No. 410PA18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

TOWN OF APEX,

Petitioner/Cross-Respondent,

vs.

BEVERLY L. RUBIN,

Respondent/Cross-Petitioner.

From the Court of Appeals
COA20-304
21-NCCOA-187

From Wake County
No. 15 CVS 5836

No. 206PA21 TENTH JUDICIAL DISTRICT

TOWN OF APEX,

Petitioner/Cross-Respondent,

vs.

BEVERLY L. RUBIN,

Respondent/Cross-Petitioner.

From the Court of Appeals
COA20-305
21-NCCOA-188

From Wake County
No. 19 CVS 6295

****

MOTION TO FILE SUBSTITUTE BRIEF

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, North Carolina Advocates for Justice ("NCAJ") request permission to file a substitute brief to correct an inadvertent signature block in its original brief.

1. On 7 February 2024, NCAJ filed its Consolidated New Brief of *Amicus Curiae* North Carolina Advocates for Justice brief.

2. The signature block portion of the brief inadvertently listed Shiloh Daum's signature block before R. Susanne Todd's signature block (at p. 28) and before the N.C. R. App. 33(b) Certification. To comply with N.C.R. App. 33(b) Shiloh Daum's signature block should be removed from page 28 of the brief and kept only under N.C. R. App. 33(b) Certification (p. 29). Additionally, R. Susanne Todd's signature block should be removed from under the N.C. R. App. 33(b) Certification (p. 29) as she was the filing attorney.

3. Filed with this motion is a proposed substitute brief that corrects the signature block errors. The changes in the substitute brief do not alter the substantive arguments in any way. Nor do the corrections shift any text in the original brief to different pages. The corrected brief will also not change the existing briefing schedule.

5. NCAJ as *amicus curiae,* made a good faith effort to inform counsel for all other parties of the intended filing of this motion.

Accordingly, NCAJ respectfully moves for an order striking the 7 February 2024 brief from the appellate docket and directing the appellate clerk to docket and

reprint the attached substitute brief as a timely replacement brief. NCAJ will pay all costs associated with the reproduction of the substitute brief.

Respectfully submitted this the 8th day of February 2024.

NORTH CAROLINA ADVOCATES FOR JUSTICE

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 2024, I electronically filed the foregoing MOTION TO FILE SUBSTITUE BRIEF with the Clerk of Court. The following counsel of record will be served via electronic mail:

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CONSOLIDATED NEW BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE

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CONSOLIDATED NEW BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE[1]

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NATURE OF THE AMICUS CURIAE'S INTEREST

NCAJ is a non-partisan professional association of more than 2,500 North Carolina lawyers. A primary purpose of NCAJ is to advance and protect the rights and interests of those that have been injured or damaged by the wrongful acts of others. In furtherance of its mission, NCAJ regularly conducts continuing legal education seminars and appears as *amicus curiae* before state and federal courts.

NCAJ boasts an active Eminent Domain section that strives to educate the public, lawmakers, judges and members of the North Carolina State Bar on the complexities of eminent domain law. NCAJ members regularly represent North Carolina property owners whose Constitutional rights have been violated by the taking of their private property for public use without just compensation. This case concerns a fundamental right of landowners in North Carolina to be protected against the unconstitutional taking of their property by the

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[1] Rule 28.1(b)(3)(c.) Disclosure: No persons or entities helped write this brief or contributed money to its preparation other than the *amicus curiae*, its members, and counsel. On brief are the current Chair and Immediate Past Chair of the NCAJ Eminent Domain Section.

government when said taking is not for a public use or benefit. This is important to NCAJ's mission to protect the property rights of North Carolina citizens.

LIST OF ISSUES

I. WHAT IS THE PROCEDURAL AND SUBSTANTIVE RELIEF REQUIRED TO REMEDY A GOVERNMENTAL TAKING FROM A PROPERTY OWNER THAT HAS BEEN ADJUDICATED AS UNCONSTITUTIONAL AND VOID?

ARGUMENT

I. SUMMARY OF ARGUMENT

The Fifth and Fourteenth Amendments to the U.S. Constitution and the North Carolina "Law of the Land" clause guarantee that citizens shall not be deprived of their property absent a public purpose and just compensation. The Town of Apex (Apex) seeks to negate the constitutional public purpose requirement by claiming taking powers through collateral attack of an earlier judgment. Apex adds insult to injury by inventing a theory of inverse condemnation that purloins

both Rubin's property and the very cause of action that exists exclusively to save landowners from illegal takings.

The Court of Appeals correctly vanquished these untenable contortions and disallowed Apex's end-run attempts at inverse condemnation through a back-door declaratory judgment, but the panel erred in applying this Court's precedent in two ways. First, the court below erred by failing to recognize an important doctrine that its own holding vacated the orders of the invalid declaratory action, which also severed any jurisdictional basis in the second trial court proceeding. *In rem* jurisdiction always remained in the original action. The court's instructions on remand failed to recognize that an unconstitutional taking is void *ab initio* with self-executing remedies that do not require a separate injunctive procedure. All rights and title reverted to Rubin within the jurisdiction of the original *in rem* action.

Second, the lower court erred by failing to apply the correct standard and give full effect of the original judgment and the courts' inherent remedial powers. The appeals court incorrectly held Rubin's original action was no longer pending, and that she should plead for

injunctive relief in still another proceeding. In fact, the first action remained pending. Rubin awaited only a hearing on post-judgment relief following a timely motion, which is entirely consistent with established post-judgment practice. The action remained pending, and *in rem* jurisdiction over Rubin's land exclusively stayed with the original trial court action until the end of *all* proceedings in that case to cure the constitutional harm, *including Rubin's remedies*. Any requirement that deprives Rubin of a cure for the unlawful deprivation of property is contrary to our State's deepest history and jurisprudential traditions. In North Carolina, this is the law of the land.

Apex's dire warnings ring hollow and cannot be used to ignore the law, especially when its voice only cries in support of prohibited governmental conduct. Our law demands that courts end long-standing wrongs, not perpetuate and enshrine them. Manifest injustice results when erroneous decisions deny relief to citizens like Rubin, who remains in the right, but still lacks a remedy.

II. APEX HAS NO RIGHT TO CONDEMN RUBIN'S PROPERTY, AND IT NEVER DID.

Amicus observes the same basic naming convention as used in Rubin's New Brief: *Rubin I*, *II*, and *III*, plus the two trial court actions which spawned those appeals. *See Town of Apex v. Rubin*, 262 N.C. App. 14 (2018) (hereinafter "*Rubin I*"); *Town of Apex v. Rubin*, 277 N.C. App 328 (2021) (hereinafter "*Rubin II*"); and, *Town of Apex v. Rubin*, 277 N.C. App. 357 (2021) (hereinafter "*Rubin III*").

To take a landowners' property without "consent for a non-public use, even though he be paid its full value, is a violation of Article I, § 17, of the Constitution of this State and of the Due Process Clause …." *State Highway Commission v. Thornton*, 271 N.C. 227, 259 (1967) (hereinafter, "*Thornton*"). The Court of Appeals panel in *Rubin II* properly concluded that Apex could not retroactively legalize its unlawful invasion of Rubin's property by switching theories and claiming inverse condemnation after losing in its previous, fully-litigated effort to condemn the property. Quite to the contrary, *Rubin II* recognized and followed this Court's holdings that inverse condemnation is not a theory of taking available to any condemning

authority at all. *See Rubin II*, 277 N.C. App. at 338-43. Rather, the power to bring an inverse condemnation action lies exclusively with a property owner seeking compensation for a taking, and not with the government. *Id.*; *Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 590 (2010). The doctrinal need for inverse condemnation exists only as "a device which forces a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Hoyle v. Charlotte*, 276 N.C. 292, 302 (1970).

The appeals court was entirely correct in much of its analysis. *See Rubin II*, 277 N.C. App. at 338-43. The court correctly applied *Thornton* and *Town of Midland v. Morris*, 209 N.C. App. 208 (2011), in concluding 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." *Rubin II* 277 N.C. App. at 341. *Rubin II* also properly distinguished this Court's decision in *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540 (2018). *Rubin II* recognized *Wilkie's* holding that "landowners do not need to show that the taking was for a public purpose to prevail on an inverse condemnation claim … 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." *Rubin II,* 277 N.C. App. at 341. (quoting *Wilkie*, 370 N.C. at 552-53.) In short, inverse condemnation cannot be repurposed as a tool for government to abuse its eminent domain powers.

Having lost on its first theory of condemnation, Apex has tried unsuccessfully to rewrite the law in search of a second. Still, it has no right to condemn the property at all. No theory of condemnation, whether statutory or common law, can survive if it fails to meet the twin, inviolate constitutional requirements of *public purpose* and *just compensation*.

III. RUBIN HOLDS TITLE TO THE PROPERTY

Apex lacked any valid taking powers[2] – including quick take powers – because it did not meet the indispensable public purpose

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[2] Apex tried to use extraordinary quick take powers that are typically reserved for NCDOT. The increasing use of quick take powers by local condemnors under Chapter 136 is problematic and directly caused the present controversy. Had Apex used the appropriate procedure delegated to municipalities by Chapter 40A, this case would have been resolved without confusion years ago at the first hearing and without multiple appeals. Municipal takings require 30 days written notice to

requirement. *Rubin II* correctly observed that there was nothing moot or voidable about the original trial court judgment, especially after that judgment was fully affirmed in *Rubin I*. *Rubin II,* 277 N.C. App. at 343. Without valid taking powers, unencumbered title reverted to Rubin automatically upon entry of the trial court's original judgment. *Rubin II,* 277 N.C. App. at 341–42; *Midland*, 209 N.C. App. at 214. An invalid taking is void *ab initio*, that is, the government has no right to the land and title is automatically vested in the property owner. In this sense, Rubin's rights in her land are "self-executing." It was hers, and Apex was ruled to have no right to take it, so it is once again hers free and clear of Apex's failed efforts to condemn it. This Court should clearly reaffirm the rules from *Sale* and *Thornton* that unconstitutional takings result in self-executing and automatic reverter, as *Rubin II* partly held. *See Sale v. State Highway & Pub. Works Comm'n,* 242 N.C. 612 (1955). It is no different than any other unlawful seizure: the law

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property owners before filing condemnation. N.C.G.S. § 40A-42. This procedure expressly gives property owners the opportunity to file an injunction and prevents condemnation lacking public purpose. Trial courts can evaluate authority to take before a citizen is disseized of her freehold or deprived of her property. *See* N.C. Const. art. I, § 19.

automatically recognizes that valid title returns exclusively to the aggrieved landowner. "We hold, following *Thornton* and [*Midland*], 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." *Rubin II,* 277 N.C. App. at 344. This portion of the opinion was entirely correct.

IV. WHERE THERE IS A RIGHT, THERE IS A REMEDY

A. The Original Trial Court Proceeding Was Still Pending, and any Orders Denying Effect of that Judgment Were Error.

Based on the principles above, two things are clear: (1) there is no basis for Apex to take or occupy this property, and (2) title to the property currently occupied by Apex is properly vested solely in Ms. Rubin. It is simple enough to assert logically that a court with jurisdiction over such a matter can reconcile these matters by simply ordering the unconstitutionally occupying authority to leave. This is where the opinion below erred, concludig as follows: "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." *Rubin II*, 277 N.C.

App. at 348. Contrary to this assertion, the combined judgment of the trial and appellate decisions in *Rubin I* do actually establish that Rubin has an unequivocal and *established* constitutional right to protection of her property by the law of the land. For this right, she must have a remedy. *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 784-85 (1992). Such a constitutional remedy attaches to the land, in this case, and it must give life to her vested property interests.

Rubin II is correct to observe that the original judgment did not go that far. This is true, however, precisely because that case and its initial judgment remained incomplete while waiting to consider ancillary remedies and relief such as attorney fees and costs. It did not ever fully reach all the *in rem* issues that attached in the first case, only because it was derailed by an invalid subsequent order. Oddly, the *Rubin II* court had just declared the declaratory action's orders were invalid and void, but *Rubin II* failed to appreciate the insidious effects and havoc that the jurisdictional diversion caused by the declaratory judgment action. The only valid case and claims were Rubin's in the

original trial court action, and all the various appeals left were these ancillary jurisdictional and remedial questions ready to be resuscitated in the original case. Once this case is returned to the correct jurisdictional track in the original action, established law provides familiar procedures and authority for Rubin to seek ejectment or other relief. Rubin's motion to enforce the original judgment is the point in time and process where this case must return. (R pp 122-126.) Then – and only then – can the original trial court that was vested with proper *in rem* jurisdiction consider appropriate constitutional relief relating to the interests in land. *See Corum,* 330 N.C. at 784. These include, but are not limited to, Rubin's prayers for relief sounding in mandamus, N.C.G.S. § 1-302, and Rule 70. These statutory enactments are all deeply rooted in the common law, and they all provide perfectly appropriate authority to remedy Apex's wrongs.

The Court of Appeals' confusion in *Rubin II*, and its chief error stems in part from a flawed conclusion that the original proceeding in *Rubin I* was not still pending. In fact, Rubin immediately sought post-judgment relief in her motion on remand from *Rubin I*. The very day that the original trial court received the jurisdictional baton back from

the first appeal, Rubin sought affirmative relief from Apex's unconstitutional occupation. (R pp 122-126.) The remand and post-judgment relief cemented the jurisdiction of the *first* trial court proceeding. Moreover, Rubin's fees and costs await adjudication, showing the original trial court retained supplemental or ancillary jurisdiction. *See* N.C.G.S. §§ 1-75.8 and 136-119.

Interestingly, the decision in *Rubin II* correctly "acknowledged that mandatory injunctive relief is available as an ancillary remedy to an action resolving title to land … but it is unavailable 'when it is not in protection of some right *being litigated.*'" *Rubin II*, 277 N.C. App. at 344 (cleaned up, emphasis in *Rubin II*). The decision below failed to recognize that Rubin's post-judgment motions for relief *were actually being litigated then, and they remain pending today*. Things went awry because Apex opened a new, second-front to attack the first adjudication, seeing an opportunity after the retirement of the presiding judge in the original trial court action. Thus, Apex launched its novel effort to collaterally attack the first judgment and wash away its failed appeal through the facially invalid maneuver to take via inverse condemnation clothed in a declaratory judgment action.

The error that this Court must reverse lies with the trial court's orders considered in *Rubin III*, that purported to vacate aspects of *Rubin I*. The trial court erred in applying substantive constitutional law of takings, and its errors were compounded because that Superior Court proceeding (the declaratory action, analyzed in *Rubin III*) never had *in rem* jurisdiction over Beverly Rubin's land.

B. The Original Trial Court Retained Exclusive *In Rem* Jurisdiction Over the Property

Stated simply, the adjudication of public purpose in *Rubin I* was not vulnerable to subsequent collateral attack in the Superior Court. It was subject *only* to reversal on appeal, which failed. It emphatically could *not* be vacated by a subsequent trial court action, yet this is precisely what happened under the guise of the orders in Apex's "Hail Mary" declaratory judgment action. The strategy-of-confusion worked for a time, but it does not cure the fatal flaw that the declaratory judgment/inverse action lacked a valid jurisdictional foundation. The original action remains singularly vested with the power to determine

and dispose of the rights and interests in the property – or *res* – including issues of lawful possession or ejectment.

"Condemnation under the power of eminent domain is a proceeding *in rem* -- against the property." *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 225, (1962). North Carolina courts have previously held that such *in rem* jurisdiction is exclusive.

> [It] requires a [federal] court to abstain from exercising jurisdiction if 'the relief sought would require the court to control a particular property or *res* over which another court already has jurisdiction. Although the doctrine is typically applied to concurrent actions in federal and state court, the principle is equally applicable to concurrent *in rem* proceedings within a state.

Whitmire v. Cooper, (hereinafter, "*Whitmire*"), 153 N.C. App. 730, 734, (2002) (quotations omitted).

Whitmire states the rule the trial court should have applied here.

> As the superior court presiding over the condemnation action was the first court to exercise in rem jurisdiction and the action has not been concluded thus far, the trial court could not exercise jurisdiction over Plaintiffs' taxpayers' action.

Whitmire, 153 N.C. App. at 734-35. The motions and relief sought immediately after the remand in *Rubin I* made that first *in rem* matter

an ongoing action, which could only be concluded by adjudicating the relief sought in that action. Instead, the jurisdictional train got highjacked and diverted to a parallel and doomed track, leading to an inevitable derailment. This Court is now able to guide the lower divisions back to the point of departure from the right jurisdictional track: the post-judgment relief sought by Rubin in the original action.

Apex has conceded in federal court and elsewhere that the *in rem* jurisdiction has always and exclusively attached in the state court action. When Rubin pursued an action in federal court in October of 2019 (the "§ 1983 Action") against the Town of Apex and several land developers seeking damages for the allegedly unconstitutional taking of her property, Defendants asked the court to dismiss the action for several reasons.[3] *Rubin v. Town of Apex*, No. 5:19-CV-00449-BO, 2020 U.S. Dist. LEXIS 23152, at *1 (E.D.N.C. Feb. 10, 2020). Apex specifically challenged the federal court's jurisdiction:

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[3] Only months after the decision *Rubin I*, the Supreme Court of the United States held that a property owner who suffers a violation of her Fifth Amendment rights when the government takes his property can bring a direct claim in federal court under 42 U.S.C. § 1983. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2168 (2019).

> Apex argues that a federal court may not assert jurisdiction when there are two actions, one in state and one in federal court, that are *in rem* or *quasi in rem*. North Carolina condemnation proceedings are *in rem* proceedings. Thus, Town of Apex argues, because Rubin has claims involving real property in both state and federal court, North Carolina Superior Court has exclusive jurisdiction over the property which is the subject of the *in rem* proceedings.

Id. at *7 n.1 (cleaned up).

The federal court ultimately agreed with Apex and subsequently dismissed Rubin's § 1983 action entirely. U.S. District Judge Boyle concluded "that the *Princess Lida* doctrine applies, that the state court has exclusive jurisdiction over the sewer line." *Rubin v. Town of Apex*, No. 5:19-cv-449-BO, 2020 U.S. Dist. LEXIS 53636, at *5 (E.D.N.C. Mar. 27, 2020). The federal court acknowledged there were "two separate *ongoing* state court proceedings – the original condemnation action filed by Apex in 2015 and the inverse condemnation action filed by Apex in 2019." *Id.* at *5-6 (emphasis added). Rubin attempted to differentiate between the *in rem* or quasi *in rem* relief she was seeking, but the federal court recognized the jurisdictional boondoggle it faced if it became ensnared in the case:

> Whether the inverse condemnation proceeding is styled as *in rem* or *quasi in rem*, the practical effect of an order from this Court for defendants to remove the sewer line is the destruction of physical property currently the subject of a state court proceeding. The Court cannot exercise jurisdiction in such a way.
>
> Moreover, Rubin's other causes of action are inextricably bound up with her Takings Clause claim. She requests removal of the sewer line as a remedy for these claims and the core issue underlying all of them is whether the taking—and therefore the actions the private defendants took to facilitate the taking—was proper. As explained above, because the state court has exclusive jurisdiction over the relevant property, the Court must abstain on these claims.

Id. at *6-7.

The District Court was right: "the state court has exclusive jurisdiction over the relevant property." *Rubin v. Town of Apex*, No. 5:19-cv-449-BO, 2020 U.S. Dist. LEXIS 53636, at *5 (E.D.N.C. Mar. 27, 2020). Apex impliedly admits this when it asks this Court to allow the original judgment to remain overturned by the trial court orders from the second, declaratory judgment action.

Rubin II and *III* were correct to conclude that the second action lacked merit and the purported inverse taking was void *ab initio*, just like the failed first attempt to take by direct condemnation. The only

valid judgments or orders arise in the original action, and the ancillary jurisdiction of that case remains intact. The only case left for the matter to return to the only case left standing: the original 2015 action.

Any taking adjudicated as unconstitutional is void *ab initio*, and the original, adjudicating trial court is tasked to enter orders granting substantive remedies sufficient to relieve the unconstitutional injuries to a property owner as provided by the law of the land. These include specific constitutional protections themselves. *See, e.g.*, *Thornton,* 271 N.C. at 236-37 (requiring dismissal of unconstitutional takings that lack public purpose); *see also, Sale v. State Highway & Pub. Works Comm'n,* 242 N.C. 612 (1955) (finding a constitutional "guaranty against any encroachment by the State on the fundamental rights belonging to every citizen.") Additional remedies also remain in valid statutes, recognized writs, and the common law where no established authority or practice controls.

Our State's *in rem* jurisdiction statute states this principal as plain, black-letter law:

> A court of this State having jurisdiction of the subject matter may exercise jurisdiction *in rem* or *quasi in rem* on the grounds stated in this section. …

> Jurisdiction *in rem* or *quasi in rem* may be invoked in any of the following cases:
>
> (1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the **relief demanded consists wholly or partially in excluding the defendant from any interest** or lien therein.
> …
> (4) When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supplementary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section.
>
> (5) In any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised.

N.C.G.S. § 1-75.8 (1, 4, 5). This statute expressly recognizes jurisdiction remains in an *in rem* trial court for relief seeking ejectment from property. It also foresees the need for supplementary jurisdiction in subsection (4) to give effect to judgments affecting property and preserves the broad reach of all constitutional powers over any *res*. *See also*, *Rubin II,* at 344 and authorities cited. This Court should recognize that the foregoing statute applies to Rubin's case and confirm jurisdiction remains in the original trial court from *Rubin I* (*i.e.*, the original action: Wake County, Case No. 15-CVS-5836).

The *in rem* jurisdiction statute is controlling, but it is far from the only statute that confirms jurisdiction must remain in the original condemnation action from *Rubin I*. That trial court obviously had jurisdiction to consider further relief such as fees and costs to Rubin:

> The court having jurisdiction of the condemnation action instituted … [in a Chapter 136 quick-take] *shall award* the owner … [attorney fees and costs] actually incurred because of the condemnation if the final judgment is that the [condemnor] cannot acquire real property by condemnation or a proceeding is abandoned . . . .

N.C.G.S. § 136-119 (cleaned up). This statute unquestionably affirms jurisdiction and authority to adjudicate matters that arise *during or after the entry of a final judgment*.

Chapter 136 has another catch-all provision that specifically anticipates that skilled trial judges will need flexibility to effectively manage the practical impacts of takings cases. These "Additional rules" statutes empower trial courts to "make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts." N.C.G.S. § 136-114. The intent of the condemnation powers of Article

9 and Chapter 136 more broadly is for taking of transportation rights-of-way, but only *for public use*. *See* N.C.G.S. §§ 136-103(b – c) and 104(3). Chapter 40A has similar provisions regarding post-judgment relief and costs, N.C.G.S. § 40A-8, as well as a residual "additional rules" provision. § 40A-12.

In sum, the statutory schemes in Chapter 136, 40A and § 1-75.8 are plainly rooted in the long tradition of the common law to apply the legal rules to everchanging facts while maintaining fidelity to core principles. Above all, they allow for all appropriate relief to a disseized owner like Rubin.[4]

C. This Court Should Affirm Ancillary Jurisdiction to Order That Constitutional Remedies in this Matter Can Include Injunctive Relief.

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[4] It is vital to note that Apex could have routed or revised its line and avoided causing collateral damage to other landowners *and* the constitutional harm to Rubin. (R S (I) pp 201-202.) They just didn't want to pay the costs and consequences of their illegal conduct. This Court has recognized the "laudable public policy" of reducing acquisition costs for public infrastructure, but cost is not a valid basis to defy our State's Constitution and the law of the land. *Kirby v. N.C. DOT*, 368 N.C. 847, 855 (2016). The facts and history of Rubin's saga are arguably more offensive than the Map Act line of cases because Apex intentionally circumvented prior orders, knowingly making the damages and natural consequences to Rubin worse.

The Court of Appeals recently affirmed that the Law of the Land "clause protects those fundamental rights and liberties which are, objectively, deeply rooted in this State's history and tradition and implicit in the concept of ordered liberty." *Howell v. Cooper*, 892 S.E.2d 445, 453 (N.C. Ct. App. 2023) (cleaned up). That panel specifically held that injunctions are available to remedy violations of fundamental rights under the law of the land clause:

> [W]e hold any alleged failure on the part of Plaintiffs to seek injunctive relief prior to damages does not bar their claims at the pleading stage under the theory of sovereign immunity. We further hold Plaintiffs have stated colorable constitutional claims where they allege a blanket prohibition against conducting their bar businesses violated both their right to earn a living and their substantive due process rights under N.C. Const. art. 1, §§ 1, 19.

Howell, 892 S.E.2d at 454 (N.C. Ct. App. 2023). This case also analyzed fundamental property rights under similar case law and constitutional doctrine.[5] The panel decision in *Howell* conflicts with the panel below

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[5] *Howell* arguably faces greater hurdles, as the governmental conduct challenged in that case is rooted in the police power, emergency health and safety powers, and the threshold barrier of sovereign immunity. None of these complications are common to this action, yet the *Howell* holding is more permissive regarding the specific question of injunctive relief for unconstitutional violations of citizens' property rights.

in *Rubin II* regarding the requirement to assert injunctive relief at the outset of a proceeding in order to address an unconstitutional breach of foundational property rights. The better rule and the weight of authority calls for this Court to articulate a rule that permits trial courts to consider injunctive relief where necessary and proper to give meaningful protection to the property rights of landowners in takings cases.

V. FINALITY OF JUDGMENTS AND RESPECT FOR THE JUDICIARY MUST BE MAINTAINED.

In making its rulings, the Court must promote rules of comity among the General Court of Justice and appellate division, while protecting finality in litigation. That is, once a court has given a judgment and its incumbent relief, then the matter is decided. Apex seeks license to abuse the law by preserving a rule wherein one trial judge can overrule another trial judge. (R. at 143-144, 162-168; R. at 102-111 in No. COA20-305.) Clearly this is contrary to North Carolina law. The consequence of such a holding also would effectively overrule *Rubin I* and this Court's denial of Apex's first Petition for Discretionary Review. This will encourage losing parties to file alternate actions in

repeat collateral attacks until they get a favorable ruling. There will be no finality to cases and parties will be forced to litigate the same issues repeatedly. The courts and the public are interested in the finality of litigation, and litigation must end for the repose of society. *Hicks v. Koutro*, 249 N.C. 61, 64 (1958).

Statutes and case law demand actions to be tried as a whole, and to deploy remedies necessary to effect judgments, including supplementary relief and post-appellate relief. *See* N.C.G.S. § 1-259 (Supplemental relief upon declaratory judgment or decree); § 1-298 (Procedure after determination of appeal). A single judgment should completely and finally determine all the rights of the parties, including the ultimate disposition of property. Litigants are bound by those judgments. Cases like *English v. Holden Beach Realty Corp*., 41 N.C. App. 1, 13 (1979), reinforce these statutes to provide mandatory injunctive relief as ancillary in an action affecting title and possession of land. A writ of mandamus and Rule 70 also provide additional tools for the trial court to fashion an appropriate remedial order. Rubin has been seeking such an opportunity since 2019, and the time is long past due.

Apex had its chance in the original condemnation action to bring forth all of its arguments and claims. These failed. Apex's taking of Rubin's property was unconstitutional. Apex, however, refused to accept this result and made every effort to evade that judgment. This multi-year saga has only deepened Rubin's grievous legal harms. Apex never deserved a "second bite at the apple", and its claims still lack support in our jurisprudence. *See City of Lumberton v. U.S. Cold Storage, Inc.*, 178 N.C. App. 305, 309-10 (2006). A "party may not file suit seeking relief for a wrong under one legal theory and, then, after that theory fails, seek relief for the same wrong under a different legal theory in a second legal proceeding. . . We can perceive no reason why [a losing party] should be given two bites at the apple." *Id.* Rubin and landowners throughout the State deserve clear guidance from this Court of last resort.

Apex's charade must stop, lest it invert the judicial hierarchy and allow a trial court to overrule the appellate bench. This Court has cautioned against just this sort of peril: "Otherwise, litigation would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals." *D & W, Inc. v. Charlotte*, 268 N.C.

720, 722-23 (1966). This Court's decision should not encourage the progenitors of unconstitutional governmental takings to litigate claims until they find a judge willing to give them a favorable result. The rulings in the lower courts that have denied Rubin full relief from Apex's original unconstitutional injury will jeopardize the finality of judgments and the jurisdictional integrity of trial court and appellate authority. This Court is uniquely able to announce a definitive holding that will cure these ills.

CONCLUSION

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. Faithful to its charge, this Court held long ago that a wealthy, powerful landowner may not manipulate the law to take property rights from a fellow citizen for private use by cloaking the taking under the guise of public authority:

> [T]he courts may not violate or weaken a fundamental principle, … . The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened.

Cozard v. Hardwood Co., 139 N.C. 283, 296-97 (1905).

Quite recently, the Supreme Court of the United States similarly observed with great poignancy that "the magnitude of a legal wrong against a citizen is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020). Apex claims that an order to reasonably end its egregious conduct would be earthshaking, when in fact the cure is merely inconvenient and carries fair costs Apex has dodged for nearly a decade. Apex charged ahead despite its many chances to change course, and its arguments are alarmist and merely convenient; Apex's "dire warnings" are "not a license for us to disregard the law. *Id.* at 2481. "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *Id.* at 2482.

Amicus curiae urge this Court to honor these principles and secure the blessings of liberty for Rubin and North Carolina's landowners against overreaching governmental takings of private property. This Court must deny Apex's takings claims by inverse condemnation or any other contrived theory that would allow its

invasion to persist. The Court should remand this matter to the trial court in the original action with a mandate to enter orders that will at long last command Apex to vacate the Rubin property in a reasonable time, and finally end its ongoing unconstitutional conduct.

For the reasons stated herein, the rulings in the original final Judgment in the 2015 action should be, once again, AFFIRMED. The second 2019 declaratory judgment action should be VACATED. This Court should remand further consideration of Rubin's motions to enforce judgment, disposition and exclusive possession of the property, and any other ancillary post-judgment relief necessary and proper to protected citizens' constitutionally-enshrined property rights.

This the 7th day of February, 2024.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of February, 2024, I electronically filed the foregoing CONSOLIDATED NEW BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE with the Clerk of Court. The following counsel of record will be served via electronic mail:

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