No. 410PA18-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

No. 206PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

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NEW CONSOLIDATED REPLY BRIEF OF PLAINTIFF-APPELLANT TOWN OF APEX

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BEVERLY L. RUBIN,	)	2021-NCCOA-188
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NEW CONSOLIDATED REPLY BRIEF OF PLAINTIFF-APPELLANT TOWN OF APEX

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Plaintiff-Appellant the Town of Apex ("Apex" or the "Town") respectfully submits this Reply Brief pursuant to Rule 28(h) of the North Carolina Rules of Appellate Procedure. The arguments contained herein are limited to new and additional issues presented by the Appellee Beverly L. Rubin ("Rubin") in Appellee's Response Brief ("Appellee's Response Brief"), filed herein on 8 March 2024.

INTRODUCTION

Rubin's Response Brief ignores the procedural posture of this appeal. What is on appeal to this Court is the denial of Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus based on the basis included in the Motion. (2015 R pp 169-172), and whether the 2019 declaratory judgment action should continue. The trial court properly denied Rubin's Motion in the 2015 case, including in its discretion, finding that Rubin did not request injunctive relief before the project was constructed, did not request the trial court grant injunctive relief at any point, and the O'Neal Judgment did not order any injunctive relief. (2015 R pp 155-162).

Rubin does not argue that the injunctive relief remedies established by the General Assembly are inadequate, and no case has found them to be inadequate. Rubin merely chose not to avail herself of the available, adequate remedies – until it was too late. The holdings of the *Thornton* and *Clark* Supreme Court cases support this conclusion.

Rubin is asking this Court to leave its "judicial lane" and move over into the "legislative lane." The North Carolina General Assembly has the authority and has created a statutory scheme allowing for those similarly situated to Rubin to seek remedies against the construction of a project when the landowner challenge the right to take. By failing to adequately utilize the procedural safeguards enacted by the General Assembly in our state's condemnation statutes, Rubin now seeks to have the judicial branch create new remedies and fix her failure to avail herself of the adequate remedies provided by law. This Court must refuse to do so.

After denying Rubin's Motion on the basis raised in the Motion, the trial court, in its Order denying Rubin's Motion, goes on to address what is left under Rubin's property given the effect of the O'Neal Judgment. The trial court found based on the language of the O'Neal Judgment that

what remained is an unauthorized physical invasion by the Town. Although under *Thornton* and *Clark*, Rubin is not provided an injunctive remedy against a condemnor like the Town, the more recent case of *Wilkie* makes available to Rubin a claim and remedy pursuant to N.C. Gen. Stat. § 40A-51 if she wants it. The Supreme Court would not provide Wilkie an unconstitutional remedy. If she does not want this remedy, that is fine. But she is not entitled to injunctive relief.

It cannot be reiterated enough that the Court of Appeals correctly determined that Rubin did not request injunctive relief to address her constitutional claims, the O'Neal Judgment did not grant her injunctive relief, the trial court in 2019 properly refused to grant relief Rubin had not requested and O'Neal did not award, and therefore the Town was not and is not required to remove the sewer lines based on the O'Neal Judgment. Rubin can pull all the sound bites from constitutional cases across the country she can find, but she cannot change the undisputed facts of this case – she failed to avail herself of the adequate remedies available to her and now it's too late.

ARGUMENT

I. RUBIN MAKES KEY OMMISSIONS IN HER RESTATEMENT OF THE FACTS SECTION.

In Rubin's attempt to restate the facts in her Response Brief, she omits most of the key provisions from Judge O'Neal's final Judgment, namely the actual language of the Judgment:

"JUDGMENT"

- "The Plaintiff's claim to the Defendant's property by Eminent Domain is null and void." (2015 R p 38, ¶ 1)[1]
- "The Plaintiff's claim is dismissed, and the deposited fund shall be applied toward any costs and/or fees awarded in this action, with the balance, if any, returned to Plaintff." (2015 R p 38, ¶ 2)
- "Defendant is the prevailing party, and is given leave to submit a petition for her costs and attorney's fees as provided in Chapter 136." (2015 R p 38, ¶ 3)
- "No rulings made herein regarding Defendant's claims for attorney's fees under N.C. Gen Stat. 6-21.7, which ruling is reserved for later judication upon Defendant's submitting a Motion in Support of such request." (2015 R p 38, ¶4)

Although the O'Neal Judgment references Rubin's constitutional claims in earlier paragraphs, it does not grant injunctive relief, and there is no directive to remove the previously installed sewer line as one of her

[1] For ease of reference and to avoid confusion since the cases have been consolidated, cites to the 2015 Record (15-CVS-5836, COA20-304, 410PA18-2) will be referenced as 2015 R p xx. Cites to the 2019 Record (19-CVS-6295, COA20-305, 206PA21) will be referenced as 2019 R p xx.

remedies. If there was anything subsequent expected regarding the previously installed sewer line, the Judgment could have addressed it like it did Rubin's desired request for attorney's fees. But it did not. Rubin did not request Judge O'Neal address the sewer line at this point, nor did Rubin appeal Judge O'Neal's Judgment. Rubin cannot now be heard to complain about the O'Neal Judgment or that the sewer line remains on her property – regardless of the constitutional claims she brought before Judge O'Neal.

Rubin asserts in her Appellee's Response Brief that it is now somehow material that her 19 May 2015 letter states that she "intends to challenge [the right to take] by the Town of Apex in this matter." Appellee's Response Brief, 7. Rubin's purported "intent" to "challenge" the direct condemnation action in no way amounts to properly, timely filed motion for injunctive relief before the trial court. In fact, it is undisputed that Rubin (i) never filed a motion seeking injunctive relief before the trial court, (ii) filed an answer without seeking injunctive relief, preliminary or permanent, (iii) as the project was constructed never sought injunctive relief, (iv) never raised injunctive relief at the

Section 108 hearing, (v) never requested that Judge O'Neal include injunctive relief in the Judgment, and (vi) did not appeal the Judgment's omission of injunctive relief.

Rubin misstates the basis for the trial court's finding that "there are not reasonable alternatives to the existing sewer line" in the 2019 declaratory judgment action. The Town is not relying on the trial court Order for this finding, and the trial court had ample evidence for this finding. Steve Adams, Real Estate and Utilities Systems Specialist for the Town of Apex, provided sworn testimony in the form of the Verified Motion for Preliminary Injunction filed on May 13, 2019, as follows:

> 34. Removal of the sewer pipe and the corresponding interruption in public sewer service to residents of the Town would cause significant, immediate and irreparable harm.
> 35. If the sewer pipe is disabled or removed, the approximately 50 residential homes and/or lots would lose their connection to the Town's public sanitary sewer system.
> 36. The existing sewer pipe is the only sewer pipe or facility touching or connecting the subdivision to Town sewer service.
> 37. There are no practical alternatives to provide sewer service to the approximately 50 residential homes and/or lots during the pendency of this action.
> 38. Given that the gravity sewer pipe and casting have been beneath the narrow portion of Rubin's property since 29 July 2015, and the Town has not and does not need to access any portion of the surface of the Property to maintain the sewer pipe, there is no irreparable harm to Rubin to enjoin Rubin's

> interference with this public sewer pipe during the pending of this action.

(2019 R p 23).

Importantly, Rubin offered no counter evidence or affidavits at the hearing on their Motion to Dismiss and the Town's Motion for Preliminary Injunction. The trial court properly relied on this evidence in concluding that that "there are not reasonable alternatives to the existing sewer line."

Rubin also argues that the Town's location of the sewer line was driven solely by cost. However, at the hearing before Judge O'Neal in the 2015 condemnation case, Tim Donnelly, PE, former Public Works and Utilities Director for the Town, testified in an Affidavit dated July 28, 2016 that:

> 12. The Gravity Sewer Project crossing the Rubin tract will allow the Town of Apex to provide sewer service to residents of the Riley's Pond subdivision as well as the Weissner, Aspnes/Ball, Wegmann, Foster Farm, LLC, Frank A. Foster, and Green properties to the east of the Riley's Pond subdivision.
> 13. Moreover, the Gravity Sewer Project can also be tapped to connect and serve the Rubin home, which currently only has septic, rather than sewer, service.
> 14. <u>The location of the Gravity Sewer Project on the Rubin Tract was driven in large part by the topography of the property</u>, and was the product of sound engineering practices and

principles. Alternative locations were considered, and the chosen location was determined to be appropriate.

15. As a courtesy to Rubin and to minimize the impact of the project on the Rubin tract during construction, the sewer pipe was installed on the Rubin tract by digging a bore pit on properties on either side of the Rubin tract, boring under the Rubin tract, a casing was inserted in the bore tunnel, and the sewer pipe was inserted into the casing inside the bore tunnel from the side. The surface of the Rubin tract was not used or disturbed during construction.

(2015 R pp 30-31) (Emphasis supplied).

Rubin ignores the topography of the property as the primary driver of the location of the gravity sewer line – presumably because it does not fit her theme of the case.

II. RUBIN'S FAILURE TO UTILIZE AVAILABLE, ADEQUATE STATUTORY REMEDIES TO PLEAD INJUNCTIVE RELIEF TO ADDRESS HER CONSTITUTIONAL CLAIMS BARS HER LATE ATTEMPTS TO NOW SEEK INJUNCTIVE RELIEF.

Rubin asserts in her Appellee's Response Brief that "[t]akings law starts with our state and federal constitutions. . . . The constitutions – not any state or federal statute – create those rights. The statutes merely provide procedures for the processing of takings claims." Appellee's Response Brief, 19. The North Carolina General Assembly has enacted such statutes and procedures with Article 9 of Chapter 136, Chapter 40A,

and the Rules of Civil Procedure, specifically Rule 65, Injunctions. These procedures provide that a landowner who objects to the right to take, in order to prevent the project from being constructed, must request in the condemnation action or in a separate timely action and receive an injunction prior to the construction of the project. Such a remedy would ensure the project is not constructed pursuant to the statutory provisions that awards condemnors immediate title and possession upon the filing of the condemnation action and deposit of just compensation. N.C. Gen. Stat. § 136-104. These remedies have been discussed in numerous North Carolina appellate cases – where the landowner has requested injunctive relief. A timely filed injunction remedy has never been found to be insufficient to protect landowners from condemnations actions that are ultimately dismissed.

Rubin does not contend that these procedures are inadequate or insufficient to address her claims herein, or protect her constitutional rights. Even if she tried to make such argument, it would fail since she did not event attempt to avail herself of the General Assembly's chosen remedy. This should end the inquiry and end Rubin's challenge to the

trial court's denial of her Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus. (2015 R pp 122-139).

A. *Corum* does not provide Rubin relief.

Rubin cites *Corum v. Univ. of North Carolina,* 330 N.C. 761, 413 S.E.2d 276 (1992) in an attempt to convince this Court to ignore these adequate statutory remedies and create a new remedy not provided for in the statutes – years after the O'Neal Judgment was entered. Rubin's argument is not supported by the plain language of *Corum* and must fail. The threshold issue in *Corum* is the party alleging the absence of an adequate state law remedy. *See Corum v. Univ. of N.C.,* 330 N.C. 761, 782, 413 S.E.2d 276, 289 ("Therefore, 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."), *cert. denied,* 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992); *see also Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.,* 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009) (noting that "an adequate remedy must provide *the possibility* of relief under the circumstances." (emphasis added)). In her answer, Rubin argued prior to the installation of the sewer line that her

constitutional rights had been abridged. There was an adequate state law remedy available to Rubin – injunctive relief – she just failed to plead and exercise it and seek injunctive relief from the trial court. *Corum* is not applicable here.

To be clear, the Town does not contest that the North Carolina Constitution affords Rubin the right to a remedy in a court of law. Article I, section 18 of the North Carolina Constitution provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18 (emphasis added). This provision has ancient roots in English and American law.

The course of law designed to address any such remedies related to condemnations was enacted by the legislative branch, pursuant to the delineation of power under the North Carolina Constitution. N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly"). Accountable to and representative of the people, N.C. Const. art. II, §§ 2–5, "[t]he legislative branch of government is

without question 'the policy-making agency of our government'" and is "a far more appropriate forum than the courts for implementing policy-based changes to our laws," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (*quoting McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). "[G]reat deference will be paid to acts of the legislature—the agent of the people for enacting laws." (*quoting State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989)).

The statutory scheme governing condemnation proceedings was duly enacted by the General Assembly. In its wisdom, the General Assembly determined that condemnation proceedings are a civil action, and therefore, are governed by the Rules of Civil Procedure. *See Bd. of Transp. v. Royster*, 40 N.C. App. 1, 4, 251 S.E.2d 921, 924 (1979) ("A condemnation proceeding under Article 9, Chapter 136, is a civil action and is subject, as are other civil actions, to the Rules of Civil Procedure, G.S. 1A-1, Rule 1"). As has been noted in a number of appellate cases, injunctive relief pursuant to N.C. Gen. Stat. § 1A–1, Rule 65 was available to Rubin prior to the installation of the sewer line. Nothing in *Corum* or any other case Rubin cites stands for the proposition that Rubin

can ignore the available, adequate remedy the legislature provides, and pursue her own self-created remedy on a timeline she creates. This is even more evident given Judge O'Neal's reference to Rubin's constitutional claims in her Judgment. These are not new claims that only came into being after Judge O'Neal's Judgment, but were pled by Rubin in her Answer filed 8 July 2015. (2015 R pp 20-24).

Rubin is asking this Court to leave the "judicial lane" and step into the "legislative lane", to essentially rewrite the statutory process and remedies a landowner has to protect their right to challenge the right to take and delay or prevent the installation of the project until this issue can be resolved. If Rubin is unhappy with the statutory process or remedies, she must take that up with the legislature – not this Court. If the General Assembly wished to permit individuals such as Rubin a "second bite at the apple" years later, they could have afforded such rights and remedies in the condemnation statutes; they could have provided that injunctive relief did not need to be sought in order to receive it. They chose not to do so. *See generally State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960) (noting that "[t]he legislative

department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts").

There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982). Because "[a] violation of separation of powers occurs when one branch of government exercises the power reserved for another branch of government," this Court must ignore Rubin's request, exercise judicial restraint, and refrain from usurping the General Assembly's policymaking role. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 651, 660, 781 S.E.2d 248, 260, 265 (2016) (Newby, J., concurring in part and dissenting in part). As this Court has previously recognized, "the wisdom of [an] enactment is a legislative and not a judicial question." *Redevelopment Commission of Greensboro v Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 612, 114 S.E.2d 688, 700 (1960).

B. *Thornton* supports the Town's position and the Trial Court's order.

Rubin misstates the holdings in *Thornton* in an attempt to convince this Court that it can ignore the existing available remedies and should craft Rubin a new one after the fact. The *Thornton* Court specifically addresses a landowner who challenged the right to take and requested the trial court during a condemnation proceeding to permanently enjoin a condemnor from (a) proceeding with a condemnation and (b) appropriating a landowner's lands. The Court stated that granting an injunction "was error, irrespective of the correctness or incorrectness of the conclusion upon which the court so decreed." *Thornton*, 271 N.C. 227, 235, 156 S.E.2d 248, 255 (1967). This "conclusion so decreed" is the conclusion about whether the taking was for a public or private purpose.

The *Thornton* Court addressed both injunction requests in turn. First, the Court addressed the request to enjoin the construction of the road and its existance on Thornton's property. The Court states:

> Upon this record, the defendants are not entitled to injunctive relief. The reply of the Commission and the testimony of the male defendant establish that the road was entirely completed before the matter came on for hearing in the court below. <u>The defendant did not apply for a temporary restraining order to halt construction</u>. In

> this respect, the present case is clearly distinguishable from State Highway Commission v. Batts, supra. As Allen, J., observed in Yount v. Setzer, 155 N.C. 213, 71 S.E. 209, '(I)t requires no authority to sustain the proposition that, if the act has been committed, it cannot be restrained.' Thus, the construction of the road being an accomplished fact, an [permanent] injunction to prevent its construction could not properly be issued.

Id. at 235-236. (emphasis supplied).

This is an acknowledgment by the Court of the availability of an injunction motion from the landowner prior to the construction of the project. *Thornton* at 235-236.

Rubin and the Court of Appeals reference language about a condemnor being embarrassed from a separate section of the case opinion concerning whether the landowner is estopped from contesting the right to take in their answer and bringing their defenses forward. *Town of Apex v Rubin*, 2021-NCCOA-187, ¶ 23. This is not an issue or argument in the case at bar.

Second, the *Thornton* Court addressed the landowner's request that the condemnation proceeding be permanently enjoined. The Court held that injunction against the institution of the condemnation proceeding would not be appropriate where there is an adequate remedy at law – i.e.,

a defense for the dismissal of the condemnation proceeding, which if granted would result in dismissal. *Id.* at 236.

Thornton treatment of the injunction related to the condemnation cannot be read to allow Rubin an injunction after O'Neal's final judgment. To read *Thornton* the way Rubin asserts would be contrary to existing North Carolina law, the General Assembly's available, adequate remedies, and the *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986). In *Clark,* the Supreme Court held that the landowners could not pursue their remedy against the North Carolina Department of Transportation ("NCDOT") for an 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). (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47). The Supreme

Court held that NCDOT 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)). (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47).

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 NCDOT arising from those acts." *Id*. (*Town of Apex v Rubin,* 2021-NCCOA-187, ¶47).

Thornton and *Clark* cannot be read to provide Rubin a right to an injunction now, after the sewer line was installed and when she did not plead injunctive relief in the condemnation case before final judgment.

III. THE TOWN PROPERLY EXERCISED ITS AUTHORITY UNDER CHAPTER 136 TO CONSTRUCT THE SEWER LINE, AND JUDGE O'NEAL'S JUDGMENT DOES NOT CHANGE THAT.

Rubin misstates in her Response Brief the Town's position regarding its installation of the sewer line, the impact of the O'Neal Judgment on the Town's installation, and the impact of the *Wilkie* case on the Trial Court's Order denying Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus. (2015 R pp 169-172).

First, when the Town entered beneath Rubin's property to install the conduit and sewer line, it was legally authorized to do so. N.C. Gen. Stat. § 136-104 provides that "[u]pon the filing of the complaint and the declaration of taking and deposit in court, to the use of the person entitled thereto, of the amount of the estimated compensation stated in the declaration, title to said land or such other interest therein specified in the complaint and the declaration of taking, together with the right to immediate possession hereof shall vest in the Department of Transportation…" See *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971); *State Highway Comm'n v. Myers*, 270 N.C. 258, 154 S.E.2d 87 (1967). N.C. Gen. Stat. § 136-104 further provides that "…said land shall

be deemed to be condemned and taken for the use of the Department of Transportation..." The Town condemned under Chapter 136 so this statutory language applies to the Town and its condemnation herein.

Judge O'Neal's Decision does not mention the Town's installation of the pipe, nor does it include any requirement regarding removal of the pipe. The Judgement simply states as it relates to the direct condemnation action: "Plaintiff's claim to the Defendant's property by Eminent Domain is null and void." (2015 R p 39, ¶ 1). The Court of Appeals has determined: "[n]ull 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). Taken a step further, when the Judgment's "null and void" 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.

Further, the "null and void" finding does not address the previously installed sewer line. This is supported by the fact that Rubin did not request at any point that Judge O'Neal address the previously installed

sewer line. So nothing in the O'Neal Judgment changes the fact that at the time the Town installed the sewer line, it was authorized to do so pursuant to N.C. Gen. Stat. § 136-104. Further, the *Thornton* and *Town of Midland v. Morris,* 209 N.C.App. 208, 704 S.E.2d 329 (2011) cases do not assert that property automatically reverts to a landowner free of any physical encroachment by the condemnor.

The plain language of Judge O'Neal's Judgment controls, and the trial court properly denied Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus and her attempts to have the court re-write the Judgment.

The Town acknowledges that post-O'Neal Judgment, there is an unauthorized physical invasion under Rubin's property. For reasons discussed more fully in the Town's New Brief, this physical invasion is not a trespass. Under *Thornton*, *Clark* and *Batts*, there would not be a remedy for Rubin since she failed to timely assert the adequate injunction remedy available to her pursuant to the statutes and case law. Again, that fact that she raised constitutional claims in the condemnation action prior to the installation of the sewer line additionally prevents her from

now arguing that these same constitutional claims should form the basis of her request that this Court create a new remedy for her.

But the recent *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018) case offers a remedy to Rubin that she would not have had under *Thornton*, *Clark* and *Batts* – namely to allow Rubin to assert a claim under N.C. Gen. Stat. § 40A-51 and have the Town's unauthorized physical invasion treated as an inverse taking for purposes of providing her a remedy – damages. The trial court acknowledges this in its Order denying Rubin's Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus.

Despite the arguments Rubin advances in her Response Brief, the following were independent basis for the trial court's order denying her Motion to Enforce Judgment and Alternative Petition for Writ of Mandamus:

> 2. The Judgment does not order the Town to do any of the acts specified in Rule 70 of the Rules of Civil Procedure.
> 3. The Judgment does not require the return or delivery of real property as per N.C. Gen. Stat. § 1-302.
> 4. A declaratory judgment action may not be commenced by a motion in the cause. Supplemental relief under N.C. Gen. Stat. § 1-259 is unavailable to Defendant in this action. *Home*

Health and Hospice Care, Inc. v. Meyer, 88 N.C.App. 257, 362 S.E.2d 870 (1987)

5. The Town cannot be held in contempt for failing to remove the underground sewer line. The Judgment does not expressly or specifically order removal. In addition, the Motion fails to satisfy the statutory requirement that it be supported by a sworn statement or affidavit. *See* N.C. Gen. Stat. § 5A-23(a1).
6. N.C. Gen. Stat. § 136-114 is not a valid basis for the Court to order removal of the sewer pipe under the facts and circumstances of this case. Defendant's request for enforcement of the Judgment is not procedural in nature and does not relate to the mode or manner of conducting this action, but is essentially a request for mandatory injunctive relief.
7. A writ of mandamus is inappropriate because Defendant has failed to show that she has a clear legal right to demand removal of the sewer line and that the Town is under a plainly defined, positive legal duty to remove it. Mandamus is appropriate to compel the performance of a ministerial act but not to establish a legal right. *Meares v. Town of Beaufort*, 193 N.C. App. 49, 667 S.E.2d 224 (2008); *Mears v. Board of Education*, 214 N.C. 89, 91, 197 S.E. 752, 753 (1938).
8. The Court has the inherent authority to enforce its own orders. However, the Court is not authorized to and refuses to expand this Judgment beyond its terms, read in additional terms, and/or order mandatory injunctive relief that Defendant did not request or plead. *State Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967).
9. Regardless of the Court's authority, the Court does not read the Judgment the way Defendant suggests and the Court does not agree the Judgment expressly or implicitly requires removal of the sewer line. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. The Court will not now require the Town to remove the sewer line.

(2015 R pp 155-161).

Further, the Trial Court makes these additional findings in its Preliminary Injunction Order the 2019 declaratory judgment action:

> 16. The only relief granted to Defendant by the Judgment is the dismissal of the Town's condemnation claim in the original condemnation action as null and void on the grounds that the paramount reason for the taking of the sewer easement described in the complaint was for a private purpose and the public's interest was merely incidental. The Judgment rendered the complaint and declaration of taking herein a nullity.
>
> 17. The Judgment does not order the Town to perform any specific act, including but not limited to removal of the underground sewer line.
>
> 18. Defendant could have requested the Court grant her injunctive relief before the sewer pipe was installed under her property, but she did not do so. Defendant did not request injunctive relief from the Court prior to the installation of the sewer line to prevent construction, did not request injunctive relief to close or remove the sewer line in her answer in the original condemnation action, and did not request injunctive relief to close or remove the sewer pipe at the all other issues hearing before the Court.

(2019 R pp 107-108).

The Trial Court had sufficient basis to deny Rubin's motion without reference to the *Wilkie* case. Nowhere in Judge Collins' Order denying Rubin's Motion does it "vacate" the original O'Neal Judgment "because of *Wilkie*." The references to *Wilkie* was merely the Court attempting to

describe and address what remains on Rubin's property under the specific language and application of the O'Neal Judgment.

Rubin states in her Response Brief that under the Town's interpretation of this Court's decision in *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 809 S.E.2d 853 (2018), the inverse condemnation statutes would be unconstitutional. Appellee's Response Brief, 26. This too is without merit. The primary issue in *Wilkie* is whether there is a public use or public purpose element to an inverse condemnation action. *Id*. at 543, 809 S.E. 2d at 856. Said another way, is the remedy provided in N.C. Gen. Stat. § 40A-51 only available when property has been taken by an act or omission of a condemnor for the public use or benefit. *Id*. The Supreme Court held that there is not a public use or public purpose element to an inverse condemnation action, and a landowner can bring a claim under N.C. Gen. Stat. § 40A-51 when a physical invasion by a condemnor is for a private purpose. *Id*, at 551, 809 S.E. 2d at 860-861.

The *Wilkie* Court also rejected an argument by Boiling Springs that the term "taken" and "taking" as used in N.C. Gen. Stat. § 40A-51 are terms of art that serve to limit statutory inverse condemnation

proceedings to claims arising from actions or omissions undertaken for a public purpose. *Id*. at 550, 809 S.E. 2d at 860. The Court in *Wilkie* recognized that "this Court has never gone so far as to hold that 'taken' invariably means 'taken by the power of eminent domain' or that 'taking' means nothing more or less than a 'taking for the public use.'" The Court held that the Town of Boiling Springs had taken Wilkie's property, the taking was for a private purpose, and Wilkie has a right to bring an action against Boiling Springs under N.C. Gen. Stat. § 40A-51. *Id*, at 551, 809 S.E. 2d at 860-861.

The Town can hardly be accused of "weaponizing" *Wilkie*, by citing *Wilkie* to attempt to provide Rubin a remedy under the circumstances where she failed to timely exercise her statutory injunction remedy and therefore lost it. The trial court recognized that an unauthorized physical invasion under the circumstances of this case was a taking, and Rubin has a right under *Wilkie* to bring an action under N.C. Gen. Stat. § 40A-51 if she so choses; but does not have an injunctive relief remedy available.

IV. AN ACTION FOR TRESPASS DOES NOT LIE AGAINST THE TOWN HEREIN.

Although Rubin does not cite in her New Brief that trespass is a claim that lies against the Town in the exercise of their power of eminent domain, she seems to assert that such a claim exists against the Town in Appellee's Response Brief. As the Town states in its New Brief, and therefore will not be restated in detail here, the Court of Appeals erred in finding that a trespass action, which the landowner had not previously claimed, is applicable against a municipal condemnor for a physical invasion resulting from their use of eminent domain power under Chapter 136 of the General Statutes. A physical invasion by a condemnor exercising eminent domain authority does not constitute trespass, and the Court of Appeals' ruling deviates from established Supreme Court precedent, on this issue.

V. *RES JUDICATA* BARS RUBIN'S ATTEMPTS FOR AN INJUNCTION.

Rubin misstates the Town's treatment of *res judicata*. The Town clearly argued in its Petition (p 40) and its New Brief (p 78) that *res judicata* applies to and bars Rubin's attempts to receive a mandatory injunction to have the sewer line removed. 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). It is undisputed that the O'Neal Judgment is a final judgment, one Rubin did not appeal. 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.

Rubin knew prior to the filing of the condemnation action that the Town had adopted a resolution to condemn her property for the sewer line easement. Based on the correspondence between counsel for the parties, Rubin new before filing her answer that the Town planned to move forward with construction of the project. (App. 2-5). Rubin subsequently filed an Answer to the Complaint on 8 July 2015 and did not request mandatory injunctive relief. (R pp 20-24). Rubin had notice of the sewer line's installation thereafter 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 Town disagrees that the 2019 declaratory judgment action is barred by *res judicata*. The Town certainly believes the law allows it to maintain the sewer line under Rubin's property given the language and effect of the O'Neal Judgment, coupled with Rubin's failure to seek injunctive relief prior to the construction of the sewer line; and that a future trial court does not have the authority to order removal. The purpose of the 2019 declaratory judgment action is to provide Rubin a right under N.C. Gen. Stat. § 40A-51 to receive damages for the Town's physical invasion beneath her property as recognized in *Wilkie*. If she does not want that remedy, then the 2019 action may not be necessary. The Town reserves the right to further evaluate the scope and necessity of the 2019 declaratory judgment action as this appeal proceeds and/or after the Supreme Court rules in this matter.

CONCLUSION

For the reasons cited herein and in the Town of Apex's New Brief, the Town of Apex respectfully requests the Court vacate the portions of the Court of Appeals opinions that allow Rubin to bring a trespass claim against the Town, that allow Rubin to seek injunctive relief in an attempt

to have the sewer line removed, and that strike or vacate portions of the trial court orders in the 2015 or 2019 cases. The Town respectfully requests the Court uphold the Court of Appeals decision that Rubin is not entitled to an injunction in the 2015 case, and hold that Rubin is not entitled to seek an injunction in a subsequent action.

Respectfully submitted, this the 25th day of March, 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

This is to certify that the undersigned has this date served a copy of the foregoing **NEW CONSOLIDATED REPLY BRIEF OF PLAINTIFF-APPELLANT TOWN OF APEX** upon the parties by depositing the same in the United States mail, first class postage prepaid, addressed as follows:

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This the 25th day of March, 2024.

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