate inverse condemnation claim).

The Court of Appeals fails to recognize and give effect to the O'Neal Judgment dismissing the condemnation claim as "null and void" and not requiring removal of the sewer line or returning the property free and clear of the sewer line. The Judgment dismissed the condemnation claim as null and void. (R pp 33-39). "Null and void" means – "it is as if it never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E. 2d 103, 108 (1970). When this language is compared to the language of N.C. Gen. Stat. § 136-111, it is clear that the impact and effect of the Judgment is as if "…no complaint containing a declaration of taking has been filed.." N.C. Gen. Stat. § 136-111. So the impact of the language of the Judgment,

when applied to the undisputed facts that the Town physically invaded Rubin's property and the sewer line remains, is that an inverse taking results. Judge Collins properly applied existing statutes and case law to the facts of this case.

This reading of N. C. Gen. Stat. §136-111 is consistent with this Court's reasoning in *Wilkie*. When the municipality in *Wilkie* went outside their easement and raised the water level on the plaintiff's property for a non-public purpose, this Court held that an inverse taking resulted. *Wilkie* held that lack of a public purpose did not convert the municipality's action from a taking into a trespass, or something else. As such, the fact that a condemnation complaint was filed then dismissed, and the sewer line was left undisturbed by the trial court, does not convert the sewer line properly installed as a taking into a trespass. An inverse taking is what resulted from the Town's physical invasion of Rubin's property and the resulting sewer line. The language of N. C. Gen. Stat. §136-111 does not negatively impact an inverse condemnation

herein, and cannot be used to support the Court of Appeals' finding of a trespass claim.

The Court of Appeals misapplies *Thornton* and *Midland* in attempting to further support is creation of a trespass claim for Rubin. The Court of Appeals cites these cases for its premises that title to the property automatically revested in Rubin free and clear of the sewer line – and thus an inverse condemnation cannot lie. These cases do not recognize a trespass claim against a condemnor, do not hold that a landowner automatically takes the property back free and clear of any facilities constructed on their property, and do not foreclose a finding of an inverse taking for the sewer line beneath Rubin's property.

At the outset, the *Thornton* and *Midland* cases are distinguishable on a very important issue. The landowners in *Thornton* and *Midland* objected to the right to take and pled mandatory injunctive relief to prohibit the condemnor from keeping facilities on their property at the conclusion of the condemnation proceeding. *State Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E.2d (1967); *Town of Midland v. Morris,* 209 N.C.App. 208, 704 S.E.2d 329 (2011). It was the landowners'

pleading of mandatory injunctive relief that allowed the courts to reach and discuss this as a remedy. The Court of Appeals properly held that Rubin did not plead this remedy and the Judgment did not award her this remedy.

The *Thornton* and *Midland* cases do not hold that property was automatically returned to a landowner free and clear of any physical intrusion by the condemnor. *Thornton* does not say a landowner has a trespass claim against the condemnor. In *Thornton*, the Supreme Court held that if the landowner does not seek injunctive relief, the project is installed, and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law – but not a mandatory injunction. *Id*. at 240-241, 156 S.E. 2d at 258-259. The Court of Appeals cites language from a section of the case dealing with whether the landowner is estopped from contesting the right to take in his answer, and whether the landowner can receive the relief they pled which was mandatory injunctive relief. *Town of Apex v Rubin,* 2021-NCCOA-187, ¶ 23. *Thornton* states that Thornton would have whatever claims exist for those that have "trespassed on upon their

land and propose to continue to do so." *Id.* When read in context, this comment is about the 700+ employees of Associated Transport Inc., delivery trucks and customers that have driven on and continue to drive on the road condemned on Thornton's property to access the Associated Transport Inc. plant where they work (*Id.*, at 231, 156 S.E. 2d at 251-252) – not to allow a trespass against the condemnor – for no such claim exists at law against the condemnor.

The Court of Appeals in *Midland* cites *Thornton* and no other source for its statement that "in this case" if a landowner is successful in challenging the right to take, it will be entitled to relief in the form of return of title to the land. *Midland,* 209 N.C.App. 208, 213-214, 704 S.E.2d 329, 334-335 (2011). It is important to note that this comment by the *Midland* Court was in the context of whether the landowner's appeal regarding its challenge to the right to take was moot due to the completion of the construction of a pipeline (the court held it was not). *Midland,* 209 N.C.App. 208, 704 S.E.2d 329 (2011). The Court did not say a trespass claim results if the condemnation action was dismissed, and did not hold that the landowner would <u>automatically</u> take property

free and clear of the pipeline. The landowners in *Midland* pled mandatory injunction relief so the Court said the landowners would be entitled to it. *Midland* cannot be read to award relief not pled. These cases can hardly support a finding by the Court of Appeals that a trespass action lies against the Town under the Judgment and facts of this case.

Regardless of what remedies *Thornton* and *Midland* make available to landowners who successfully challenging the right to take, they do not say these remedies are automatic – remedies must be pled for a landowner to be entitled to receive a remedy. Here, the Court of Appeals makes an improper leap that the revesting automatically flows from the O'Neal Judgment dismissing the condemnation claim as "null and void." However the Court of Appeals acknowledges that *Thornton* does not hold that dismissal of a condemnation action is equivalent to a mandatory injunction to undo the construction and restore the land. (*Town of Apex v. Rubin*, 2021-NCCOA-187, ¶ 35). Under *Thornton* and the ruling of the Court of Appeals herein, revesting free and clear of the sewer line cannot automatically flow given the existence of the sewer line. The Court of Appeals held the Judgment did not require removal of the sewer line, yet

ignored this holding in finding that the Judgment revested title in Rubin free and clear of the sewer line (to argue an inverse taking does not lie). The Court of Appeals cannot have it both ways. After the Judgment, a sewer line remains that was not ordered removed by the Judgment. The physical invasion was authorized and legal at the time it occurred, and has not been adjudicated unauthorized or illegal by a trial court, and therefore cannot be a trespass.

Further, the Court of Appeals erred in holding that Judge Collins' finding that the sewer line is an inverse taking is barred by *res judicata* - that the Judgment bars such a finding. The Court of Appeals says the Judgment does not address the sewer line – so how can the Judgment be *res judicata* against the Town regarding the existence of the sewer line?[3] In any event, the Court of Appeals erred in its conclusion that a trespass claim exists for Rubin herein, and erred in its refusal to affirm Judge Collins findings and conclusions on inverse taking.

B. The Court of Appeals erroneously held that a landowner who did not seek mandatory injunctive

[3] As we discuss below, *res judicata* prevents Rubin from seeking a mandatory injunction to remove the sewer line in a subsequent action. *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15, 591, 870, 880 (2004).

relief in a condemnation action can bring a separate lawsuit after the fact and seek mandatory injunctive relief for removal of a previously installed sewer line.

The Court of Appeals opinion is significant to the jurisprudence of the State because the Court of Appeals held that a landowner who did not seek mandatory injunctive relief in a condemnation action can bring a separate lawsuit after the fact and seek mandatory injunctive relief for removal of a previously installed sewer line. Surprisingly, the Court of Appeals also held that injunctive relief does not lie against "state" condemnors in their exercise of the power of eminent domain but does lie against "municipal" condemnors in their exercise of the power of eminent domain. Regardless of whether the resulting sewer line is a taking or a trespass, Rubin is not entitled to seek mandatory injunctive relief in a subsequent, separate action against the Town.

The Court of Appeals properly cites settled Supreme Court law that private landowners cannot seek mandatory injunctive relief against the State to restore property/remove facilities following an unauthorized encroachment or taking for a non-pubic purpose. (*Town of Apex v. Rubin,* 2021-NCCOA-187,¶48). *Clark v. Asheville Contracting Co., Inc.,* 316 N.C.

475, 342 S.E.2d 832 (1986) (holding injunctive relief was unavailable against the Department of Transportation for an occupation of private property that was not for a public purpose)*; State Highway Comm'n v. Batts,* 265 N.C. 346, 144 S.E.2d 126 (1965). The Supreme Court's reasoning and holdings in the *Clark, Batts and Thornton* cases should have ending this inquiry and resulting in a holding by the Court of Appeals that Rubin cannot now request mandatory injunctive relief against the Town. But it did not; and the Court of Appeals committed a number of errors in attempting to create a mandatory injunctive remedy for Rubin herein.

The Court of Appeals correctly held that the Town's condemnation action was pursuant to the eminent domain powers granted to the North Carolina Department of Transportation found in N. C. Gen. Stat § 136-103, *et. seq.* (2019) per its Charter. (*Town of Apex v. Rubin,* 2021-NCCOA-187, ¶6, Ft Nt 1, ¶21)(App. p.1). As such, the Town acted with the same eminent domain power (pursuant to Chapter 136) as the condemnors in the *Clark* and *Batts* cases, and therefore the prohibition on mandatory injunctive relief from these cases applies to defeat Rubin's new requested

injunctive remedy. Inexplicably, the Court of Appeals ignores this undisputed finding and power in order to attempt to allow a mandatory injunction claim to be brought against the Town after the fact. The Court of Appeals cites to the Town's use of Chapter 136 in its conclusion that no inverse condemnation lies (*Town of Apex v. Rubin,* 2021-NCCOA-187, ¶61) – but fails to cite to it when it forecloses mandatory injunctive relief. The Court of Appeals cannot have it both ways.

Further, the Court of Appeals' refusal to apply this prohibition on mandatory injunctions to a municipality exercising its eminent domain power under Chapter 136 harms and calls into question the efficacy of and authority vested in the approximately 54 other municipalities that have this authority per their charters.[4] The Town's use of its legislatively

[4] There are approximately 55 municipalities with similar charter provisions that allow the use of the eminent domain power and process of Chapter 136, that will be negatively impacted by the Court of Appeals ruling (list includes effected municipality and year of the Session Law enacting this power to condemn under Chapter 136 for certain enumerated purposes including sewer):

Winston-Salem 1967	Morganton 1975	Farmville 1979	Troutman 1981
Chapel Hill 1969	Cabarrus Co 1975	Garland 1979	Mayodan 1981
Goldsboro 1973	Garner 1977	Rutherfordton 1979	Maiden 1981
Zebulon 1973	Concord 1977	Wake Forest 1979	Brevard 1981
Fairmont 1973	Lenoir 1977	Fuquay-Varina 1979	High Point 1981
Raleigh 1973	Fayetteville 1977	Knightdale 1979	Newton 1981
Raeford 1973	Spring Lake 1977	Lincolnton 1979	Kinston 1981
Wilson 1973		Albemarle 1979	Charlotte 1983

granted eminent domain power under Chapter 136 insulates it from a mandatory injunctive claim to be brought by Rubin under the facts of this case. *Clark*; *Batts.*

In refusing to apply *Clark* and *Batts* to bar Rubin's mandatory injunction claim, the Court of Appeals attempts to create a distinction between State and municipal condemnors and whether these condemnors are subject to a mandatory injunction claim to remove previously installed facilities. (¶49, 50) The Court of Appeals makes this leap by trying to classify the Town's actions in this case as a proprietary function – operation of a sewer system. But the Court of Appeals has held that the Town was exercising their power of eminent domain pursuant to N. C. Gen. Stat 136-103, *et. seq.* (2019) when they installed the sewer line. Rubin's purported mandatory injunction remedy arises out of the Town's exercise of its power of eminent domain – which resulted in the

Greensboro 1973 Reidsville 1974 Eden 1974 Durham 1975 Grifton 1975 Ramseur 1975	Cumberland Co 1977 Valdese 1977 Mint Hill 1977 Mount Olive 1977 Statesville 1977 Greenville 1977	Asheboro 1979 Pineville 1980 Mocksville 1980 Forest City 1981 Southern Pines 1981 Jamestown 1981	Conover 1985 Hickory 1985 Salisbury 1987 Apex 1987 Rocky Mount 2004 Holly Springs 2005

installation of the sewer line beneath Rubin's property. The power of eminent domain is an inherent power of government. The *Harrison v. City of Sanford* case deals with a sewage spill resulting from a municipality's operation of a municipal sewer system – not the exercise of the power of eminent domain. 177 N.C. App. 116, 627 S.E. 2d 672 (2006). The Court of Appeals purported distinction between state and municipal condemnors should be rejected – and the Court should find that a mandatory injunction remedy does not lie against the Town herein.

The Court of Appeals cites *Corum v. Univ. of North Carolina,* 330 N.C. 761, 413 S.E.2d 276 (1992) in an attempt to justify its ruling that Rubin can seek a mandatory injunction remedy after the condemnation action is cloncluded. There is no Supreme Court case applying *Corum* to an eminent domain case. In fact, this Court recently rejected *Corum* as providing relief to a landowner against a physical invasion by a municipality that lacked a public purpose; and applied the state's inverse condemnation law to address the municipality's action. *Wilkie v. City of*

Boiling Spring Lakes, 370 NC 540, 809 S.E.2d 853 (2018)[5]. Further, there is no North Carolina case that says that the statutory remedies of Article 3 of Chapter 40A (local public condemnors), Article 9 of Chapter 136 (condemnation for NC Dept. of Transportation), or Article 37 of Chapter 1 (injunctions) are not adequate to address the rights of a landowner in a condemnation case. For instance, N. C. Gen. Stat §40A-42(f) provides that "the provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor." Specifically, N. C. Gen. Stat §40A-42(a)(1) provides a landowner a right to bring an injunction action in the condemnation action to halt the vesting of title and immediate possession in a condemnor after the filing of a condemnation complaint.

> "***Unless an action for injunctive relief has been initiated***, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of

[5] The Court of Appeals attempts to distinguish *Wilkie* due to the relief sought by the landowner. But there is nothing in the *Wilkie* opinion that the conclusion that a public purpose is not an element of an inverse condemnation is based on the remedy sought (damages vs injunctive relief).

> the deposit in accordance with G.S. 40A-41." [Emphasis supplied][6]

The Court of Appeals opinion essentially ignores this provision and attempts to grant Rubin rights beyond what has been provided for in these statutes.

It should not come as a surprise that in *Corum,* the plaintiff pled mandatory injunctive relief, so the court addressed that remedy. Also, Rubin has already raised U.S. and N.C. Constitutional claims in the condemnation action, and receive in the Judgment the relief she sought in the protection of her constitutional claims. The Court of Appeals cannot use C*orum* to create a new claim and allow a mandatory injunction remedy because "there are no adequate statutory remedies" (remedies Rubin refused to avail herself of). *Corum* does not provide

[6] Article 9 of Chapter 136 does not contain a similar injunction provision – but *Thornton* recognizes a landowner's ability to file an injunction to prevent or halt the construction of the project before the project is constructed.

Rubin a "do over" and does not provide Rubin a new opportunity to seek mandatory injunctive relief.

The Court of Appeals decision to allow Rubin to bring a mandatory injunction claim in a new action to address conduct by the Town that was the subject to the prior condemnation action violates the Rules of Civil Procedure, *res judicata,* and the law on "all other issues" hearings in condemnation cases. In *In re McKinney,* 158 N.C. App. 441, 581 S.E.2d 793 (2003), this Court stated: "To be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter.:

> An application to the court for an order shall be by motion which… shall be made in writing, shall state with particularity the grounds therefor, *and shall set forth the relief or order sought.*

N. C. R. Civ. P. 7(b)(1) (2001) (emphasis added in original). N. C. R. Civ. P. 8(a)(2) provides that for a claim of relief in a pleading, it must contain "a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded." The

Rules of Civil Procedure do not allow a litigant to hold back relief or remedies they seek to assert – and save them for a future lawsuit.

A subsequent mandatory injunction remedy is barred by *res judicata*. Res judicata bars every ground of recovery or defense which was actually presented or which could have been presented in the previous action. *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004); *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336–37, disc. rev. denied, 323 N.C. 173, 373 S.E.2d 108 (1988). A final judgment "operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985), disc. review denied, 315 N.C. 590, 341 S.E.2d 29 (1986) (citation omitted). "A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the ...

litigation with respect to matters which might have been brought forward in the previous proceeding." *Id.* at 23, 331 S.E.2d at 730. "The defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Id.* at 30, 331 S.E.2d at 735.

The Court of Appeals failed to find that res judicata applies to Rubin's contest of the installation of the sewer line and her attempts to receive a mandatory injunction to have the sewer line removed. Rubin knew prior to filing her answer that the Town planned to move forward with construction of the project. (App. 2-5). Prior to construction of the sewer line, Rubin's attorney sent the Town a letter stating Rubin intended to contest the right to take and "will be filing a motion to be heard by the Court on an expedited basis" and that "if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim for ***damages***." [Emphasis supplied]. (R p 72)(App. 5). The Town responded through counsel, requesting that if Rubin intended to bring a motion, to do so soon. (R pp 69-71)(App. 2-4). At no point did counsel for Rubin state that they intended to bring a claim for injunctive relief, either preliminary or

permanent, to prevent the sewer line from being constructed. (R pp 69-71)(App. 2-5). Rubin subsequently filed an Answer to the Complaint on 8 July 2015, requesting dismissal of the Condemnation Complaint, but did not request mandatory injunctive relief. (R pp 20-24). Rubin had notice of the sewer line's installation and did not bring the issue before the Court at the Section 108 hearing approximately 12 months after the sewer line installation. Rubin's request for a mandatory injunction is a claim which she, exercising reasonable diligence, might have brought forward at the time of the original lawsuit. As such, Rubin's claim for mandatory injunction is barred by res judicata, and the Court of Appeals in so ordering. *Williams v. Peabody,* 217 N.C. App. 1, 719 S.E.2d 88 (2011).

The Court of Appeals' attempt to allow Rubin to bring an action for a mandatory injunction for conduct occurring in the condemnation action after the action is concluded also violates the law on Section 108 "all other issues" hearings. "[The] parties to a condemnation proceeding must resolve all issues other than damages at a hearing pursuant to N.C.G.S. § 136–108." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707,

710 (1999). "We hold that, at a minimum, a party must argue all issues of which it is aware, or reasonably should be aware, in a N.C.G.S. § 136–108 hearing." *City of Wilson v. Batten Family, L.L.C.,* 226 N.C. App. 434, 439, 740 S.E.2d 487, 491 (2013). As the landowner and party challenging the right to take, Rubin was aware that the Town had constructed the sewer line beneath her property (Aug. 2016 T p 44) approximately 12 months before the Section 108 hearing. If she wanted the remedy, Rubin was required to argue to Judge O'Neal at the Section 108 hearing for the removal of the sewer line and request mandatory injunctive relief – but she failed to do so and failed to obtain relief as it relates to the sewer line. (*Town of Apex v. Rubin,* 2021-NCCOA-187, ¶¶ 33-34). As the Court of Appeals stated in *Batten*, "we do not believe N.C.G.S. § 136–108 contemplates affording a party multiple hearings, at least not when the party had every opportunity to argue all relevant issues in a single N.C.G.S. § 136–108 hearing." *Id*.

The Court of Appeals erred in holding that a landowner who did not seek mandatory injunctive relief in the condemnation action can bring a

separate lawsuit after the fact and seek mandatory injunctive relief to remove a previously installed sewer line.

C. The Court of Appeals' decisions are of significant public interest.

Unless reviewed by this Court, the opinions of the Court of Appeals will have negative impacts on condemnation cases and civil cases generally. A trespass claim against a municipal condemnor is not contemplated by our condemnation statutes and has not previously be recognized by our appellate courts. If the Court of Appeals is going to recognize the ability to bring a tort claim like trespass against a condemnor in their exercise of the power of eminent domain, don't the opinions open the door for other tort claims to be alleged like nuisance, conversion, and other similar tort claims? Since the Court of Appeals recognized a trespass claim against a municipal condemnor exercising eminent domain powers granted to the North Carolina Department of Transportation found in N. C. Gen. Stat 136-103, *et. seq.*, don't the

opinions open the door for trespass claims against NCDOT? The same condemnation authority (Chapter 136) is at issue herein and for NCDOT.

Also troubling are the Court of Appeals holdings that Rubin can bring a new trespass claim and seek a mandatory injunction remedy after the conclusion of the original condemnation case. The Court of Appeals has essentially established a bifurcated process where the landowner "protests" the right to take, but does not have to plead available injunctive remedies, or the newly created tort claims in the alternative. So, like here, the condemnor and the trial court are not aware that the landowner seeks mandatory injunctive relief. Then if successful in their challenge to the right to take, the landowner can institute a new action for trespass and possibly other torts, and can seek mandatory injunctive relief – all after the condemnor has properly followed the statutes that provide for immediate vesting of title and possession upon the filing of a condemnation complaint and deposit of just compensation.

The Court of Appeals' rulings promote uncertainty and protracted litigation, and will delay a condemnor's ability to timely extend utilities such as electricity, water, sewer and broadband to the citizens of a

municipality or the state. These opinions change the rules and procedures in condemnation actions and ignore the statutory authority given to condemnors to have title vested and enter, take possession, and construct the project. Going forward, it seems condemnors will not feel comfortable relying on the statutorily authorized condemnation authority and procedures, including quick take authority, provided by the legislature if they could be subject to a trespass action and mandatory injunctive relief after the fact? A condemnor that believes they are proceeding properly and that they have instituted a condemnation action properly may elect to wait to extend utilities to the property or customers – until the condemnation case is completely over and all appeal rights have been exhausted.

The Court of Appeals' attempt to limit the application of the opinions does not lessen the negative impact on condemnation law and procedures – and in fact adds to the confusion. The Court of Appeals says that "we limit our holding to cases in which a municipality filed a direct condemnation, constructed an improvement on the protesting landowner's property, and later lost the condemnation action on the

ground that it was for a non-public purpose." (*Town of Apex v. Rubin, 2021-NCCOA-187,* ¶61). Setting aside that even this "limited" holding is contrary to *Wilkie, Thornton,* and other Supreme Court cases, as well as applicable statutory provisions, the Court of Appeals does not say what "protesting" means, what is required to protest, when the protest must be raised, and whether the protester has to plead injunctive relief. How will the trial court and parties know if this opinion applies when they are going through the case – before the Section 108 hearing? How will the trial court apply and/or recognize these new claims and remedies etc. before they know if the complaint would be dismissed for lack of a public purpose.

Under the Court of Appeals opinions, it appears a landowner is now relieved from the pleadings and request of injunctive relief requirements outlined in cases like *Thornton* for Chapter 136 condemnations and in N. C. Gen. Stat. § 40A-42 for municipal takings? Landowners have historically not just been able to challenge the right to take – but have been required to plead any equitable or injunctive remedy if they want such a remedy. In fact, this Court of Appeals' ruling incentivizes

landowners to stay quiet and not seek injunctive relief – so they can "create" a trespass claim if they win their challenge. This is clearly not what the legislature contemplated in enacting the statutory powers and procedures for state and municipal condemnors.

Under the Court of Appeals opinion, a condemnor can no longer rely on the relief sought in a landowner's pleading; can no longer rely on the Section 108 hearing to resolve all issues other than damages. The Court of Appeals' rulings allowing new claims and mandatory injunctive relief after an action is concluded could be attempted and applied in other civil actions.

This opinion also creates uncertainly for landowners – with no inverse condemnation remedy, landowners will not have the ability to seek attorney's fees in these cases.

Again, there is no statutory or constitutional right to a mandatory injunction in a condemnation case, and a mandatory injunction to remove a previously installed sewer line does not automatically flow from a dismissal of a condemnation complaint.

Finding that the sewer line left in the ground is a taking not a trespass does not weaponize *Wilkie* or any other opinion. Such a finding merely gives effect to the Judgment in this case – and recognizes that the landowner did not seek removal and the Court did not order it – so the sewer line stays. Judge Collins applied existing statutes and case law to reach his conclusions, and they were proper.

II. The rulings of the Court of Appeals appear likely to be in conflict with decisions of the Supreme Court.

As we have stated in this Petition, the opinions of the Court of Appeals appear to be in conflict with several Supreme Court cases, including (to summarize certain Supreme Court authority discussed herein – including but not limited to the reasons stated herein):

- *State Highway Commission v. Thornton,* 271 N.C. 227, 156 S.E.2d 248 (1967) - held that if the landowner in a Chapter 136 condemnation does not seek injunctive relief, the project is installed, and the taking ultimately fails for lack of a public purpose, the condemnation petition is dismissed and the landowner has whatever rights exist at law – but not a mandatory injunction – Court of Appeals cannot recognize a new

trespass claim and subsequent mandatory injunction remedy given *Thornton*.

- *Wilkie v. City of Boiling Springs* case. 370 N.C. 540, 809 S.E.2d 853 (2018) – Supreme Court had the choice to allow a trespass claim, *Corum* claim, and/or some other claim for a landowner against a physical invasion by a municipality that lacked a public purpose, and applied the state's condemnation statutes, specifically its inverse condemnation statutes, to the municipality's action. – Case precludes the Court of Appeal's attempts to create a trespass claim for Rubin.

- *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986) - Private landowners cannot seek mandatory injunctive relief against a State agency to restore property following an unauthorized encroachment for a non-public purpose.

- *Beroth Oil Co. v. N.C. Dept. of Transp.*, 367 N.C. 333, 341, 757 S.E. 2d 466, 473 (2014); *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E. 2d 101, 109 (1982); and *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 484, 57 S.E.2d 817, 819 (1950) – a

physical invasion by a condemnor is a taking and there is no common law right to bring an action for trespass against a municipality in the exercise of the power of eminent domain

- *Department of Transportation v. Bragg*, 308 N.C. 367, 371, 302 S.E. 2d 227, 230 (1983) – landowner can bring an inverse taking claim when a condemnation compliant has been filed; N.C. Gen. Stat. § 136-111 does not prohibit such a filing
- *Matthews v. Forrest*, 235 N.C. 281, 69 S.E. 2d 553 (1952) – must have an unauthorized and therefore unlawful entry onto the land of another to have a trespass claim – the Court of Appeals erred in finding a trespass even though the Town was authorized and therefore lawful in its entry onto Rubin's property

For these reasons, and the reasons stated above, it appears that the opinions of the Court of Appeals are in conflict with Supreme Court precedent and therefore should be reviewed.

CONCLUSION

For the reasons cited herein, Apex respectfully requests the Court to certify the issues identified herein for discretionary review.

ISSUES TO BE BRIEFED

In the event the Court allows these Petitions for Discretionary Review, the Petitioner intends to present the following issues in their brief(s) to the Court:

Issue 1: Did the Court of Appeals err in finding that the sewer line beneath Rubin's property is not an inverse taking by the Town?

Issue 2: Did the Court of Appeals err in finding that the property revested in Rubin free and clear of the sewer line under the language of the Judgment herein?

Issue 3: Did the Court of Appeals err in finding the Town trespassed on Rubin's property given the existence of the sewer line beneath Rubin's property?

Issue 4: Did the Court of Appeals err in finding that Rubin could bring a new trespass action against the Town after the conclusion of the original condemnation action?

Issue 5: Did the Court of Appeals err in striking the listed findings of fact and conclusions of law from Judge Collins' Order Denying Rubin's

Motion to Enforce Judgment and alternative Petition for Writ of Supersedeas entered in the COA20-304 case?

Issue 6: Did the Court of Appeals err in finding that res judicata bars the Judge Collins' finding that the sewer line beneath Rubin's property is an inverse taking by the Town?

Issue 7: Did the Court of Appeals err in finding that Rubin could assert a mandatory injunction remedy for the removal of the sewer line in a new trespass action against the Town?

Issue 8: Did the Court of Appeals err in finding that Rubin could assert a mandatory injunction remedy for the removal of the sewer line in a new trespass action against the Town when she did not plead or raise it in the original condemnation action?

Issue 9: Did the Court of Appeals err in finding that the Judgment and/or the ruling in the COA20-304 case is res judicata and barred the trial court from finding that the sewer line beneath Rubin's property is an inverse taking by the Town in the COA20-305 case.

Issue 10: Did the Court of Appeals err in finding that the ruling in the COA20-304 case is res judicata and barred the trial court from finding

that mandatory injunctive relief is not available to Rubin in the COA20-305 case.

Issue 11: Did the Court of Appeals err in reversing the trial court's denial of Rubin's motion to dismiss as to declarations (1)-(7) in paragraph 27 of the Town's amended complaint in the COA20-305 case?

Respectfully submitted, this the 8th day of June, 2021.

/s/ David P. Ferrell
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Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **PLAINTIFF-APPELLEE'S PETITION FOR DISCRETIONARY REVIEW UNDER N.C. GEN. STAT. § 7A-31 IN COA20-304 AND COA20-305** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

Matthew Nis Leerberg
Smith Moore Leatherwood LLP
PO Box 27525
Raleigh, NC 27611
Attorneys for Defendant-Appellant

Kenneth C. Haywood
Boxley, Bolton, Garber & Haywood
PO Box 1429
Raleigh, NC 27602
Attorneys for Defendant-Appellant

This the 8th day of June, 2021.

/s/ David P. Ferrell
David P. Ferrell

CONTENTS OF APPENDIX

Sec. 6.5. - Additional eminent domain powers.

Notwithstanding the provisions of G.S. 40A-1, in the exercise of its authority of eminent domain for the acquisition of property interests (including, without limitation, fee simple title, rights-of-way, and easements) to be used for: (i) water lines and treatment facilities; (ii) sewer lines and treatment facilities; (iii) electric distribution and transmission facilities; and (iv) opening, widening, extending, or improving public streets and roads, the town may use the procedure and authority prescribed in G.S. Article 9 of Chapter 136, as now or hereafter amended; provided further, that whenever therein the words "Secretary" or "Secretary of Transportation" appear, they shall be deemed to include the "Town Manager", and whenever therein the word "highway" appears, it is deemed to include "public works" in accordance with this section, provided further that nothing herein shall be construed to enlarge the power of the town to condemn property already devoted to public use. Provided further, just compensation for the acquisition of fee simple title, or a perpetual easement, pursuant to this section, to be used for street or road right-of-way, shall be no less than (i) one dollar ($1.00) per square foot of real property taken, or (ii) the prorated ad valorem tax value of the parent tract, whichever is less. Just compensation for the acquisition of fee simple title or a perpetual easement pursuant to this section to be used for electric distribution and transmission facilities shall be no less than: (i) fifty cents ($0.50) per square foot of real property taken, or (ii) one-half the prorated ad valorem tax value of the parent tract, whichever is less. The powers granted by this section are in addition to and supplementary to those powers granted by any local or general law.

(S.L. 1987, Ch. 170, § 1; Amend. of 7-16-03; S.L. 2003-88, § 1, 5-29-03; S.L. 2007-37, § 2, 5-8-07)

David Ferrell

From: David Ferrell
Sent: Friday, June 12, 2015 5:28 PM
To: Kenneth Haywood
Subject: RE: Town of Apex / Rubin

Kenneth,

We disagree with your characterizations that the condemnation complaint was filed suddenly. To date we have received nothing as a result of your May 19 letter. The Town will need to move forward with the project. Let me know if you would like to discuss.

David

David P. Ferrell
VANDEVENTER BLACK LLP
O: 919.754.1171 | F: 919.754.1317
dferrell@vanblk.com
Bio vCard

From: Kenneth Haywood [mailto:KHaywood@bbghlaw.com]
Sent: Wednesday, June 10, 2015 4:24 PM
To: David Ferrell
Subject: RE: Town of Apex / Rubin

David,

We stand by our last letter. Prior to the initiation of the lawsuit we had prepared a public record's request to send to the Town. That was interrupted by the sudden filing of the lawsuit. We therefore have request for production of documents that will need to be responded to in order to bring on our motions. We will be sending these out to you in the next couple days. I am not aware of any urgency in moving forward with the construction and therefore best for all parties to gather the necessary documents and have the hearing.

Kenneth

Kenneth C. Haywood

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khaywood@bbghlaw.com
www.bbghlaw.com

From: David Ferrell [mailto:DFerrell@vanblk.com]
Sent: Wednesday, June 10, 2015 3:49 PM
To: Kenneth Haywood
Subject: RE: Town of Apex / Rubin

Kenneth,

Given that the Town has heard nothing from Ms. Rubin regarding the issues in your May 19, 2015 letter and our exchange of correspondence on May 22, 2015, we will move the construction of the project forward. If you have questions or would like to discuss, please give me a call. Thanks.

David

David P. Ferrell
VANDEVENTER BLACK LLP
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From: Kenneth Haywood [mailto:KHaywood@bbghlaw.com]
Sent: Friday, May 22, 2015 5:20 PM
To: David Ferrell
Subject: RE: Town of Apex / Rubin

David,

I have signed the acceptance and it is being mailed back. Given that the Town decided to go under 136 and not issue a 30 day letter and we received the complaint out of the blue we will move this matter along at the required pace.

Kenneth

Kenneth C. Haywood

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From: David Ferrell [mailto:DFerrell@vanblk.com]
Sent: Friday, May 22, 2015 5:05 PM
To: Kenneth Haywood
Subject: Town of Apex / Rubin

Kenneth

I am in receipt of your letter dated May 19, 2015 in the above referenced matter. Although we disagree with the characterizations in your letter and the basis for your motion, if you plan to file the motion and schedule a hearing,

please do quickly and set the matter on a mutually agreeable hearing date. The Town's project is scheduled to move forward and we cannot put it on hold for an undetermined period of time.

Also, if you do not plan to accept service on behalf of Ms. Rubin, please let me know so we can serve her directly. Thanks.

If you have questions or want to discuss, please give me a call. Thanks.

David

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App. 5

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May 19, 2015

MAY 2 2 2015

David P. Ferrell
Vandeventer Black LLP
Post Office Box 2599
Raleigh, North Carolina 27602

VIA FACSIMILE AND
U.S. MAIL

Re: Town of Apex v. Beverly L. Rubin

Dear David:

I am writing in response to the recent complaint you filed on behalf of the Town of Apex. Our client intends to challenge, the right to take, by the Town of Apex in this matter. Therefore, we will be filing a motion to be heard by the Court on an expedited basis.

I am writing to alert you to our intent to file such a motion and would encourage your client and its partner, the developer of the tract of land on either side of Ms. Rubin to not commence any construction activities until after the motion is heard. Otherwise, if our motion is granted and there is disturbance to the soil beneath Ms. Rubin's property, she will have to make a claim for damages. I trust that you appreciate providing advance notice to you of our intention in order to be able to mitigate against any actions caused by premature construction activities.

Once we have a motion hearing date, I will notify you in advance.

With best regards, I am

Sincerely yours,

Boxley, Bolton, Garber & Haywood, L.L.P.

Kenneth C. Haywood

KCH/lbf
cc: Beverly Rubin

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-187

No. COA20-304

Filed 4 May 2021

Wake County, No. 15-CVS-5836

TOWN OF APEX, Plaintiff,

v.

BEVERLY L. RUBIN, Defendant.

Appeal by Defendant from orders entered 21 January 2020 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 24 February 2021.

Nexsen Pruet, PLLC, by David P. Ferrell and Norman W. Shearin, for Plaintiff-Appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg and Troy D. Shelton, and Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Kenneth C. Haywood and B. Joan Davis, for Defendant-Appellant.

Johnston, Allison & Hord, P.A., by Susanne Todd and Maisha M. Blakeney, and Sever Storey, LLP, by Shiloh Daum, for amicus curiae North Carolina Advocates for Justice.

John Locke Foundation, by Jonathan D. Guze, amicus curiae.

INMAN, Judge.

¶ 1 Our Federal and State Constitutions protect us, our homes, and our lands from unrestrained government intrusion. Police cannot roam about our private property

unfettered. U.S. Const. amend. IV; N.C. Const. art. I § 20. The military cannot forcibly occupy our homes during peacetime. U.S. Const. amend. III; N.C. Const. art. I § 31. And, most pertinent to this appeal, the State cannot take our property without both a public purpose and payment of just compensation. U.S. Const. amend. V; N.C. Const. art. I § 19.

¶ 2 Plaintiff-Appellee Town of Apex ("the Town") asks this Court to uphold the Town's continuing intrusion onto the land of a private citizen through a circuitous and strained application of North Carolina law on eminent domain and inverse condemnations. The Town's position, in essence and when taken to its logical conclusion, is as follows: (1) if a municipality occupies and takes a person's private property for no public purpose whatsoever, that private landowner can do nothing to physically recover her land or oust the municipality; (2) if the encroachment decreases the property's value, then the landowner's sole remedy is compensation by inverse condemnation; and (3) in all other instances, a landowner is powerless to recover or otherwise vindicate her constitutional rights. This is not the law, nor can it be consistent with our Federal and State Constitutions.

¶ 3 Defendant-Appellant Beverly L. Rubin ("Ms. Rubin") appeals from orders denying her motion to enforce a judgment in her favor in a direct condemnation action and granting the Town's motion to be relieved from that judgment. She asserts that, having successfully recovered title to her land after the Town's unlawful taking, she

is entitled to repossess her property free of a sewer pipe installed by the Town. We agree with Ms. Rubin that mandatory injunctive relief may be available to her, but hold that it is not available in the direct condemnation action that was taken to final judgment without a request for or adjudication concerning the availability of injunctive relief. Instead, she may pursue mandatory injunctive relief against the Town to remedy its continuing encroachment through a claim for trespass.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 4 Many of the facts underlying this appeal were summarized in our prior decision, *Town of Apex v. Rubin*, 262 N.C. App. 148, 821 S.E.2d 613 (2018). However, because we now address post-judgment motions that were entered after that decision, a brief recitation of the factual and procedural history is warranted.

1. The Direct Condemnation Action and Installation of the Sewer Pipe

¶ 5 Ms. Rubin owns a tract of land in rural Wake County. In 2012 and 2013, a local real estate developer, Brad Zadell ("Mr. Zadell"), purchased several parcels to the east and west of Ms. Rubin's land with the intention of improving and selling them for residential development. *Rubin*, 262 N.C. App. at 149, 821 S.E.2d at 614. The western tract, known as Arcadia West, received sewer service from the Town, while the eastern tract, Riley's Pond, had no such access. *Id.* Mr. Zadell asked Ms. Rubin if she would grant him an easement to connect Riley's Pond to the Town's sewer service. *Id.* Ms. Rubin declined. *Id.*

¶ 6 Undeterred, Mr. Zadell turned to the Town's utilities director, asking for the Town to take the sewer easement by eminent domain.[1] *Id.* In 2015, The Town and Mr. Zadell agreed that: (1) the Town would pursue a direct condemnation action to seize a sewer easement across Ms. Rubin's property; and (2) Mr. Zadell would cover any and all costs incurred by the Town in the exercise of its eminent domain powers. *Id.* at 150, 821 S.E.2d at 615. A few weeks after entering into the agreement, Mr. Zadell contracted to sell Riley's Pond at a $2.5 million profit. *Id.*

¶ 7 In March 2015, the Town council voted to pursue a direct condemnation action for a sewer line easement across Mr. Rubin's land. *Id.* It filed the direct condemnation action the following month and used its statutory "quick-take" powers[2] to obtain immediate title to a 40' easement running across Ms. Rubin's property for the installation and maintenance of sewer lines "above, in, on, over, above, [sic] under, through, and across" the easement area. Ms. Rubin timely filed an answer contesting the taking as illegal and unconstitutional, but she did not pursue any injunctive relief to restrain the Town from constructing the sewer line.

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[1] The Town is authorized by its charter to exercise the same eminent domain powers granted to the North Carolina Department of Transportation found in N.C. Gen. Stat. §§ 136-103, *et seq.* (2019).

[2] Quick-take powers grant a condemnor "right to immediate possession" of the condemned property "[u]pon the filing of the complaint and the declaration of taking and deposit in court[.]" N.C. Gen. Stat. § 136-104.

¶ 8 After Ms. Rubin filed her answer, and while her challenge to the condemnation action was pending, the Town installed a sewer line within the 40' easement. The trial court later resolved Ms. Rubin's challenge to the condemnation and entered a judgment (the "Judgment") concluding the taking was not for a public purpose, even though the sewer line would serve the Riley's Pond subdivision. The Judgment declared the Town's "claim to [Ms. Rubin's] property by Eminent Domain . . . null and void" and dismissed the direct condemnation action. The Judgment was left undisturbed following a lengthy series of post-judgment motions and appeals. *See id.* at 153, 821 S.E.2d at 616-17 (2018), *temp. stay dissolved, disc. rev. denied*, 372 N.C. 107, 825 S.E.2d 253 (2019).

2. Litigation Following the First Appeal

¶ 9 After this Court's decision in the prior appeal, Ms. Rubin filed a combined motion and petition for writ of mandamus asking the trial court to compel the Town to remove the sewer line. Ms. Rubin sought this relief under several theories, including: (1) N.C. Gen. Stat. § 136-114 (2019), which gives trial courts in direct condemnation actions "the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter[;]" (2) N.C. Gen. Stat. § 1-302 (2019) and Rule 70 of the North Carolina Rules of Civil Procedure, which collectively authorize trial courts to compel a party to comply with a judgment directing the conveyance of land; (3) by writ of mandamus to compel the

Town to perform the act of removing the pipes; and (4) through the trial court's inherent powers to enforce its own orders.[3]

¶ 10 The Town responded to Ms. Rubin's motion in two ways. First, it filed a motion for relief in the direct condemnation action on the basis that the Judgment voided the action *ab initio*, extinguished the trial court's jurisdiction, and rendered the installation of the sewer line a separate inverse condemnation. Second, the Town filed a new declaratory judgment lawsuit seeking to declare the sewer pipe installation an easement by inverse condemnation, limit Ms. Rubin's relief to that singular remedy, and enjoin her from removing the sewer line.

¶ 11 The trial court heard motions in the two actions jointly and ruled for the Town in each. In the direct condemnation action, the trial court denied Ms. Rubin's motion to enforce the Judgment, denied Ms. Rubin's petition for writ of mandamus, and granted the Town's motion for relief from the Judgment. In the declaratory judgment action, the trial court denied a motion to dismiss filed by Ms. Rubin and entered a

[3] Ms. Rubin's motion asserted additional bases for injunctive relief. We do not address those additional bases because Ms. Rubin has not argued them in her briefs on appeal. *See* N.C. R. App. P. 28(a) (2021) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

preliminary injunction prohibiting Ms. Rubin from disturbing the sewer line. This decision addresses only the direct condemnation action.[4]

3. The Order Denying Ms. Rubin Injunctive Relief

¶ 12 In the first of two orders in the direct condemnation action, the trial court denied Ms. Rubin's motion for injunctive relief, based in part on the following facts:

> 4. [Ms. Rubin] did not plead any claim for relief entitling her to the relief requested in the Motion. [Ms. Rubin] could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. [Ms. Rubin] did not request injunctive relief from the Court prior to the installation of the sewer line to prevent construction . . . 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 issues hearing . . . the Judgment does not address the actual installation, maintenance and use of the sewer pipe under [Ms. Rubin]'s property and does not require removal
> . . . .
>
> 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.
>
> . . . .
>
> 14. The sewer line was installed prior to the entry of the

[4] The declaratory judgment action is discussed in greater detail in *Town of Apex v. Rubin*, No. COA20-305, ___ N.C. App. ___, 2021-NCCOA-___ (filed 4 May 2021), filed contemporaneously with this opinion.

> Judgment, remains in place and in use, and serves approximately fifty (50) residential homes and/or lots in the Riley's Pond Subdivision . . . .

¶ 13 The trial court also made several findings and conclusions of law[5] interpreting the effect of the Judgment:

> 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.

The trial court also entered conclusions of law rejecting Ms. Rubin's arguments for injunctive relief and concluding that the Town had taken an easement by inverse condemnation:

> 1. The Judgment does not afford to [Ms. Rubin] 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).

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[5] The parties dispute whether the trial court's interpretation of the Judgment is a question of law or fact. Determinations as to the "legal effect of [an] order" are conclusions of law, which we review *de novo*. *Delozier v. Bird*, 125 N.C. 493, 34 S.E.2d 643, 643 (1899); *see also N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) ("[C]onclusions of law are reviewed de novo." (citation omitted)). To the extent the trial court's particular interpretations require application of legal principles to the facts, they are mixed questions of law and fact. *See, e.g., Brown v. Charlotte-Mecklenburg Bd. of Ed.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967) (holding mixed questions of law and fact arise when "[t]he determination . . . requires an application of principles of law to the determination of facts"). We are not bound by the labels given these determinations by the trial court in conducting our analysis. *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 487-88, 711 S.E.2d 165, 169 (2011). The standards of review we apply to specific aspects of the trial court's orders are discussed below in the Analysis Section of this opinion.

. . . .

7. A writ of mandamus is inappropriate because [Ms. Rubin] 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.2d 752, 753 (1938).

8. The Court has the inherent authority to enforce its own orders. However, the Court is not authorized and refuses to expand this Judgment beyond its terms, read in additional terms, and/or order mandatory injunctive relief that [Ms. Rubin] 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 [Ms. Rubin] suggests and the Court does not agree the Judgment expressly or implicitly requires removal of the sewer line. [Ms. Rubin] 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.

. . . .

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 [Ms. Rubin]'s property by the Town that was not subject to a condemnation complaint, and thus was an inverse condemnation of an underground sewer easement. . . .

> 13. [Ms. Rubin]'s allegations that the condemnation complaint resulted in a constitutional violation and [Ms. Rubin]'s comments about fairness do not support or provide a basis for the granting of the Motion. Further, the Supreme Court in [*Wilkie v. City of Boiling Springs,* 370 N.C. 540, 809 S.E.2d 853 (2018)], 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 [Ms. Rubin] seeks, will not be granted.
>
> 14. [Ms. Rubin] has an adequate remedy at law—i.e. compensation for inverse condemnation. . . . The Town's pending declaratory judgment action . . . provides [Ms. Rubin] 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 [Ms. Rubin] requests and declines to issue a writ of mandamus.

4. The Order Granting Relief from Judgment

¶ 14 The trial court's second order in the direct condemnation action granted the Town's motion for relief from the Judgment. In that order, the trial court made findings of fact and conclusions of law consistent with several of those made in the order denying Ms. Rubin's motion to enforce the Judgment, including conclusions that an inverse condemnation had occurred and Ms. Rubin's only avenue for relief was an inverse condemnation claim for money damages. The second order added

several conclusions of law explaining why the Town was entitled to relief from the Judgment:

> 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. [Ms. Rubin'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. . . .
>
> 5. The Judgment's dismissal of the condemnation proceeding had no effect on the rights inversely taken. . . .
>
> 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 [Ms. Rubin'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 [these] issues at the time of the entry of the Judgment. The issue of whether the Town could maintain a sewer line across [Ms. Rubin's] property no longer existed at the time that Judgment was entered. [Ms. Rubin] did not seek an injunction prior to construction and the Town had already constructed the sewer easement. . . .

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 [Ms. Rubin's] property to construct a public sewer line 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 [Ms. Rubin'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. . . .

12. Since the Judgment against the Town is void as to [Ms. Rubin's] challenge to the installed sewer pine 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. . . .

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. . . . Rule 60(b)(6) may be properly employed to grant relief from a judgment affected by a subsequent change in the law. . . .
>
> 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. [Ms. Rubin] 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, [the] 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, [the] Town should be granted relief from Judgment.

Ms. Rubin timely noticed an appeal from both orders. Following oral argument, both parties filed supplemental briefs with this Court.[6]

II. ANALYSIS

¶ 15 Ms. Rubin argues the trial court erred in concluding: (1) the installation of the pipe resulted in an inverse condemnation; (2) the inverse condemnation rendered the Judgment moot and void; (3) injunctive relief, either in the form of a writ of mandamus or otherwise, was unavailable to enforce the Judgment; and (4) inverse

[6] Ms. Rubin submitted her supplemental arguments through a motion for leave to submit a supplemental response, and the Town provided its additional briefing in its response to Ms. Rubin's motion. We allow Ms. Rubin's motion and consider these supplemental materials submitted by the parties.

condemnation is the only available remedy for the Town's constitutional violation. We address the applicable standard of review before addressing each argument in turn.

1. Standard of Review

¶ 16 Findings of fact, when left unchallenged on appeal or supported by competent record evidence, are binding on this Court. *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011). Conclusions of law are generally reviewable de novo, *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 180, 695 S.E.2d 429, 435 (2010), and mixed questions of law and fact are fully reviewable on appeal, *Hinton v. Hinton*, 250 N.C. App. 340, 347, 792 S.E.2d 202, 206 (2016). However, when the trial court reaches a legal conclusion on whether to exercise its discretionary inherent authority, "we need determine only whether they are the result of a reasoned decision." *Sisk*, 364 N.C. at 435, 695 S.E.2d at 180 (citations omitted); *see also In re Cranor*, 247 N.C. App. 565, 573, 786 S.E.2d 379, 385 (2016) ("The proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion." (citation omitted)). "When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion," *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006) (citations omitted), and "the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the

applicable law may require," *State v. Cornell*, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972) (citations omitted).

2. Installation of the Pipe Did Not Vest the Town with Title as a Matter of Law

¶ 17 In both orders, the trial court concluded that the installation of the pipe resulted in an inverse condemnation of a sewer easement on Ms. Rubin's property independent of the direct condemnation action. We agree with Ms. Rubin that the trial court erred in this respect.

¶ 18 Our Supreme Court has recently described inverse condemnations as follows:

> "Inverse 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 Spring Lakes, 370 N.C. 540, 552, 809 S.E.2d 853, 861 (2018) (cleaned up) (emphasis added).[7] This general description accords with the right of action afforded to landowners by statute. N.C. Gen. Stat. § 136-111 authorizes inverse condemnation suits by landowners against the Department of Transportation when "land or a compensable interest therein has been taken by . . . the Department

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[7] Consistent with our Supreme Court's current practice, *see, e.g., In re G.G.M.*, ___ N.C. ___, ___, 2021-NCSC-25, ¶ 22 (2021), we use the parenthetical "(cleaned up)" to denote removal of extraneous punctuation and citations without alteration of the quoted passage's meaning. *See generally* Jack Metzler, *Cleaning Up Quotations*, 18 J. Appellate Prac. & Process 143 (2017) (discussing the use and purposes of the "cleaned up" parenthetical).

of Transportation and no complaint and declaration of taking has been filed." So inverse condemnation is a claim assertable *by landowners* against a government entity "which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 8 (1970) (quotation marks and citation omitted).

¶ 19 Although caselaw uniformly establishes that inverse condemnation claims inure in favor of landowners against government entities that have declined to pursue direct condemnation, the Town maintains that its installation of the sewer pipe—and subsequent defeat in the direct condemnation action—mean that the Town can compel a determination—against Ms. Rubin's express interest—that it took title to a sewer easement by inverse condemnation. The Town specifically asserts that: (1) the Judgment dismissing the condemnation action voided the condemnation *ab initio*; and (2) the installation of the sewer pipe therefore amounted to a separate intrusion vesting title in the Town through inverse condemnation. The Town's argument is not supported by the facts or the law.

¶ 20 Upon filing its direct condemnation action, the Town took legal title to a 40'-wide sewer easement across Ms. Rubin's property through a statutory "quick take" provision. N.C. Gen. Stat. § 136-104 provides that title to property, "together with the right to immediate possession" of the land, vests in the condemnor upon the filing of its complaint, the declaration of taking, and deposit of a bond with the trial court.

Title to the easement at issue in this case included the right "to construct . . . a system of . . . pipes . . . under, through, and across" the easement area.

¶ 21 The Town entered onto Ms. Rubin's property and installed a sewer line within the 40' strip under the rights granted to it by the easement obtained at the outset of the direct condemnation action.[8] That the Judgment would later decree the Town's "claim to [Ms. Rubin]'s property by Eminent Domain . . . null and void" does not obviate, as a factual matter, that the Town installed the pipe under the "quick take" title granted to the Town in the direct condemnation action.

¶ 22 As for whether the installation of the sewer pipe and the Judgment's decree vested the Town with title by inverse condemnation as a matter of law, two pertinent cases, *State Highway Comm'n v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967), and *Town of Midland v. Morris*, 209 N.C. App. 208, 704 S.E.2d 329 (2011), preclude a holding in favor of the Town on this issue.

¶ 23 In *Thornton*, the North Carolina State Highway Commission (the "Commission") filed a direct condemnation action to construct a roadway across land belonging to the Thorntons. 271 N.C. at 229, 156 S.E.2d at 250. The Commission began construction five days after filing its action and, by the time the Thorntons

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[8] Indeed, the record includes an affidavit from the Town's assistant manager and former utilities director stating that the direct condemnation action conveyed title to the 40' easement for completion of a "Gravity Sewer Project" and that the Gravity Sewer Project was completed through installation of the sewer pipe at issue here.

filed their answer challenging the taking as for a non-public purpose, construction was 96 percent complete. *Id.* at 230, 156 S.E.2d at 251. The matter proceeded to trial after the road was entirely finished, and the trial court entered a judgment in favor of the Thorntons declaring the taking as not for a public purpose. *Id.* at 231-32, 156 S.E.2d at 251-52. On appeal to the Supreme Court, the Commission contended that the construction of the road precluded the Thorntons from protesting the taking. *Id.* at 237, 156 S.E.2d at 256. Though the Supreme Court ultimately reversed the trial court and upheld the taking as for a public purpose, it did so only after rejecting this argument by the Commission:

> Even if the Commission now finds itself embarrassed by its having constructed the road prematurely, upon its own assumption that the defendants would not assert a defense which the [direct condemnation] statute authorizes (i.e., the Commission's lack of power to condemn the land), the Commission may not assert such embarrassment as a bar to this right of the defendants. *The Commission may not, by precipitate entry and construction, enlarge its own powers of condemnation . . . .*

Id. (emphasis added). The Supreme Court also plainly held that the Thorntons were "not estopped to assert that the land in question still belongs to them, *free of any right of way across it*[,]" *id.* at 238, 136 S.E.2d at 257 (emphasis added), and, in the event they prevailed, could assert "whatever rights they may have against those who have trespassed upon their land and propose to continue to do so." *Id.* at 240, 156 S.E.2d at 258. *Thornton* establishes that completion of a project subject to a direct

condemnation action does not preclude a return of title—free and clear of any interest held by the State—to the prevailing landowner.

¶ 24 This Court reached a similar result in *Midland*, when the Town of Midland filed a direct condemnation action to construct a natural gas pipeline across private property. *Midland*, 209 N.C. App. at 211-13, 704 S.E.2d at 333-34. The private landowners argued the pipeline was not for a public purpose and moved for a preliminary injunction. *Id.* at 213, 704 S.E.2d at 334. The trial court denied the motion for a preliminary injunction and granted summary judgment for Midland. *Id.* Pending the property owners' appeal to this Court, Midland completed the pipeline and argued that the appeal was moot because construction was complete. *Id.* We disagreed, holding that "if this Court finds in their favor, [the] [p]roperty [o]wners will be entitled to relief . . . in the form of return of title to the land." *Id.* at 213-14, 704 S.E.2d at 334 (citing *Thornton*, 271 N.C. at 241, 156 S.E.2d at 259) (additional citations omitted). We further explained:

> We are wholly unpersuaded by Midland's argument that, even where a city flagrantly violates the statutes governing eminent domain, that city can obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment on the validity of condemnation is rendered.

Id. at 214, 704 S.E.2d at 335.

¶ 25 Both *Thornton* and *Midland* establish that a government body cannot take title to private property for a non-public purpose simply by filing a direct condemnation

action and completing the construction project. In this case, the Town's position that it took title to a sewer easement by inverse condemnation through construction of the sewer pipe during the pendency of the direct condemnation action is irreconcilable with *Thornton*'s prohibition against the enlargement of the government's condemnation powers "by precipitate entry and construction." 271 N.C. at 237, 156 S.E.2d at 256. It also conflicts with this Court's holding in *Midland* that title reverts to the landowner after a successful challenge to a condemnation action irrespective of whether the project was completed, as a "city [cannot] obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment . . . ." 209 N.C. App. at 214, 704 S.E.2d at 335. We therefore hold the trial court erred in its conclusions of law, found throughout both orders, establishing that the Town took an easement by inverse condemnation when it completed the installation of the sewer pipe across Ms. Rubin's property.

¶ 26 We are also unpersuaded by the Town's argument that *Wilkie* supports the trial court's conclusions to the contrary. That decision is distinguishable for at least three reasons. First, *Wilkie* involved an inverse condemnation claim *brought by the landowners*, *i.e.*, the parties with the right to bring an inverse condemnation claim against the government. 370 N.C. at 552, 809 S.E.2d at 861-62*; see also* N.C. Gen. Stat. § 136-111 (2019) (authorizing a party "whose land . . . has been taken" to file a statutory inverse condemnation claim); *Ferrell v. Dep't of Transp.*, 104 N.C. App. 42,

46, 407 S.E.2d 601, 604 (1991) (observing that "*property owners* have a constitutional right to just compensation for takings" (citation omitted) (emphasis added)). Second, *Wilkie* did not involve the completion of a project subject to a disputed direct condemnation, as occurred in both *Thornton* and *Midland*. Lastly, though *Wilkie* held that *landowners* do not need to show that the taking was for a public purpose to prevail on an inverse condemnation claim, it did so in part because the public purpose requirement serves as a shield to protect the landowner from government intrusion rather than as a sword to cut away private property rights. 370 N.C. at 552-53, 809 S.E.2d at 862. To adopt the Town's interpretation of *Wilkie* would weaponize that decision and deprive private property owners of the public purpose protection. This we will not do.

¶ 27 The Town's theory of the law would also open the door to numerous constitutional harms. For example, under the Town's theory, a municipality could pursue a direct condemnation action to pave a landowner's gravel driveway for no public purpose whatsoever, even if the landowner, in the exercise of his private property rights and out of a personal preference for gravel, had never sought to increase the value of his lot by paving the driveway. Then suppose, akin to *Thornton*, the municipality paved the landowner's driveway before the landowner filed an answer. If the municipality voluntarily dismissed its condemnation action or lost on the merits at trial, the theory that inverse condemnation damages were the property

owner's sole remedy would preclude relief for the municipality's flagrant violation of the landowner's constitutional rights, as an inverse condemnation action must show both an intrusion *and* "that the interference caused a decrease in the fair market value of [the property owner's] land as a whole." *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 856, 786 S.E.2d 919, 926 (2016). We do not believe the law of inverse condemnation can be used to facilitate such an abuse of the government's eminent domain power.

3. The Judgment Is Not Moot

¶ 28 We further hold that the trial court erred in concluding the Judgment is moot. The trial court reached this conclusion in part on the basis that the Town took title to the easement by inverse condemnation. As explained *supra*, we hold that no such permanent vesting of title in the Town has occurred. If the completion of the pipeline in *Midland* did not preclude a return of title upon a final determination that the direct condemnation was not pursued for a public purpose, 209 N.C. App. at 213-14, 704 S.E.2d at 334, the Town's completion of the sewer line cannot moot Ms. Rubin's judgment to that effect.

4. The Judgment is Not Void

¶ 29 The trial court also erred in concluding that the Judgment was void "as it relates to the installed sewer pipe and corresponding easement because the trial court did not have jurisdiction over these[] issues at the time of the entry of the Judgment."

The trial court premised this legal conclusion on its erroneous conclusion that an inverse condemnation had already occurred. As we have explained, the Town's direct condemnation action and installation of the sewer pipe did not automatically vest it with title to an easement by inverse condemnation after the trial court determined that the taking was not for a public purpose, and Ms. Rubin is entitled to pursue relief despite completion of the project. *See Thornton*, 271 N.C. at 238, 156 S.E.2d at 257; *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334.

¶ 30 During the direct condemnation action, The Town maintained that it had installed the pipe pursuant to the easement obtained through its "quick take" powers. The trial court, in resolving the dispute raised by the direct condemnation complaint and Ms. Rubin's answer contesting it, therefore had jurisdiction to determine whether the easement taken by the Town constituted a lawful taking for a public purpose irrespective of the installation of the sewer pipe. The Judgment's resolution of that issue in favor of Ms. Rubin and against the Town did not divest the trial court of jurisdiction to enforce the judgment. *See, e.g., Wildcatt v. Smith*, 69 N.C. App. 1, 11, 316 S.E.2d 870, 877 (1984) ("It is . . . true that while a court loses jurisdiction over a cause after it renders a final decree, it retains jurisdiction to correct or enforce its judgment." (citations omitted)). We hold that the Judgment, contrary to the Town's claim that it "is void as to Rubin's ability to contest the installed sewer line and corresponding easement," was not rendered void in any respect by the installation of

the sewer line. As our Supreme Court held in *Thornton*, Ms. Rubin is "not estopped to assert that the land in question still belongs to [her], free of any right of way across it," 271 N.C. at 238, 156 S.E.2d at 257, and she may seek to vindicate "whatever rights [she] may have against those who have trespassed upon [her] land and propose to continue to do so," *id.* at 240, 156 S.E.2d at 258, despite the sewer pipe's construction.

¶ 31 Because the Judgment was neither moot nor void and the Town has not taken title by inverse condemnation, we reverse the trial court's order granting the Town relief from the Judgment.

5. The Effect of the Judgment

¶ 32 We next address what effect the Judgment has and whether it affords Ms. Rubin a right to obtain previously unpled mandatory injunctive relief as a matter of law. We hold, following *Thornton* and *Midtown*, that the Judgment reverted title to Ms. Rubin in fee, restoring to her exclusive rights in the tract and divesting the Town of any legal title or lawful claim to encroach on it. *See Thornton*, 271 N.C. at 238, 156 S.E.2d at 257 ("The [Thorntons] are not estopped to assert that the land in question still belongs to them, free of any right of way across it."); *Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334 ("[I]f this Court finds in their favor, [the] [p]roperty [o]wners will be entitled to relief . . . in the form of return of title to the land.").

¶ 33 But because Ms. Rubin did not seek mandatory injunctive relief in the direct condemnation action, she is not entitled to that remedy by the plain language of the

Judgment. *See Wildcatt*, 69 N.C. App. at 11, 316 S.E.2d at 877 (holding that a trial court's jurisdiction after final judgment is generally limited to enforcing the judgment). Ms. Rubin's answer and defense in the direct condemnation action asserted that the Town's taking of a 40' easement to construct a sewer line was beyond the constitutional exercise of the Town's eminent domain powers. The trial court agreed, concluded that the taking was unconstitutional, and rendered its Judgment declaring null and void both the direct condemnation action and the Town's "quick take" title to the easement. The Judgment, given the issues raised before the trial court, did nothing more than that.

¶ 34 We acknowledge that mandatory injunctive relief is available as an ancillary remedy to an action resolving title to land. *See English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 13, 254 S.E.2d 223, 234 (1979). But a mandatory injunction is available as ancillary relief only if it has been requested while the principal action is pending. *See Jackson v. Jernigan*, 216 N.C. 401, 403-04, 5 S.E.2d 143, 145 (1939) (noting mandatory injunctive relief is available as an ancillary remedy to a continuing trespass in an action resolving title "to protect the subject of the action against destruction or wrongful injury *until the legal controversy has been settled*" but it is unavailable "when it is not in protection of some right *being litigated*" (emphasis added)). Ms. Rubin failed to seek a mandatory injunction while the direct condemnation action was pending. Mandatory injunctive relief falls outside the scope

of the Judgment. For this reason, the trial court did not abuse its discretion in declining to exercise its inherent authority to enforce the Judgment in the manner Ms. Rubin requested.

¶ 35 Ms. Rubin asserts *Thornton* held that dismissal of a direct condemnation action is equivalent to a mandatory injunction requiring restoration of the property to its former condition. She misreads *Thornton*. There, as previously discussed, the Commission condemned the Thorntons' land; though they protested the action by asserting it was not for a public purpose, they did not seek to enjoin construction. 271 N.C. at 229-31, 156 S.E.2d at 250-52. After the road was complete, the trial court ruled that the condemnation was not for a public purpose and entered a judgment "permanently restraining [the Commission] (and enjoin[ing] [it]) from proceeding with the condemnation and appropriation of [the Thorntons'] lands." *Id.* at 235, 156 S.E.2d at 255 (quotation marks omitted). Our Supreme Court struck down the trial court's judgment. *Id.* at 236, 156 S.E.2d at 255. The Court drew a line between injunctive relief to halt *construction* and injunctive relief to halt a condemnation *proceeding*:

> An injunction against the institution or maintenance of condemnation proceedings, as distinguished from an injunction to restrain construction, is not proper[l]y issued, however, where the ground asserted therefor is one which the landowner may assert as a defense in the condemnation proceeding itself, for, in that event, the landowner has an adequate remedy at law.

Id. (citation omitted). The Supreme Court held that because the Thorntons' defense would mandate dismissal of the direct condemnation proceeding, an injunction prohibiting the proceeding from continuing would be redundant. *Id.* *Thornton* establishes that it is unnecessary to enjoin a proceeding that has been extinguished by dismissal; *Thornton* does not hold that dismissal of a condemnation action is equivalent to a mandatory injunction to undo the construction and restore the land.

¶ 36 Ms. Rubin further cites prior decisions from this Court, as well as from other jurisdictions, to support her assertion that the Judgment directly affords mandatory injunctive relief requiring the Town to remove the sewer pipe irrespective of her failure to raise the issue in the direct condemnation action. None of the cases she cites—with one exception—addresses whether construction completed by the condemnor during the pendency of the direct condemnation action must be removed if the contesting landowner prevails. *See, e.g., Midland*, 209 N.C. App. at 213-14, 704 S.E.2d at 334 (holding a prevailing landowner in a direct condemnation action is "entitled to relief . . . in the form of return of *title* to the land" (emphasis added)); *In re Rapp*, 621 N.W.2d 781, 784 (Minn. 2001) (holding that a prevailing landowner is entitled to "relief in the form of the return of his property" notwithstanding the government's completion of construction).

¶ 37 In the one North Carolina decision Ms. Rubin cites in which the trial court

issued a mandatory injunction in a direct condemnation action, the landowners requested that remedy by counterclaim during the pendency of the action and the injunction was not challenged on appeal. *City of Statesville v. Roth*, 77 N.C. App. 803, 805-06, 336 S.E.2d 142, 143 (1985). As explained below, our Supreme Court has more recently held that such injunctive relief is generally not available against the State. *See Clark v. Asheville Contracting Co., Inc.*, 316 N.C. 475, 485-86, 342 S.E.2d 832, 838 (1986) (holding injunctive relief was unavailable against the Department of Transportation for an occupation of private property that was not for a public purpose).

¶ 38 We also are unpersuaded by Ms. Rubin's reliance on N.C. Gen. Stat. §§ 40A-12, 1-302, and Rule 70 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 40A-12 provides that "[w]here the procedure for conducting an action under this Chapter is not expressly provided for in this Chapter or by the statutes governing civil procedure . . . , the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter." Here, Ms. Rubin seeks more than just a procedural ruling; she seeks the additional substantive right to compel removal of the Town's sewer pipe by order of the trial court. As we have explained, mandatory injunctive relief is ancillary to—and thus exceeds—the ordinary relief afforded by a judgment resolving a dispute as to title. *See English*, 41 N.C. App. at

13, 254 S.E.2d at 234 (noting mandatory injunctive relief is ancillary to an action seeking to resolve disputes of title and possession of land).

¶ 39 N.C. Gen. Stat. § 1-302 allows enforcement of "a judgment [that] requires . . . the delivery of real . . . property" and Rule 70 allows a trial court to order the conveyance of title "[i]f a judgment directs a party to execute a conveyance of land[.]" The Judgment in this case does neither. It simply restores title to Ms. Rubin. With title in hand, she is left to pursue the "rights [she] may have against those who have trespassed upon [her] land and propose to continue to do so." *Thornton*, 271 N.C. at 240, 156 S.E.2d at 258.

¶ 40 Ms. Rubin further proposes, relying on *Thornton,* that the Judgment as a matter of law established her right to eject the Town by writ of mandamus. While mandatory injunctive relief may be available to her through a trespass claim for the Town's continuing encroachment, the Judgment does not provide that relief. A mandatory injunction is available only after "consider[ation] [of] the relative convenience-inconvenience and the comparative injuries to the parties." *Clark*, 316 N.C. at 488, 342 S.E.2d at 839 (citation omitted).[9] This Court has described that balancing test as follows:

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[9] This is in contrast to encroachment actions between private landowners; because neither party possesses the right to private eminent domain, the trespasser cannot be compelled to buy the land she has unlawfully built upon and the injured landowner cannot

> Factors to be considered are whether the [trespassing] owner acted in good faith or intentionally built on the [injured party's] land and whether the hardship incurred in removing the structure is disproportionate to the harm caused by the encroachment. Mere inconvenience and expense are not sufficient to withhold injunctive relief. The relative hardship must be disproportionate.

Williams, 82 N.C. App. at 384, 346 S.E.2d at 669 (citing Dobbs, Remedies, § 5.6 (1973)). If Ms. Rubin establishes the Town's trespass and its liability therefor, the trial court may grant mandatory injunctive relief only after weighing the equities as set forth above. *See Clark*, 316 N.C. at 488, 342 S.E.2d at 839.

¶ 41 Because a writ of mandamus is available only to enforce an established right, and the Judgment in this case did not establish the right Ms. Rubin seeks to enforce, she is not entitled to a writ of mandamus. *See Ponder v. Joslin*, 262 N.C. 496, 504, 138 S.E.2d 143, 149 (1964) ("The function of the writ is . . . not to establish a legal right . . . .").

6. Mandatory Injunctive Relief is Available by Separate Trespass Claim

¶ 42 The Judgment does not provide the Town an easement by inverse condemnation as a matter of law. Ms. Rubin cannot be compelled to surrender title to the Town. The Judgment also does not afford Ms. Rubin the mandatory injunctive

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be compelled to sell the property encumbered by the encroachment. In such a circumstance, mandatory injunctive relief to destroy the encroachment is the only relief available and will be awarded as a matter of law. *Williams v. South & South Rentals, Inc.,* 82 N.C. App. 378, 384, 346 S.E.2d 665, 669 (1986).

relief she seeks. The question remains whether the trial court correctly concluded that the Judgment precluded mandatory injunctive relief. We hold that the trial court erred in this respect. While Ms. Rubin is not entitled to post-judgment mandatory injunctive relief in the direct condemnation action, she may bring a trespass claim against the Town in pursuit of the mandatory injunctive relief she seeks. We therefore vacate the trial court's orders insofar as they preclude the availability of mandatory injunctive relief, but we ultimately affirm the trial court's denial of Ms. Rubin's motion to enforce the Judgment.

a. Caselaw Regarding Remedies for Government Trespass

¶ 43 The proposition that a government body occupying private property outside its eminent domain powers is committing a trespass—and may be ejected for it—is not a new one. In *McDowell v. City of Asheville*, 112 N.C. 747, 17 S.E. 537 (1893), our Supreme Court held that a town committing such an act "may be treated as a trespasser and sued in ejectment." 112 N.C. at 750, 17 S.E. at 538. The aggrieved landowner may also, however, "elect [not] to treat the [town] as a trespasser . . . [and] compel the [town] to assess the damages as provided by its charter," *id.*, effectively compelling a payment of just compensation by inverse condemnation. *See, e.g., Hoyle*, 276 N.C. at 302, 172 S.E.2d at 8. This framing of the encroaching town as a trespassing tortfeasor and the ability of the landowner to *elect* damages *or* ejectment is generally consistent with *Lloyd v. Venable*, 168 N.C. 531, 84 S.E. 855 (1915), in

which a town that lacked any eminent domain powers built a street over private land. 168 N.C. at 534, 84 S.E. at 857. In holding the landowner's claim for damages could proceed, our Supreme Court held that the town's "entry . . . was . . . unlawful . . . [but] the plaintiff can waive the tortious entry and the want of power to condemn, and recover a just and reasonable compensation for the property taken." *Id.*

¶ 44 In the century since *McDowell* and *Lloyd*, our Supreme Court has limited monetary and injunctive relief available to private landowners following wrongful intrusion by the government.

¶ 45 In *State Highway Comm'n v. Batts*, 265 N.C. 346, 144 S.E.2d 126 (1965), the Commission, on behalf of the State, filed a condemnation action to pursue construction of a road across privately owned land and, in preparation for construction, cut down several trees on the property. 265 N.C. at 348, 144 S.E.2d at 127. The private landowners challenged whether the condemnation was for a public purpose and counterclaimed for damages to recover the value of the trees cut down by the Commission's employees. *Id.*, 144 S.E.2d at 128. The trial court initially entered a preliminary injunction barring construction but ultimately concluded the condemnation was for a public purpose. *Id.* at 349-50, 144 S.E.2d at 129. On appeal, the Supreme Court held that the condemnation was not for a public purpose and reversed the trial court's judgment. *Id.* at 360-61, 144 S.E.2d at 137. It also held, however, that the Commission could not be held liable for having cut down the trees:

> [The private landowners] alleged that the construction of [the] highway is beyond the scope of the [eminent domain] authority vested in the Commission and inferentially that acts done in furtherance thereof are also unauthorized. We have agreed. Therefore, the cutting of the trees was not a taking of private property for public use. It was merely an *unauthorized trespass by employees of the Commission, for which no cause of action exists against the Commission in favor of [the private landowners].* . . . An agency of the State is powerless to exceed the authority conferred upon it, *and therefore cannot commit an actionable wrong*.

Id. at 361, 144 S.E.2d at 137-38 (citations omitted) (emphasis added). *Batts* did not address the availability of injunctive relief to bar government intrusion onto private property for a non-public purpose.

¶ 46 In *Clark v. Asheville Contracting Co.,* 316 N.C. 475, 342 S.E.2d 832 (1986), our Supreme Court held that mandatory injunctive relief cannot be obtained against the State following its trespass on private land. 316 N.C. at 485, 342 S.E.2d at 838. There, a contractor building a highway near Asheville for the Department of Transportation ("DOT") dumped rock waste in a residential subdivision. 316 N.C. at 478-79, 342 S.E.2d at 834. The landowners sued DOT, the contractor, and the corporate president of the contractor, seeking damages in tort, a mandatory injunction ordering the removal of the rock waste and, failing that, just compensation for the taking by DOT. *Id.* All defendants cross-claimed each other and filed motions to dismiss and for summary judgment; at the hearing on those motions, the landowners elected to forego their claims for monetary damages in favor of an "order

that the [DOT] and the contractor remove the waste previously deposited on the property in question." *Id.* at 482, 342 S.E.2d at 836. The landowners moved for summary judgment, and DOT sought to dismiss all claims against it on the grounds that it was immune from suit. *Id.* at 482-83, 342 S.E.2d at 836. The trial court denied DOT's motions and, after hearing evidence, concluded that the dumping of waste was a taking for a non-public purpose. *Id.* It then ordered that the defendants, including DOT, "cease and desist, and eliminate the nonconforming use . . . and . . . remove all waste rock material placed on the property." *Id.* at 483, 342 S.E.2d at 836. DOT appealed.

¶ 47 The Supreme Court held that the trial court erred in denying summary judgment for DOT. *Id.* at 484, 342 S.E.2d at 837. No party challenged the trial court's determination that the waste disposal was not for a public purpose, so the Supreme Court took that conclusion as true. *Id.* It then held, citing both *Thornton* and *Batts*, that the landowners could not pursue their remedy against DOT for the unauthorized taking:

> As the acts the plaintiffs complain of were not for a public purpose, they were beyond the authority of DOT to take property for public use in the exercise of its statutory power of eminent domain. Since DOT as a matter of law is incapable of exceeding its authority, the acts complained of could not be a condemnation and taking of property *by DOT* or an actionable tort *by DOT*. At most, the acts complained of could have been unauthorized trespasses by agents of DOT, for which no actionable claim exists against DOT.

Id. at 485, 342 S.E.2d at 838 (citing *Thornton*, 271 N.C at 236, 156 S.E.2d at 255; *Batts*, 265 N.C. at 361, 144 S.E.2d at 137) (additional citations omitted). The Supreme Court held that DOT was immune to claims for both damages *and* injunctive relief: " [']The owner of property cannot maintain an action against the State or any agency of the State in tort for damages to property (except as provided by statute . . .). *It follows that he cannot maintain an action against it to restrain the commission of a tort*.['] " *Id.* at 486, 342 S.E.2d at 838 (quoting *Shingleton v. State*, 260 N.C. 451, 458, 133 S.E.2d 183, 188 (1963) (emphasis added)). Consistent with *Thornton* and *Batts*, the Supreme Court held that the aggrieved landowners had a valid cause of action against the individual public employees and officials responsible for the unauthorized taking:

> [T]he landowner is not without a remedy. When public officers whose duty it is to supervise and direct a State agency attempt or threaten to invade the property rights of a citizen in disregard of law, they are not relieved of responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State.

Id. (quoting *Shingleton*, 260 N.C. at 458, 133 S.E.2d at 188). The Supreme Court explained that "the acts of the defendants forming the basis of the claims by the plaintiffs . . . against DOT must be viewed as not having been a taking for a public use. Therefore, neither the plaintiffs nor the other defendants could maintain an

action against DOT arising from those acts." *Id.*[10]

¶ 48 In sum, *Clark* holds that private landowners cannot seek mandatory injunctive relief against a State agency to restore property following an unauthorized encroachment for a non-public purpose. In such instances, it is the individual public officials and agents of the State who are personally liable for the illegal acts "invad[ing] the property rights of a citizen in disregard of law . . . even though they act or assume to act under the authority and pursuant to the directions of the State." *Id.* (quoting *Shingleton*, 260 N.C. at 458, 133 S.E.2d at 188).

b. Applying Precedent to This Case

¶ 49 *Batts* and *Clark* are distinguishable from this case because they concern the sovereign immunity of state *agencies* as opposed to *municipalities*.[11] Unlike the

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[10] Immunity from suit does not bar inverse condemnation claims filed by landowners pursuant to statutory provisions authorizing such actions. *See Wilkie*, 370 N.C. 540, 551 n.9, 809 S.E.2d 853, 861 n.9 (holding *Clark* has no bearing on a statutory inverse condemnation claim brought under N.C. Gen. Stat. § 40A-51 because the Court's decision in *Clark* did not discuss or reference the statute).

[11] Although *Clark* and *Batts* do not explicitly label the immunity discussed in those decisions as sovereign immunity, the case law cited and rationale provided in those decisions are grounded in sovereign immunity law. For example, both *Clark* and *Batts* cite *Schloss v. State Highway & Public Works Comm'n*, 230 N.C. 489, 53 S.E.2d 517 (1949) for their holdings on immunity, and *Schloss* begins with the maxim "[t]hat the sovereign may not be sued, either in its own courts or elsewhere, without its consent, is an established principle of jurisprudence in all civilized nations." 230 N.C. at 491, 53 S.E.2d at 518 (citations omitted). Similarly, the legal fiction espoused in *Batts* and *Clark* that a State agency cannot commit a tortious act because it is unable to act outside its lawful authority is identical to the antiquated fiction that the "king can do no wrong" undergirding sovereign immunity. *See Epps v. Duke Univ.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996) ("Sovereign immunity extends from feudal England's theory that the 'king can do no wrong.' " (citation omitted)).

State, municipalities enjoy only limited governmental immunity that does not extend to propriety functions. *Estate of Williams ex rel. Overton v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012).

¶ 50 A municipal sewer system that is supported by rates and fees is a propriety function not subject to governmental immunity. *See, e.g., Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676 (2006) ("The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for maintenance of sewer lines." (citations omitted)). The record in this case includes several sections from the Apex Town Code of Ordinances—submitted by the Town to the trial court—disclosing that the Town does charge rates and fees for its sewer service. On the record before us, we cannot conclude that the Town is immune to suit for trespassing.

¶ 51 We further distinguish *Batts* and *Clark* based on more recent precedents. Both of these decisions were decided years before our Supreme Court's landmark decision in *Corum v. Univ. of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), which carved out an express exception to sovereign immunity for constitutional injuries. Under *Corum*, "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Id.* at 782, 413 S.E.2d at 289. And, "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must

prevail." *Id.* at 786, 413 S.E.2d at 292. Our Supreme Court has since made clear that *Corum* preserves constitutional claims arising out of tortious acts by the State that are otherwise barred by sovereign immunity. *See Craig ex rel. Craig v. New Hanover Cty Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009) ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim. But as we held in *Corum*, plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim.").

¶ 52 The Town maintains on appeal, as it did before the trial court, that the only remedy available to Ms. Rubin is money damages for inverse condemnation. The Town relies on *McAdoo v. City of Greensboro*, 91 N.C. App. 570, 372 S.E.2d 742 (1988). In *McAdoo*, Greensboro widened a road onto private property, and the property owners sought damages for trespass and inverse condemnation. 91 N.C. App. at 570-71, 372 S.E.2d 742-43. We held that the landowners could not recover monetary damages for both trespass and inverse condemnation, as "[t]he exclusive remedy *for failure to compensate* for a 'taking' is inverse condemnation[,]" and the landowners therefore "ha[d] no common-law right to bring a trespass action against a city." *Id.* at 573, 372 S.E.2d at 744 (citing *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E.2d 101 (1982)) (additional citation omitted) (emphasis added).

¶ 53 *McAdoo* is distinguishable for several reasons. Most obviously, that case did not involve a taking that was adjudicated to be unconstitutional and for a non-public purpose. And unlike the landowners in *McAdoo*, Ms. Rubin is not seeking to redress a "failure to compensate for a 'taking[,]' " *id.*, but has instead elected to pursue mandatory injunctive relief to remedy what was already determined to be an unconstitutional encroachment. *Cf. Clark*, 316 N.C. at 488, 342 S.E.2d at 839 (holding that private landowners had valid claims only against DOT's contractor where they had "*elected* to pursue only the remedy of injunctive relief" instead of claims for monetary damages, including inverse condemnation); *Lloyd*, 168 N.C. at 531, 84 S.E. at 857 (providing a landowner injured by an intrusion onto private property not within the power of eminent domain "can waive the tortious entry and the want of power to condemn, and recover a just and reasonable compensation for the property taken"); *McDowell*, 112 N.C. at 747, 17 S.E. at 538 ("[I]t may be true . . . that the [City of Asheville] . . . may be treated as a trespasser, and sued in ejectment, but it is clear that such a remedy would not be appropriate to the peculiar circumstances of this case. [City of Asheville] is still occupying the land as a street . . . and the plaintiffs evidently prefer that the street should remain, and therefore do not *elect* to treat [the City] as a trespasser." (citation omitted)); *Thornton*, 271 N.C. at 241, 156 S.E.2d at 258 (describing *Lloyd* and *McDowell* as holding "where there is a taking not within the power of eminent domain the

landowner may *elect* to claim damages as if the taking had been lawful . . . .").

¶ 54 *McAdoo* held that a claim for damages in trespass did not lie because the applicable inverse condemnation statute, N.C. Gen. Stat. § 40A-51, was the exclusive remedy. 91 N.C. App. at 573, 372 S.E.2d at 744. But a different statute applies here, and the Town's actions compel a different result. N.C. Gen. Stat. § 136-111 authorizes an inverse condemnation claim against a condemnor only when "no complaint and declaration of taking has been filed." Because the Town *did* file a complaint and declaration of taking to install the sewer pipe at issue, a statutory inverse condemnation claim was not available to Ms. Rubin.

¶ 55 We also disagree with the Town's argument, presented in supplemental materials filed with this Court, that monetary compensation through an inverse condemnation action is a proper and "adequate state remedy" under *Corum*. As our Supreme Court unequivocally held in *Thornton*, payment for an occupation of private land by the State for a non-public purpose does not remedy the constitutional injury:

> 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*. To take his property without his consent for a non-public use, *even though he be paid its full value*, is a violation of Article I, s 17, of the Constitution of this State and of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

271 N.C. at 241, 156 S.E.2d at 259.

¶ 56 We note that mandatory injunctive relief is not guaranteed by a successful claim for trespass against the Town. In *Clark*, our Supreme Court remanded the matter back down to the trial court for further findings of fact that "consider[ed] the relative convenience-inconvenience and the comparative injuries to the parties." 316 N.C. at 488, 342 S.E.2d at 839. This Court has since enumerated the factors to be considered in that balancing test. *Williams*, 82 N.C. App. at 384, 346 S.E.2d at 669. The Town may also have other defenses precluding relief and it "is entitled to all defenses that may arise upon the facts and law of the case." *Corum*, 330 N.C. at 786, 413 S.E.2d at 292.

¶ 57 We also do not agree with the Town's contention that Ms. Rubin's failure to raise mandatory injunctive relief in the direct condemnation action precludes her from pursuing it after entry of the Judgment. The mandatory injunctive relief sought was not, at the time Ms. Rubin filed her answer, a compulsory counterclaim barred by *res judicata*. *See, e.g., Murillo v. Daly*, 169 N.C. App. 223, 227, 609 S.E.2d 478, 481 (2005) ("As the [plaintiffs'] claims were not compulsory counterclaims in the previous action, they are not now barred by the doctrine of *res judicata.*"). Whether a counterclaim is mandatory under our Rules of Civil Procedure is determined based on its maturity at the time of pleading. *See, e.g., Driggers v. Commercial Credit Corp.*, 31 N.C. App. 561, 564-65, 230 S.E.2d 201, 203 (1976) ("Where a cause of action, arising out of the transaction or occurrence that is the subject matter of the opposing

party's claim, matures or is acquired by a pleader after he has served his pleading, the pleader is not required thereafter to supplement his pleading with a counterclaim. . . . [S]uch supplemental pleading is not mandated and failure to do so will not bar the claim." (citations omitted)).

¶ 58 Here, the Town was not a trespasser until: (1) it installed the sewer pipe *after* Ms. Rubin had filed her answer, and; (2) the Judgment extinguishing the Town's right, title, and interest in Ms. Rubin's land went into effect.[12] Furthermore, the sewer pipe represents a continuing trespass, "a peculiar animal in the law. . . . [E]ach day the trespass continues a new wrong is committed." *Bishop v. Reinhold*, 66 N.C. App. 379, 382, 311 S.E.2d 298, 300 (1984)*; see also John L. Roper Lumber Co. v. Elizabeth City Lumber Co.*, 140 N.C. 437, 442, 53 S.E. 134, 136 (1906) (holding recovery for the continuing injury of a trespass action is not barred by *res judicata* unless the claimant failed to establish in the prior action "the unlawful entry, or to show his possession, either actual or constructive, of the land upon which he alleges the defendant trespassed").

¶ 59 As for Ms. Rubin's failure to raise mandatory injunctive relief in the "all other issues" hearing required by N.C. Gen. Stat. § 136-108, we note that our Supreme

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[12] The Judgment was temporarily stayed by the Supreme Court in the course of the Town's appeals, and the stay was eventually dissolved on 27 March 2019. *Town of Apex v. Rubin*, 372 N.C. 107, 825 S.E.2d 253 (2019).

Court in *Thornton*, which involved a roadway completed during a direct condemnation action subject to an "all other issues" hearing under the same statute, held that the Thorntons, who never sought to enjoin construction, could continue to claim ownership "free of any right of way" and pursue relief "against those who have trespassed upon their land and propose to *continue to do so*" if they prevailed. 271 N.C. at 238, 240, 156 S.E.2d at 257, 258 (emphasis added).

¶ 60 Like the Thorntons—had they prevailed—Ms. Rubin is entitled to relief against the Town for its trespass following the trial court Judgment dismissing the condemnation action and the exhaustion of the Town's appeal rights. Given the nature of a continuing trespass, and *Thornton*'s holding on the continued availability of trespass actions, Ms. Rubin may seek injunctive relief for the continuing trespass that the Town refuses to abate. *Id.* at 240, 156 S.E.2d at 258.

¶ 61 Finally, as noted by the parties at oral argument, this case presents a unique circumstance involving the continued use of a sewer line, installed pursuant to a direct condemnation action, that was determined to be for a non-public purpose and in violation of the landowner's constitutional rights. This case therefore differs significantly from those addressed by the inverse condemnation statutes N.C. Gen. Stat. §§ 136-111 and 40A-51, both of which apply when no condemnation action was filed by the government. We limit our holding to cases in which a municipality filed a direct condemnation action, constructed an improvement on the protesting

landowner's property, and later lost the condemnation action on the ground that it was for a non-public purpose. We do not address instances in which a taking occurred without the filing of a direct condemnation action.

III. CONCLUSION

¶ 62 For the foregoing reasons, we vacate the provisions of the trial court's order denying Ms. Rubin's motion to enforce the Judgment that declared: (1) the Town took title to an easement by inverse condemnation; (2) the Judgment was moot; and (3) the Judgment was void. However, because the Judgment itself does not establish a right to mandatory injunctive relief and is instead available only through a separate claim against the Town upon a balancing of the equities, we affirm the trial court's denial of that relief. The trial court's order granting the Town relief from the Judgment is reversed.

VACATED IN PART; AFFIRMED IN PART; REVERSED IN PART.

Judges DILLON and JACKSON concur.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-188

No. COA20-305

Filed 4 May 2021

Wake County, No. 19-CVS-6295

TOWN OF APEX, Plaintiff,

v.

BEVERLY L. RUBIN, Defendant.

Appeal by Defendant from orders entered 21 January 2020 by Judge G. Brian Collins in Wake County Superior Court. Heard in the Court of Appeals 24 February 2021.

Nexen Pruet, PLLC, by David P. Ferrell and Norman W. Shearin, for Plaintiff-Appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg and Troy D. Shelton, and Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Kenneth C. Haywood and B. Joan Davis, for Defendant-Appellant.

Johnston, Allison & Hord, P.A., by R. Susanne Todd and Maisha M. Blakeney, and Sever Storey, LLP, by Shiloh Daum, for amicus curiae North Carolina Advocates for Justice.

John Locke Foundation, by Jonathan D. Guze, amicus curiae.

INMAN, Judge.

¶ 1 This appeal arises from the same underlying facts at issue in *Town of Apex v. Rubin*, COA20-304, ___ N.C. App. ___, 2021-NCCOA-___ (filed 4 May 2021)

(hereinafter "*Apex v. Rubin I*"), filed concurrently with this opinion. In that action, as here, Plaintiff-Appellee Town of Apex ("the Town") asserts title to a sewer line installed on Defendant-Appellant Beverly L. Rubin's ("Ms. Rubin") land for a non-public purpose, in excess of the Town's eminent domain powers, and in violation of Ms. Rubin's constitutional rights. Both cases involve the same facts and some of the same legal issues. *Apex v. Rubin I* arises from post-judgment orders in a direct condemnation action. This appeal arises from interlocutory orders in a separate declaratory judgment action filed by the Town to settle the parties' rights in the sewer line and prohibit Ms. Rubin from disturbing it after the Town's condemnation action was dismissed.

¶ 2 Ms. Rubin appeals from interlocutory orders denying her motion to dismiss the Town's declaratory judgment complaint and granting the Town's motion for a preliminary injunction. After careful review, we reverse in part and affirm in part the trial court's denial of Ms. Rubin's motion to dismiss. We vacate in part and affirm in part the preliminary injunction.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 Many of the facts underlying this appeal are discussed in *Apex v. Rubin I*. But because this appeal arises out of a separate action with its own unique procedural history, we will summarize facts pertinent to the issues before us here.

1. The Direct Condemnation Action, Appeal, Post-Judgment Motions, and The Town's Response

¶ 4 In 2015, the Town filed a direct condemnation action and, under its statutory "quick take" powers, assumed title to a sewer easement across Ms. Rubin's property to connect a private residential development called Riley's Pond to the Town's sewer service. Ms. Rubin contested the direct condemnation action as for a non-public purpose but did not counterclaim for or otherwise pursue injunctive relief. While the direct condemnation was pending, the Town installed its sewer pipe on Ms. Rubin's property.

¶ 5 The trial court ultimately ruled in favor of Ms. Rubin, declared the taking was for an impermissible non-public purpose, and entered a judgment dismissing the Town's direct condemnation action in October 2016 ("the Judgment"). The Judgment was left undisturbed following a series of post-judgment motions and appeals by the Town. *Town of Apex v. Rubin*, 262 N.C. App. 148, 153, 821 S.E.2d 613, 616-17 (2018), *temp. stay dissolved*, *disc. rev. denied*, 372 N.C. 107, 825 S.E.2d 253 (2019).

¶ 6 Having prevailed in the direct condemnation action, Ms. Rubin asked the Town to remove the sewer line. The Town refused, leading Ms. Rubin to file a combined motion to enforce the Judgment and petition for writ of mandamus to compel the Town to remove the sewer pipe.

¶ 7 The Town responded to Ms. Rubin's motion in two ways. First, in the direct condemnation action, it filed a motion for relief on the basis that the Judgment voided the action *ab initio*, extinguished the trial court's jurisdiction, and rendered the installation of the sewer line a separate inverse condemnation. Second, the Town filed a new declaratory judgment lawsuit—the subject of this appeal—seeking to declare the sewer pipe installation an easement by inverse condemnation, limit Ms. Rubin's relief to that singular remedy, and enjoin her from removing the sewer line.

2. The Declaratory Judgment Complaint and Ms. Rubin's Motion to Dismiss

¶ 8 The facts alleged in the Town's declaratory judgment complaint largely restate the procedural history of the direct condemnation action through the filing of Ms. Rubin's post-judgment motions. Based on those facts, the Town asserts it is entitled to judgment declaring:

> (1) . . . that the installation of the sewer line on 27 July 2015 was an inverse taking, (2) that inverse condemnation is Rubin's sole remedy for the installation of the sewer pipe on her property, (3) that the remedy of inverse condemnation is time barred, (4) that given the Town's limited waiver of its defense of the statute of limitations, Rubin is entitled to a jury trial on the issue of the amount of compensation due for the inverse taking described in this complaint, (5) that . . . relief be granted to order a jury trial to be held on the issue of the amount of compensation due for the inverse taking described in this complaint, (6) that . . . relief be granted to order the amount deposited by the Town that is being held by the Clerk of Superior Court for the benefit of Rubin be deemed to be the Town's deposit of its estimate of just compensation for the inverse taking

> described in this complaint, (7) that the judgment is *res judicata* as to any claims by Rubin for injunctive relief or an extraordinary writ, and/or should not be applied prospectively . . . , and (8) [that] the doctrines of laches, economic waste, and other similar equitable doctrines bar Defendant from causing the removal of the sewer pipe.

¶ 9 Ms. Rubin filed a motion to dismiss the Town's complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that the complaint was barred by *res judicata* and the prior action pending doctrine based on the Judgment and her then-unresolved post-judgment motions.

3. The Orders Denying Ms. Rubin's Motion to Dismiss and Entering a Preliminary Injunction

¶ 10 The trial court heard motions in both the direct condemnation action and the declaratory judgment action jointly and ruled for the Town in each. In the direct condemnation action, the trial court denied Ms. Rubin's motion to enforce the Judgment, denied Ms. Rubin's petition for writ of mandamus, and granted the Town's motion for relief from the Judgment. We review those rulings in *Apex v. Rubin I*. In the declaratory judgment action, the trial court denied Ms. Rubin's motion to dismiss and entered a preliminary injunction prohibiting Ms. Rubin from disturbing the sewer line. This decision addresses only the declaratory judgment action.[1]

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[1] The direct condemnation action is discussed in greater detail in *Apex v. Rubin I*. To the extent we discuss the contents of the record of *Apex v. Rubin I*, we take judicial notice of those documents. *See West v. G.D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223

¶ 11 The trial court's order denying Ms. Rubin's motion to dismiss, consistent with ordinary practice, contains no findings of fact or conclusions of law, and simply denies dismissal on the two grounds asserted by Ms. Rubin. In its preliminary injunction order, the trial court made findings of fact and conclusions of law establishing: (1) a dispute existed between the parties as to whether Ms. Rubin could disturb, destroy, or compel the Town to remove the sewer line; (2) an inverse condemnation had occurred as a result of the Town's installation of the sewer line and the subsequent dismissal of the direct condemnation action; (3) Ms. Rubin's sole remedy was an inverse condemnation claim; (4) removal of the sewer line would cause irreparable harm to the Town and the lots and/or homes served in Riley's Pond; (5) an injunction was necessary to protect the Town's rights and preserve the status quo during the course of litigation; (6) there are no practical alternatives available to the Town to serve Riley's Pond; and (7) the Town is likely to succeed on the merits of its claims for declaratory and injunctive relief.

¶ 12 Ms. Rubin noticed an appeal from both orders. The Town filed a motion to dismiss Ms. Rubin's appeal with this Court on 19 May 2020 on the ground that the orders below are interlocutory and do not affect a substantial right. Ms. Rubin then

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(1981) ("[A] court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration.").

filed a conditional petition for writ of certiorari requesting review should this Court grant the Town's motion to dismiss.

II. ANALYSIS

¶ 13 Ms. Rubin broadly argues, as she does in *Apex v. Rubin I*, that the trial court's orders in this case stem from the erroneous conclusions that: (1) the Judgment does not grant her a right to mandatory injunctive relief to remove the pipe; and (2) the Town's installation of the pipe during the pendency of the direct condemnation action, absent any effort by Ms. Rubin to enjoin that installation, vested the Town with title to a sewer easement by inverse condemnation. Because those issues are necessary to the resolution of *Apex v. Rubin I*, she contends the Town's declaratory judgment action, and by extension its request for a preliminary injunction, are barred by *res judicata* and the prior action pending doctrine.

1. Appellate Jurisdiction

¶ 14 We first resolve the question of appellate jurisdiction. Both parties agree that Ms. Rubin seeks to appeal two interlocutory orders, and that such orders are not subject to immediate appellate review unless they affect a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). As explained below, we conclude both orders affect a substantial right.

¶ 15 Interlocutory orders rejecting a *res judicata* defense may affect a substantial right when " '(1) the same factual issues would be present in both trials and (2) the

possibility of inconsistent verdicts on those issues exists.' " *Whitehurst Inv. Props, LLC .v NewBridge Bank*, 237 N.C. App. 92, 96, 764 S.E.2d 487, 490 (2014) (quoting *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 628, 727 S.E.2d 311, 315 (2012)).

¶ 16 Both prongs are satisfied here. *Apex v. Rubin I* and the declaratory judgment action arise out of the same factual issues. In *Apex v. Rubin I*, the Town sought relief from the Judgment by asserting that: (1) the installation of the sewer pipe and dismissal of the direct condemnation action gave it title by inverse condemnation; and (2) Ms. Rubin's sole remedy is monetary compensation for the inverse condemnation. Here, the Town alleges ownership of a sewer easement based on these same facts under the same legal theory, and again asserts Ms. Rubin can only receive monetary compensation for the taking in an amount determined by a jury. Given our holding in *Apex v. Rubin I* that the Town does not have title to any sewer easement across Ms. Rubin's land under any condemnation theory, that she cannot be compelled to accept monetary compensation for the violation of her constitutional rights, and that she may seek mandatory injunctive relief through a separate trespass claim for the Town's unlawful presence, the declaratory judgment action presents a possibility of inconsistent verdicts on the question of the Town's ownership of a sewer easement and, by extension, the remedy available to Ms. Rubin for the taking.

¶ 17 The trial court's orders denying Ms. Rubin's motion, based on *res judicata*, to dismiss the Town's declaratory judgment action and granting the Town's motion for preliminary injunction entered conclude—contrary to our holdings in *Apex v. Rubin I*—that the Town has title to a sewer easement by inverse condemnation and Ms. Rubin's sole remedy is monetary compensation. These orders thus affect a substantial right and we deny the Town's motion to dismiss this appeal.

¶ 18 Even assuming, *arguendo*, that the trial court's orders do not affect a substantial right, Ms. Rubin's petition for writ of certiorari is appropriate to "serve the expeditious administration of justice or some other exigent purpose." *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975). The interests of judicial economy are implicated and may be well served by certiorari review of interlocutory orders when they are "interrelated [in] nature" to other issues on appeal as a matter of right. *Jessee v. Jessee*, 212 N.C. App. 426, 431, 713 S.E.2d 28, 33 (2011). *See also Radcliffe v, Avenel Homeowners Ass'n*, 248 N.C. App. 541, 551, 789 S.E.2d 893, 901-02 (2016) (granting certiorari review of interlocutory orders when they "factually overlapp[ed]" with other issues on review). Our resolution of *Apex v. Rubin I* necessarily impacts the claims and defenses available to the parties in the declaratory judgment action, and, given this overlap, the interests of judicial economy are served

by immediate review of the interlocutory orders at issue here.[2] As a result, and even absent a substantial right, we would grant Ms. Rubin's petition for certiorari review of the trial court's denial of her motion to dismiss and its preliminary injunction order.

2. Standards of Review

¶ 19 We review a denial of a motion to dismiss under Rule 12(b)(6) *de novo*. *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010). In undertaking this review, "[w]e consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation omitted). A 12(b)(6) motion:

> is seldom an appropriate pleading in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail. It is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy.

N.C. Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974) (citations omitted).

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[2] The Town did not oppose Ms. Rubin's petition for certiorari review and conceded at oral argument that this appeal overlaps with *Apex v. Rubin I*.

¶ 20 Review of an order granting a preliminary injunction is also "essentially *de novo*." *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984). This extends to findings of fact made by the trial court, as "an appellate court is not bound by the findings [in the preliminary injunction order], but may review and weigh the evidence and find facts for itself." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983) (citations omitted). Even so, "a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003) (citation omitted). A preliminary injunction is only available:

> (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (citations omitted).

3. Res Judicata Precludes Relitigation of Title to the Sewer Easement

¶ 21 Ms. Rubin argues that the Judgment in *Apex v. Rubin I* and *res judicata* bars the Town "from relitigating whether the Town has a claim to an easement on Ms. Rubin's property." We agree.

¶ 22 "Generally, in order that the judgment in a former action may be held to constitute an estoppel as res judicata in a subsequent action there must be identity of parties, of subject matter and of issues." *Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co.*, 238 N.C. 679, 691, 79 S.E.2d 167, 175 (1953). All three requirements are met here. The parties are the same. The subject matter, namely, a sewer easement across Ms. Rubin's land to serve Riley's Pond, is the same. And the issues—whether the Town can compel Ms. Rubin to surrender title to such an easement in exchange for compensation—are the same. In fact, despite now claiming *Apex v. Rubin I* did not involve the same facts or issues, the Town moved for—and received—relief from the Judgment on the basis that "[t]he sewer easement is the subject of the captioned [direct] condemnation . . . [and] [t]he inverse condemnation of the sewer easement . . . transferred title to the easement to the Town." And though the Town now argues *res judicata* should not apply because the Judgment in *Apex v. Rubin I* did not specifically address a taking by inverse condemnation, a party cannot escape the doctrine's application merely by swapping theories of recovery. *See, e.g., Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985) ("The defense of res judicata may not be avoided by shifting legal theories or asserting a different ground for relief." (citations omitted)).

¶ 23 As we held in *Apex v. Rubin I*, binding precedents preclude us from holding that the Town took title to a sewer easement by inverse condemnation across Ms.

Rubin's land by virtue of its " [']precipitate entry and construction' " during the pendency of the direct condemnation action and in the face of Ms. Rubin's defense that the taking was for a non-public purpose. *Apex v. Rubin I*, ___ N.C. App. at ___, 2021-NCCOA-___, ¶ 23 (quoting *State Highway Comm'n v. Thornton*, 271 N.C. 227, 237, 156 S.E.2d 248, 256 (1967)). *See also Town of Midland v. Morris*, 209 N.C. App. 208, 214, 704 S.E.2d 329, 335 (2011) (holding a "city [cannot] obtain permanent title to the land by fulfilling the purpose of a condemnation before final judgment"). The Judgment in Apex v. Rubin I, involving the same parties, subject matter, and issues, was therefore res judicata as to any claim by the Town that the completion of the sewer pipe during the direct condemnation action vested it with title to a sewer easement.3 We reverse the denial of Ms. Rubin's motion to dismiss as it pertains to this claim.

¶ 24 We are unpersuaded by the Town's argument that our decision in *City of Charlotte v. Rousso*, 82 N.C. App. 588, 346 S.E.2d 693 (1986), supports a determination that *res judicata* does not apply here. In *Rousso*, the City of Charlotte

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[3] The Town, as it did in *Apex v. Rubin I*, relies on *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018), for the proposition that it can claim title to the easement by inverse condemnation irrespective of the Judgment in the direct condemnation action. We find *Wilkie* inapplicable here for all the reasons stated in *Apex v. Rubin I.* ___ N.C. App. at ___, 2021-NCCOA-___, ¶ 26. *Wilkie* did not involve the doctrine of *res judicata* or the issue of whether a condemnor can swap its legal theory of ownership from direct condemnation to inverse condemnation when an action under the former fails.

filed a direct condemnation action to convert a landowner's lot into retail space for rent by private enterprises. *Id.* at 589, 346 S.E.2d at 694. When that direct condemnation action was dismissed as for a non-public purpose, Charlotte filed a new direct condemnation action seeking to take the same lot for a public park. *Id.* We held that the new condemnation action was not barred by *res judicata* because the change in purpose meant it was "not based upon the same facts as the prior case . . . [and] [wa]s free of the illegal taint that caused the earlier case to fail." *Id.*

¶ 25 We are not persuaded that this Court's decision in *Rousso* supports the Town's position here. The condemnor in *Russo* fundamentally changed its purpose for taking the landowner's property—from use for retail space to use for a public park—before bringing its second condemnation action. No such change has occurred here, as the Town has simply changed its legal theory to take a sewer easement across Ms. Rubin's land to serve Riley's Pond. Further, unlike the condemnor in *Rousso*, the Town has not filed a second direct condemnation action, but instead claims title through inverse condemnation by dint of the sewer pipe it *installed for a non-public purpose in the failed direct condemnation action*. Nothing has rendered the Town's actions "free of the illegal taint that caused the earlier case to fail," *Rousso*, 82 N.C. App. at 589, 346 S.E.2d at 694, so *res judicata* applies.

4. Res Judicata Bars the Town's Claims that Inverse Condemnation Is Ms. Rubin's Sole Remedy, Compensation Is Her Sole Relief, and Mandatory Injunctive Relief is Unavailable

¶ 26 We likewise conclude that our holding in *Apex v. Rubin I* and *res judicata* bar a declaratory judgment limiting Ms. Rubin's remedy to compensation pursuant to an inverse condemnation claim. In *Apex v. Rubin I*, the Town moved for relief from the Judgment on the ground, among others, that inverse condemnation is the only cause of action available to Ms. Rubin, that "[t]he exclusive remedy to which [Ms.] Rubin is entitled for inverse condemnation is compensation," and that "the Town . . . [is] insulate[d] from [Ms.] Rubin's claim that she is entitled to mandatory injunctive relief." The trial court then entered orders agreeing with those arguments. Despite requesting and receiving an order relieving it from the Judgment on those bases in the direct condemnation action, the Town nonetheless sought and obtained an identical determination in its declaratory judgment action. Because these claims for declaratory relief involve the same parties, the same subject matter, and the same issues as those raised and determined in *Apex v. Rubin I*, our holding therein that Ms. Rubin cannot be compelled to accept compensation and may instead elect to pursue mandatory injunctive relief through a trespass claim bars relitigation of these questions by the Town in its declaratory judgment action. *Apex v. Rubin I*, ___ N.C. App. at ___, 2021-NCCOA-___, ¶ 42.

5. The Town's Remaining Claims Are Not Barred

¶ 27 The Town's declaratory judgment action seeks resolution of other claims that

we conclude are not barred, because they were not addressed in the Judgment. Specifically, the complaint alleges the Town's ownership of the pipe itself, asserts "[a] genuine controversy exists between the Town and [Ms.] Rubin as to their rights and duties regarding the underground sewer line," requests a permanent injunction "enjoining [Ms.] Rubin . . . from removing or disturbing the sewer line," and seeks a declaration that "the doctrines of laches, economic waste, and other similar equitable doctrines bar [Ms. Rubin] from causing the removal of the sewer pipe." The question raised by these claims—what is to be done with the Town's encroaching pipe following the Judgment now that fee simple title in the land reverted back to Ms. Rubin—was not raised by Ms. Rubin or addressed by the Judgment in *Apex v. Rubin I*. As our opinion explains:

> [T]he Judgment reverted title to Ms. Rubin in fee, restoring to her exclusive rights in the tract and divesting the Town of any legal title or lawful claim to encroach on it.
>
> But because Ms. Rubin did not seek mandatory injunctive relief in the direct condemnation action, she is not entitled to that remedy by the plain language of the Judgment. . . . The trial court . . . rendered its Judgment declaring null and void both the direct condemnation action and the Town's "quick take" title to the easement. The Judgment, given the issues raised before the trial court, did nothing more than that.

Apex v. Rubin I, ___ N.C. App. at ___, 2021-NCCOA-___, ¶¶ 32-33 (citations omitted).

¶ 28 *Thornton*, discussed at length in *Apex v. Rubin I*, likewise suggests that

dismissal of a direct condemnation action does not serve to fully and finally adjudicate what relief is available against parties who continue to occupy the land when the landowner did not seek an injunction during condemnation. In such a circumstance, the prevailing landowners "are entitled to have [the direct condemnation] proceeding dismissed, *leaving them to whatever rights they may have against those who have trespassed upon their land and propose to continue to do so*." *Thornton*, 271 N.C. at 240, 156 S.E.2d at 258 (emphasis added). Here, because the Judgment addressed only whether the Town lawfully took title to a sewer easement across Ms. Rubin's land—and not what must now be done with the installed sewer pipe—the extent and enforcement of the "rights [Ms. Rubin] may have" against the Town were not adjudicated in the Judgment. The Town's declaratory judgment action therefore presents new issues,[4] namely whether the trespassing Town must remove its pipe or can preclude Ms. Rubin from disturbing it despite title based on "laches, economic waste, and other similar equitable doctrines."[5]

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[4] We do not address whether the Town might ultimately prevent a removal of the pipe based on the equitable doctrines asserted in its complaint, as that is not the question raised by a 12(b)(6) motion to dismiss a declaratory judgment action. *See, e.g., Morris v. Plyler Paper Stock Co.,* 89 N.C. App. 555, 557, 366, S.E.2d 556, 558 (1988) ("A motion to dismiss for failure to state a claim is seldom appropriate in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail.").

[5] At least one of the equitable doctrines contemplated by the Town is generally raised as an affirmative defense. *See, e.g., MMR. Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001) (describing the equitable doctrine of laches as an "affirmative defense"). And we acknowledge that *res judicata* "bars every ground of recovery

¶ 29 Ms. Rubin further contends that the declaratory judgment action should be dismissed *in toto* because the complaint allegedly failed to disclose a genuine controversy. She premises this argument on her belief that the question of whether removal of the sewer pipe is required had already been fully adjudicated and determined in *Apex v. Rubin I*. However, as we have stated, the Judgment simply determined title reverted to Ms. Rubin and did not address what must be done with the Town's pipe under her land. We therefore reject this argument.

¶ 30 We also conclude that the prior action pending doctrine does not require dismissal of the Town's request for a declaration as to whether the pipe must be moved or may remain under some equitable theory absent title. Under the doctrine, "[w]hen a prior action is pending between the same parties, affecting the same subject matter in a court within the state . . . having like jurisdiction, the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to plea in abatement." *State ex rel. Onslow Cty. v. Mercer*, 128 N.C. App. 371, 375, 496 S.E.2d 585, 587 (1998) (citations omitted). However, for purposes of the

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or defense which was actually presented or which could have been presented in the previous action." *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93, 367 S.E.2d 335, 336-37 (1988) (emphasis added). However, because Ms. Rubin did not assert a claim for mandatory injunctive relief in the prior action and did not receive a judgment to that effect, any equitable defenses to such relief are not barred by *res judicata*. *See Walton v. Meir*, 10 N.C. App. 598, 604, 179 S.E.2d 834, 838 (1971) ("[T]his principle simply means that a defendant must assert any defense that he has available, and that he will not be permitted in a later action to assert as an affirmative claim, a defense, which if asserted and proved as a defense in the former action, *would have barred the judgment entered in plaintiffs' favor*." (emphasis added)).

doctrine, "[a]n action is deemed to be pending from the time it is commenced until its final determination," and the rights available to Ms. Rubin were finally determined upon entry of the Judgment. *Apex v. Rubin I*, ___ N.C. App. at ___, 2021-NCCOA-___, ¶¶ 32-33. While Ms. Rubin raised in her post-judgment motions the issue of whether the Town must be compelled to remove the pipe, we have held that the Judgment did not award her such relief and she was not entitled to obtain it in that action. *Id.* at ___, 2021-NCCOA-___, ¶ 33. In other words, because the Judgment did not grant mandatory injunctive relief, despite Ms. Rubin's post-judgment motions, no proper action regarding removal of the pipe was pending at the time the Town filed its declaratory judgment action.

6. The Preliminary Injunction

¶ 31 A preliminary injunction is proper:

> (1) if a plaintiff is able to show *likelihood* of success on the merits of his [or her] case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Ridge Cmty. Inv'rs, Inc. v. Berry, 293 N.C. 688, 701 239 S.E.2d 566, 574 (1977). Ms. Rubin only challenges the first prong, arguing that the Town cannot show a likelihood of success on the merits because the entire complaint should have been dismissed under *res judicata* or prior action pending grounds. We agree with Ms. Rubin that

the Town cannot succeed on its claims that are barred by *Apex v. Rubin I* and *res judicata*, as discussed in Parts II.3-4 above. We therefore vacate findings of fact 9, 11, 14, 20, and 21, as well as a portion of conclusion of law 2, in the preliminary injunction order that are contrary to *Apex v. Rubin I*. In light of today's decisions in these cases, the Town cannot show a likelihood of success on those claims.

¶ 32 Ms. Rubin further asserts the trial court erred in finding as a fact that there are no practical alternatives to the currently installed sewer line that could provide sewer service to Riley's Pond. She points out that documents provided to the trial court by both parties demonstrate numerous alternatives to the sewer pipe currently running through her property. Based on the evidence of record, we vacate finding of fact 28 and the portion of conclusion of law 10 stating that there are no practical alternatives to the sewer line already installed on Ms. Rubin's land.

¶ 33 Though we vacate portions of the preliminary injunction order, we ultimately leave it undisturbed in light of our holding that the Town's request for a declaration resolving whether the pipe may be removed is not subject to dismissal. We must presume the preliminary injunction was proper, and Ms. Rubin bears the burden of showing error to rebut the presumption. *Analog Devices, Inc.*, 157 N.C. App. at 465, 579 S.E.2d at 452. Ms. Rubin has offered no argument against a likelihood of success on this claim beyond the *res judicata* and prior action pending arguments, which we have rejected, so she has not rebutted the presumption that the trial court correctly

determined the Town was likely to succeed on this claim.[6] We therefore affirm the remainder of the preliminary injunction order.

III. CONCLUSION

¶ 34 For the foregoing reasons, we reverse the trial court's denial of Ms. Rubin's motion to dismiss as to declarations (1)-(7) sought by the Town in paragraph 27 of its amended complaint. We affirm the denial of Ms. Rubin's motion as to declaration (8) requested by that same paragraph. As to the preliminary injunction order, we vacate findings of fact 9, 11, 14, 20, 21, and 28, as well as those portions of conclusions of law 2 and 10 described above. We affirm the remainder of the preliminary injunction order and remand this action to the trial court for further proceedings not inconsistent with this opinion.

REVERSED IN PART; VACATED IN PART; AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

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[6] Our vacatur of the finding and conclusion that no alternatives to the current sewer pipe exist does not preclude affirmance of the preliminary injunction. The second prerequisite to a preliminary injunction—which is not argued by Ms. Rubin on appeal—is satisfied "if . . . , in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Inv'rs, Inc.*, 293 N.C. at 701, 239 S.E.2d at 574. As set forth above, Ms. Rubin only challenges a likelihood of success on the merits and the specific factual determination that there were no alternatives to the existing sewer line; she levies no argument against the trial court's conclusion that the preliminary injunction was necessary to protect the Town's rights in the pipe pending litigation of the declaratory judgment action. Absent argument to that effect, Ms. Rubin has not rebutted the presumption that the trial court properly entered a preliminary injunction on that basis.

Judges DILLON and JACKSON concur.