In the

Supreme Court of Virginia

At Richmond

Record No. _____

COURT OF APPEALS RECORD NO. 0350-25-1

SHARON MORGAN,

Petitioner-Appellant,

– v. –

THE CITY OF NORFOLK,

Respondent-Appellee.

PETITION FOR APPEAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions:

Statutes & Other Authorities:

NATURE OF CASE AND MATERIAL PROCEEDINGS BELOW

I. Constitutional Framework

This Court's review is needed to correct a fundamental constitutional error by the Court of Appeals ("Panel") and Norfolk Circuit Court ("trial court") which resulted in Sharon Morgan, a Norfolk homeowner, being deprived of her sacred right to have a jury determine the amount of just compensation which the City is obligated to pay for a partial taking of her private property. *See* Va. Const. art. I, § 11, cl. 4 ("trial by jury is preferable to any other, and ought to be held sacred"); *id*. art. I, § 11, cl. 8 ("Just compensation shall be no less than … the value of the property taken … and damages to the residue caused by the taking.").

The trial court concluded that the City had *de facto* taken a portion of Ms. Morgan's property. This finding triggered the City's obligation to pay just compensation under Virginia's "Damaged or Taken" Clause (the "Takings Clause"):

> No private property shall be damaged or taken for public use without just compensation to the owner thereof.

Va. Const. art. I, § 11, cl. 7. Where, as here, the government takes less than all of the owner's property rights, Virginia's "Just Compensation Clause" expressly requires that "damage to the residue caused by the taking" be considered as part of the determination of just compensation:

> Just compensation shall be no less than the value of the property taken, lost profits and lost access, **and damages to the residue caused by the taking.**

Va. Const. art. I, § 11, cl. 8 (emphasis added).[1] It is well-established and not in contention here, that in both affirmative condemnations and inverse condemnation cases the amount of just compensation is a question of fact reserved for the jury. *See Comm'r of Hwys. v. Karverly*, *Inc.*, 295 Va. 380, 389-90 (2018); *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 601 (2004); *Appalachian Elec. Power Co. v. Gorman*, 191 Va. 344, 357-58 (1950) (findings of commissioners (or jury) in eminent domain cases is entitled to "great weight"); *Hannah v. City of Roanoke*, 148 Va. 554 (1927); *Whitworth v. Puckett*, 2 Gratt.528, 531-32, 43 Va. 528 (1846) ("the power to estimate and assess damages is confided to the jury alone.") Code §§25.1-220; 25.1-230. *See also Town of Iron Gate v. Simpson*, 82 Va. App. 38, 47 (2024) (noting that the Town took Simpson's property by storing excess stormwater thereon; and that the jury awarded just compensation for the value of the "rights being taken" and for "the impact to the remainder property.").

Thus, once the trial court determined the City had taken a portion of Ms. Morgan's property, the next step should have been to empanel a jury for it to consider evidence of just compensation. *See* Code §8.01-187. As in every other partial taking eminent domain case, the jury should have heard evidence of "damages to the residue caused by the taking." But the trial court rejected Ms. Morgan's request for

[1] Appellant will refer to Va. Const. art. I, § 11 as "Section 11" herein; and where necessary will specify whether such reference is to the Takings Clause, the Just Compensation Clause or some other provision contained therein.

a jury determination of residue damages by prohibiting her from introducing such evidence into the record. R. 769-770; 1362-82. The trial court, not a jury, concluded that the City owed her zero just compensation for "damages to the residue caused by the taking." R. 1380-81.

The trial court conflated its power to determine whether the City had committed a *de facto* taking or a damaging under the Takings Clause, with the jury's authority to determine the amount of just compensation the City owes under the Just Compensation Clause for partially taking Ms. Morgan's property (which includes damages to her residue property caused by the taking). By doing so, the trial court blurred a line that has long been clear—legal issues that are the province of the court, and factual determinations reserved for the jury, such as determining the amount of just compensation—a line reaffirmed by the plain text of the Virginia Constitution. This error was not *de minimis* or theoretical: it deprived Ms. Morgan of her fundamental right to have a jury determine the amount of just compensation which the City must provide. The Panel compounded the trial court's mistake by failing to confront this fundamental error. [2]

[2] Contrary to the assertion of the Panel, Morgan did not waive this issue by stipulating to the value of the City's taking. R. 771-72. *See Morgan v. City of Norfolk*, 86 Va. App. 535, 549 (2026). Without evidence of damage Morgan elected to avoid the unnecessary expense and time of a jury trial for the value of the taking and stipulated to that amount while preserving her ability to appeal the trial court's ruling. R. 771-72.

This Court should grant review and reaffirm that the plain text of the Virginia Constitution must be honored: that once a court concludes the government has damaged or taken private property for a public use, it must let a jury do what juries have always done—determine the amount of just compensation owed by the government as Section 11's plain text provides.

II. Sequence of Proceedings Below

Ms. Morgan filed a Petition for Declaratory Judgment ("Petition") alleging the City had violated Section 11 by occupying and physically taking and damaging her property for a public use – the Bruce's Park Pump Station #152 Project (the "Project")[3]. R. 1, 9 (¶37-44). Morgan pled that the City physically entered her property and removed a portion of her handicapped ramp by which she accessed her home, making it functionally obsolete; and that the City had caused noise, concussions and vibrations to physically enter upon and shake her home. R. 6 (¶21); R 5, 9-10 (¶¶ 42, 45). As a result of the City's taking and damaging actions, she pled that the residue of her property was "damaged" or reduced in value. R. 10 (¶ 45).

[3] The Project consisted of three interconnected phases, running from 2015-2022; and involved construction of a pump station and installation of water and sewer piping in the rights-of-way immediately adjacent to Morgan's property. All three phases were part of the same project. R. 4, 15, 326-327, 1219, 1447-1448.

Prior to the liability trial[4], the City filed a Motion *in Limine* to Exclude Evidence of Actions Prior to February 2, 2018 ("Limitations Motion"), arguing that Phases 1 and 2 of the Project were outside the three-year statute of limitations.[5] R. 278-84, R. 249, 1448. The trial court granted the Limitations Motion. R. 545, 1202-1342. The liability trial moved forward only as to the City's actions in Phase 3A of the Project.

The trial court found that the City violated Section 11's Takings Clause by taking part of her handicap-access ramp for six months during Phase 3A. R. 569-71, 1322, 1339-1340. However, the trial court struck Ms. Morgan's evidence of the noise and vibration that the City caused to enter her property during Phase 3A and the resulting cracking that occurred in her home, among other things. R. 569-70, 1333.

A trial for the determination of just compensation was scheduled. The City moved to exclude "testimony and opinions regarding Petitioner's damages and just compensation" (the "Exclusion Motion"). R. 592-609. The trial court granted the

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[4] Inverse condemnation proceedings occur in three phases: 1) the determination of liability for a taking or damaging for a public use, where the court is the fact finder; 2) if the owner proves liability, then the determination of just compensation owed for any taking or damaging of the property, which is often tried to a jury; and 3) the determination of fees and costs to be reimbursed pursuant to Code §25.1-420. *See generally*, *Town of Iron Gate v. Simpson*, 82 Va. App. 39, 46-49 (2024); Code §§8.01-184, 8.01-187.

[5] Morgan initially filed a Petition in February 2021, which she later nonsuited pursuant to Code §8.01-380. Pursuant to Code §8.01-229(E)(3), the statute of limitations for her cause of action is tolled by the commencement of the nonsuited action.

Exclusion Motion, limiting Ms. Morgan's just compensation evidence to only the value of the property taken, which ruling violated the Just Compensation Clause of Section 11. R. 769-71, 1362-82. The parties then stipulated the value of the property taken, with Ms. Morgan preserving all objections and appellate rights. R. 772.

Ms. Morgan appealed to the Court of Appeals, where a three-judge panel affirmed the trial court on each of Ms. Morgan's four assignments of error. *See Morgan v. City of Norfolk*, 86 Va. App. 535 (2026). Ms. Morgan sought an *en banc* review of the Panel's decision but her request was denied and this Petition for Appeal follows.

STATEMENT OF FACTS

Ms. Morgan, a United States Navy veteran disabled in the line of duty, owns and resides in her home at 1305 Cary Avenue in Norfolk, VA (the "Property"). R. 1217-19, 1258, 1473. The Property is improved with a single-family residence built over one-hundred years ago. Due to her disability, Ms. Morgan added a one-story, handicapped-accessible addition to the rear of her property, along with a smooth, gently graded handicap-accessible walkway which allowed her to enter and exit her home. R. 239-40, 1260-1262, 1281-1282, 1474; PA, Ex. I (p. 91); RA2, Ex. J (pp. 20-21, 54-56, 89-91).

In January 2015, the City began constructing the Project. While one project, the City constructed it in three phases, with Phases 1 and 2 running from January

2015 through January 2017. R. 1447-1448. *See* R. 750-52, 1215-19. *See also* First Proffer (PA).[6] Phase 3A ran from August 2020 through January 2022 and involved installing water and sewer pipes directly in front of Ms. Morgan's home, including within twenty feet of her front door. R. 1216-18, 1447-48. *See* R. 747, 752-53, 1263, 1305, 1452-56, 1474-76. The City considered all three phases to be part of the same project. R. 326-27, 1219.

Throughout the course of the Project, Ms. Morgan discovered a progression of physical damages to her home, including cracking in walls and ceilings, sinking and slanting of floors, and sinking and separation of the kitchen counter and cabinets. R. 5-6 (¶¶ 17-20), 116 (¶19), 22-23, 1259-87, 1298-1301, 1307, 1457-62, 1475-84. *See also* PA (First Proffer), Ex. I (pp. 35-36); Second Proffer (RA2), Ex. J (pp. 25-31, 33-39, 64-71, 81-85, 90-92). She also repeatedly experienced vibrations and concussions and noise entering her property. R. 1263-67. *See* R. 1239-48; 1452-56.

Before the liability trial, the City filed its Limitations Motion to exclude any evidence of damages or construction from Phases 1 and 2, which occurred more than

[6] Morgan's two proffers each appear as a record addendum. The first relates to the limitations motion; the second to the exclusion motion. Morgan will cite to her first proffer, entitled Petitioner's Proffer of Evidence ("First Proffer" or "PA"), by referencing its text, its exhibit numbers and the page numbers within its exhibits. The trial court Clerk sent Petitioner's Second Proffer of Evidence ("Second Proffer") in two parts: one contained the text of the second proffer and the other contains only the second proffer's exhibits. Morgan will cite to Second Proffer's text by referencing the addendum as "(RA2, __);" she will cite to the second proffer's exhibits by referencing exhibit numbers and the page numbers within its exhibits.

three years prior to the filing of the suit. R. 278-84. The trial court granted the City's Limitations Motion, excluding evidence from the earlier phases, despite the uncontested fact that all three phases were part of the same ongoing project. R. 545, 1157. *See* R. 278-84, 326-27, 1219. The ruling limited Ms. Morgan's evidence at the liability trial to the City's actions only during Phase 3A.

Ms. Morgan and her expert witness George Compo[7], a licensed Class A contractor, presented testimony and evidence of the physical damages caused to her home during Phase 3A. Ms. Morgan testified at length that significant noise and vibrations entered and shook her home. R. 1263-67. *See also* RA2, Ex. J. (pp. 26-27, 66-67). She further testified that Phase 3A activities caused *new* impacts to her home, including, but not limited to, cracking in the walls which did not exist prior to Phase 3A because she previously repaired any of the cracking to the walls inside her home caused by Phases 1 and 2. R. 1263-87. She also testified to the destruction of the entrance to her handicapped ramp and that without it she could not access her home for six months. R. 1260-62, 1281-82, 1285-86, 1474. *See* First Proffer (PA) Ex. I (p. 91); Second Proffer (RA2), Ex. J (p. 54, 65, 78-81, 90-92).

[7] Mr. Compo also provided expert testimony concerning the construction activities during Phase 3A, including the type of equipment used and purposes for using it. He also testified generally as to the types of noise and vibratory effects use of such equipment can have. R. 1240-48, 1255. *See also* First Proffer.

The trial court found that the City violated Section 11's Takings Clause when it took Ms. Morgan's entrance to her handicap ramp for six months. R. 569-70, 1327-28, 1333, 1340. However, the trial court struck Ms. Morgan's evidence of a taking or constitutional damaging, physical or otherwise, by the Phase 3A vibrations and noise. R. 569-70, 1327-28, 1333, 1340.

Upon the trial court's finding of a constitutional taking, Ms. Morgan obtained an appraisal to determine the just compensation to which she is entitled. In accordance with the Just Compensation Clause of Section 11 and Code §25.1-230, her appraiser appraised the value of the taken property and the value of any damages (diminution in value) to the remainder or residue property resulting from both the taking itself as well as the public use for which the property was taken, Phase 3A. R. 696-98; Second Proffer (RA2), p. 15-33, Ex. A, Ex. B.

The appraiser determined the remainder was damaged due to the taking because "the property was inaccessible and rendered essentially unlivable or un-rentable during the [Phase 3A] construction," and as a result the market would reduce the property's value. R. 695-98; *see* R. 631-38. R. 625-34; RA2, 27-29, Ex. B (pp. 76-90). The appraiser also concluded that the market would react negatively to the City's taking of a portion of the handicapped ramp for six months which prevented Ms. Morgan from accessing the property. Ms. Morgan would have testified in support of these opinions, based on her experience being unable to access

the residue of her property. R. 1282, 1285-86, 1474; RA2, 30-32, and Exhibits I, J (pp. 54, 65, 79-81, 85, 90-92), K, L. *See also* R. 1396-97, 1409, 1425-28, 1432.

The City moved to exclude the appraiser's testimony and opinions, arguing that his opinions of damages to the residue were contrary to the trial court's finding that there had only been a taking. The trial court granted the Exclusion Motion, holding Ms. Morgan was only entitled to the fair market rental value of the fifteen square feet taken for six months; and that she could not present evidence of the diminution of her home's value caused thereby. R. 769-71, 1362-82. The trial court stated its belief that Ms. Morgan did not plead access- and use-related damages to her remaining property. R. 1380. Ms. Morgan's counsel responded "I don't think you can plead damages [to the residue] as a result of a taking until you know what the taking is… That's why it's a two-phase system. And an inverse condemnation is to, one determine, what the taking was, and then to determine what the damages [to the residue] are as a result of that taking." R. 1380-81. Nevertheless, the Court ruled, contrary to the Just Compensation Clause, that "this case is limited in a jury trial. What was the rental value of the 15 square feet of asphalt for six months, which your expert says is $6." R. 1380. The trial court thus refused to allow the evidence of damages to the residue to be heard by a jury. Following the trial court granting the Exclusion Motion, the parties then stipulated to the fair market rental value for the temporary taking while preserving Ms. Morgan's right to appeal the rulings to avoid

the expenditure of resources on this limited issue. R. 771-72. This stipulation did not waive Ms. Morgan's right to a jury trial on damages.

The Court of Appeals affirmed the trial court's decisions; and denied an *en banc* review.

ASSIGNMENTS OF ERROR[8]

I. The trial court reversibly erred by denying Ms. Morgan her rights under the Just Compensation Clause to present evidence of damages to the residue of her property resulting from the City's taking. Such evidence is specifically protected by the Just Compensation Clause of Section 11 which states, "Just compensation shall be **no less than** the **value of the property taken**, lost profits and lost access, **and damages to the residue** caused by the taking." (emphasis added). The trial court ruled that her just compensation would be **less than** the Constitutional prescription and the Court of Appeals erred in affirming this decision.

Error Preserved: Petition for Declaratory Judgment Petition for Declaratory Judgment, (R. 1-12) *and attached exhibits* (R 15-66); Petitioner's Memorandum in Opposition to Respondent's Exclusion Motion (R. 665-80) *and attached exhibits* (R. 682-755); Ms. Morgan's counsel's statement at end of August 14, 2023, liability bench trial (R. 1340); Ms. Morgan's counsel's arguments at the October 3, 2024 hearing (R. 1374-82); Order of October 10, 2023 (R. 769-70); Stipulation of Oct. 11, 2023 (R. 771-73); Ms. Morgan's counsel's argument at December 10, 2024 hearing (R. 1423-33); Second Proffer; Final Order (R. 908).

II. The trial court reversibly erred by ruling Ms. Morgan's claims that the City took or damaged her property during construction of Phases 1 and 2 of its Project were outside the statute of limitations. The Court of Appeals erred in affirming this decision.

Error Preserved: Petition for Declaratory Judgment, (R. 1-12) *and attached exhibits* (R 15-66); Petitioner's Memorandum in Opposition to Respondent's

[8] For purposes of this Petition, Appellant has slightly re-worded and has re-ordered her assignments of error from the Court of Appeals, below. Assignment of Error I herein was Assignment III below; Assignment II herein was Assignment I below; Assignment III herein was Assignment II below. The substance of the Assignments has not changed.

Limitations Motion (R. 311-15, 321) *and attached exhibits* (R. 324-422); Argument at Aug. 7, 2023 hearing (R. 1151-57); Order of August 7, 2023 (R. 545); Discussion with Trial Court on August 14, 2023 (R. 1203-06); Petitioner's Proffer of Evidence; Stipulation of Oct. 11, 2023 (R. 771-73); Final Order (R. 908).

III. The trial court reversibly erred by striking Ms. Morgan's evidence that her home was invaded by vibrations, noise and concussions and dismissing, in part, her Petition for Declaratory Judgment finding that Ms. Morgan failed to prove the City had violated Section 11's Takings Clause when it invaded her property with vibrations, noise and concussions during Phase 3A of the Project causing physical injuries to her home. The Court of Appeals erred in affirming this decision.

Error Preserved: Petition for Declaratory Judgment, (R. 1-12) *and attached exhibits* (R 15-66); Liability Bench Trial (R. 1203-10, 1215-24, 1228-32, 1238-52, 1256-89, 1305, 1317, 1324-29, 1341); Argument at Aug. 7, 2023 hearing (R. 1151-57); Order of August 7, 2023 (R. 545); First Proffer; Order of October 10, 2023 (R. 769-70); Stipulation of Oct. 11, 2023 (R. 771-73); Second Proffer; Final Order (R. 908).

STANDARDS OF REVIEW

Assignment of Error I asserts that the trial court reversibly erred in removing the issue of just compensation, including any damages to the residue caused by the City's taking of a portion of Ms. Morgan's property, from the jury's determination by granting the Exclusion Motion. The court's review of the evidentiary decision is reviewed for abuse of discretion, but a trial court abuses its discretion when laboring under a mistake of law. *Galiotos v. Galiotos*, 300 Va. 1, 10 (2021); *CNH Am. LLC v. Smith*, 281 Va. 60, 66 (2011). The sufficiency of Ms. Morgan's just compensation-related allegations are reviewed *de novo*. *Eagle Harbor, LLC v. Isle of Wight Cnty.*, 271 Va. 603, 511 (2006).

Assignment of Error II asserts that the trial court reversibly erred by granting the limitations motion. When a cause of action accrues, for statutory limitations purposes, is an issue of law and fact, reviewed *de novo*. *See Radiance Cap. Receivables Fourteen, LLC v. Foster*, 298 Va. 14, 19 (2019); *Morgan*, 86 Va. App. at 544. Likewise, the court's concomitant interpretation of Code §8.01-230 respecting the limitations period applicable to the implied contract inverse condemnation claim is reviewed *de novo*. *Radiance Cap. Receivables Fourteen, LLC*, 298 Va. at 19; *Cole v. Smyth Cnty. Bd. of Supr's*, 298 Va. 625, 635 (2020).

Further, granting the limitations motion excluded Ms. Morgan's evidence of the takings and physical damages to her property caused by Phases 1 and 2 of the Project. The court's decision on evidence admissibility is subject to an abuse of discretion review; however, an abuse of discretion occurs where the circuit court excludes evidence while laboring under a mistake of law. *Galiotos*, 300 Va. at 10; *Comm'r of Hwys. v. Karverly*, *Inc.*, 295 Va. at 388, n.7.

Assignment of Error III asserts that the trial court erred by striking portions of Ms. Morgan's evidence regarding the taking and damaging of her property caused by the City's directing vibrations, concussion, noise, dust and debris thereon during Phase 3A, which also physically damaged her home. When reviewing a trial court's decision to strike a plaintiff's evidence, "all reasonable inferences deducible therefrom in the light most favorable to the plaintiff. Furthermore, any reasonable

doubt as to the sufficiency of the evidence must be resolved in favor of the plaintiff." *Jenkins v. Cnty. of Shenandoah*, 246 Va. 467, 469 (1993). When viewed in isolation, without regard for the pervasive effects of the trial court's other rulings, the liability bench trial ruling will not be disturbed unless plainly wrong or without evidence to support it. *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 188 (2006).

AUTHORITIES AND ARGUMENT

I. The trial court erred by preventing Ms. Morgan from presenting evidence of damages to the residue of her property in violation of Section 11's Just Compensation Clause, and by imposing an improper heightened pleading standard

A. Ms. Morgan cannot be deprived of her fundamental right to a jury simply because the City failed to follow the law

When the City takes property but refuses to lawfully condemn it, the owner does not lose her right to a jury merely because the City forced her to file an inverse condemnation action. The trial court summarily deprived Ms. Morgan of her sacred constitutional right to a jury when it denied her the right to present evidence regarding a central element of just compensation. Va. Const. art. I, § 11 ("[I]n controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.").

"Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking." Va. Const. art. I, § 11. *See also* Code §25.1-230; *Karverly, Inc.*, 295 Va. at 387. Owners are

entitled to present evidence of each element of just compensation when their property is taken. Equally important, owners are entitled to have a jury determine each element of compensation. *See* Code §§25.1-220, 25.1-230(A); *Karverly, Inc.*, 295 Va. at 392, 395; *Gorman*, 191 Va. at 353-54.

The trial court held that the City's actions amounted to a constitutional taking of Ms. Morgan's property, but that the City had not properly filed an eminent domain lawsuit, forcing Ms. Morgan to file an inverse condemnation action to vindicate her right to just compensation. R. 569-71.

Once the trial court ruled that the City had violated the Takings Clause and had taken Ms. Morgan's property, its role as factfinder was complete. It should have impaneled a jury to determine all elements of just compensation as required by the Just Compensation Clause in Section 11; and Code §§8.01-187; 25.1-220, 25.1-230(A). *See* R. 11.[9] Instead, the trial court improperly injected itself into the province of the jury by holding that Ms. Morgan could not recover, as part of just compensation, "damages to the residue caused by the taking." Va. Const. art. I, § 11.

Had the City complied with its constitutional obligation to file an eminent domain action against Ms. Morgan's property *before* it entered and took possession of it, there would be no question that she would have been entitled to present

[9] Ms. Morgan specifically requested that a jury be impaneled to determine the amount of just compensation to which she is entitled. R. 11.

evidence to the trier of fact—the condemnation jury—as to the just compensation to which she was entitled, including both the value of the property taken and damages to the residue caused by the taking. Yet, the trial court wrongly interfered in the province of the jury by holding, in violation of the Just Compensation Clause in Section 11, that Ms. Morgan could not recover the full measure of just compensation, including damages to the residue caused by the taking. The effect of this erroneous ruling is to encourage the City—and all condemning authorities—to avoid formally exercising the eminent domain power and instead force property owners to file inverse condemnation claims. Condemning authorities may then be able to avoid the Just Compensation Clause's requirement to compensate owners for damages to the residue caused by the taking.

Ms. Morgan had significant supporting evidence and basis for her opinion that the City's unlawful taking depreciated the value of her property. R. 239-40, 695-98, 1260-1262, 1281-1282, 1474; PA. Ex. I (p. 91); RA2 pp. 15-32, Ex. A, B, J (pp. 20-21, 54-56, 89-91). Instead, the trial court summarily decided that the taking did not reduce the value of Ms. Morgan's remaining property without impaneling a jury to determine the measure of damages.

B. Code §8.01-187 empowers the court to determine whether property has been taken or constitutionally damaged and expressly empowers the jury to determine just compensation when a court finds a compensable taking or damaging has occurred

The inverse condemnation statute enacted by the General Assembly, Code §8.01-187, does not alter the determination of just compensation. It merely authorizes a judge to determine whether an owner's property has been taken or damaged, thereby entitling an owner to just compensation. Section 11 guarantees owners the right to just compensation when their property has been "damaged or taken" for a public use. *See also Tidewater R. Co. v. Shartzer*, 107 Va. 562, 570 (1907) (when property has been damaged in the constitutional sense, the owner is entitled to just compensation).

Code §8.01-187[10] merely gives owners a remedy when a condemnor acts in a manner which results in a taking or damaging of private property, but fails to pay just compensation, stating: "Whenever it is determined in a declaratory judgment proceeding that property has been taken or damaged within the meaning of [Section 11],… the court which entered the order or decree may, upon motion of such person …, enter a further order appointing commissioners or condemnation jurors to

[10] Code §8.01-187 was amended in 2025 to the clarify the jury or commissioners determination of "just compensation." Appellant is quoting the version of Code §8.01-187 in effect at the time she filed her Petition.

determine the compensation. … [A]ll proceedings thereafter shall be governed by the procedure[11] prescribed for the condemning authority."

A judge must determine if a condemnor has "taken or damaged" an owner's property in the constitutional sense, but the plain language of the statute recognizes an owner's right to have a jury determine just compensation once a taking (or constitutional damaging) is established. If the statute allowed otherwise, it would be constitutionally infirm, in that it would authorize a judge to deny owners a right to have a jury determine just compensation simply because the condemnor forced the owner to file an inverse condemnation suit.[12] That cannot be the effect of the statute, as owners whose property is "damaged or taken" for public use are entitled to have a jury determine the measure of just compensation, including damages to the residue. The trial court applied the statute in an unconstitutional manner.

The lower courts erred by conflating the phrases "damaged …for a public use" and "damages to the residue." This Court has recognized that these phrases have different meanings and held that a constitutional taking or damaging still requires a

[11] Localities are generally governed by the provisions of Title 25.1 of the Code in eminent domain proceedings. *See* Code §§15.2-1901.1, 15.2-1902.

[12] For example, in direct condemnation cases, the City would describe the property and rights it is taking in its Petition; the Owner would be permitted to present evidence of the impacts to the remaining property caused by the taking; and the jury would decide the amount of compensation to award for the property taken and the damages to the residue caused by the taking. Inverse condemnation requires the owner to allege such taking; and the Court's order declaring a taking effectively serves as the Petition for Condemnation.

determination of just compensation which includes damages to the residue or a "decline in the value of the subject property." *Compare Livingston v. Va. Dep't of Transp.*, 284 Va. 140, 156-57 (2012) (internal quotes omitted) (citing and quoting *Richmeade, L.P. v. City of Richmond*, 267 Va. at 602, 607) ("Taking or damaging property in the constitutional sense means that the government action adversely affects the landowner's ability to exercise a right connected to the property. When such a right connected to the property is adversely affected by government action, we continued, the measure of that compensation may be based on a decline in the value of the subject property." (internal quotations omitted)) *with Appalachian Elec. Power Co. v. Gorman*, 191 Va. at 353 ("The true test of damages to the residue of the land not taken is the difference in value before and immediately after the taking…").

Here, the misapplication of the statute resulted in Ms. Morgan losing her right to a jury merely because the trial court found that the City had taken her property rather than the City following the law and admitting it at the outset of the taking. Once the taking was established, Ms. Morgan was entitled to have a jury hear the evidence and determine both the value of the property taken and the damages to the residue caused by the taking. She does not lose the right to trial by jury merely because the City failed to follow the law and instead required her to file a suit to establish the taking and receive a declaratory order under Code § 8.01-187.

C. Ms. Morgan properly pled her damages resulting from the City's taking and public use

The trial court attempted to justify its ruling by claiming that Ms. Morgan had not "accurately" pled the damages to the residue which she sought to present evidence of to the jury.[13] R. 769-70, 1379-80. No such pleading requirement exists in Virginia and this holding imposes an inappropriate, heightened burden of the notice pleading required under Rule 1:4(d). Indeed, had the City complied with Section 11 and properly condemned Ms. Morgan's property, she was under no obligation to even file an answer, yet was still entitled to recover just compensation because eminent domain matters are *in rem* and just compensation must be paid regardless of an owner's participation. Code §25.1-214. The trial court's addition of

[13] In addition to its argument regarding the failure to plead and prove damages, the City argued that Morgan's appraiser was mistaken in relying on the "project influence rule" to ignore any of the physical damages alleged to have been caused by the project's Phases 1 and 2. R. 594-600. The City claimed adherence to this rule violated the trial court's limitation's motion holding. R. 594-600. The project influence rule requires appraisers to "disregard any increase or decrease in the fair market value of the property caused by the public use for which the property is being acquired," when valuing the property before the taking. Code §§ 25.1-204(E)(1), 25.1-230. The appraiser properly applied this rule because the evidence demonstrated that all three construction phases constituted a single project, and because his adherence to the project influence rule impacted only the value of Morgan's property before the Phase 3A taking and his opinions on diminution of value did not include damages to the property caused by Project Phases 1 or 2. R. 327, 669-72, 686-89, 694-95, 1219. Further, there was no prejudice to the City by such adherence as the Court granted the limitations motion and, notwithstanding this fact, Morgan stood ready to prove that Phases 1 and 2 project work damaged her property and negatively affected its market value. *See* R. 665-79; R.311-21.

heightened pleading requirements, *ex post*, has no basis in law and deprived Ms. Morgan of her right to have a jury decide just compensation.[14] No other court of record has even attempted to make this a requirement of pleading.

Regardless, Ms. Morgan included sufficient allegations to clearly inform the City of the true nature of her inverse condemnation claim. *See* Rule 1:4(d). She pled that the City had taken and/or damaged her property by causing vibrations to physically invade her property which resulted in damage to her home. R. 9-10, ¶ 42. She pled that the construction of the City's project caused, among other things, cracking in the walls. R. 10, ¶ 45. She further alleged that not only did the physical invasion of the temporary taking and the vibrations cause damages to the remainder of her property, but so did the construction of the project itself. R. 10 (¶ 47).[15] These factual allegations, independent of Ms. Morgan's uncontroverted evidence, are more

[14] The fact that the taking was temporary does not change the measure of just compensation. "The principles involved and governing are the same whether there be a permanent taking or one for temporary use only." *Anderson v. Chesapeake Ferry Co.*, 186 Va. 481, 492 (1947); Code §25.1-230. The sole difference is that the value of the property taken—the first element of just compensation—is measured by rental value for the duration of the taking in a temporary taking. *See id*. A temporary taking can affect the price a buyer pays for property on the date of taking just as a permanent taking can. For example, a buyer of a fast-food restaurant property on January 1, 2026 would pay less for that property if the buyer knew the entire parking lot would be lost to a temporary taking for two years. Likewise, a temporary taking may result in permanent changes to a property, such as removing landscaping or changing grade, impacting the property's utility, use and value.

[15] Furthermore, Ms. Morgan presented evidence at the liability trial of just these impacts. R. 239-40, 695-98, 1045, 1260-62, 1263-87, 1474.

than sufficient to satisfy the pleading requirements for an inverse condemnation action. *See e.g. Kitchen v. City of Newport News,* 275 Va. 378, 387–88 (2008).

Requiring more specificity in alleging damages in an inverse condemnation matter is not only inconsistent with the requirements of Rule 1:4(d), but is also impossible at the pleading stage as the extent of the taking or damaging has not yet been defined by the court. As a part of just compensation, damages to the residue are determined as a result of the impacts of a taking and public use. *See* Code §25.1-230. Before ascertaining the amount of compensation an owner is entitled to, the trial court must make a finding as to the date, nature and extent of the taking. *See* Code §8.01-187. Without such determination, it is impossible to determine the loss in value, if any, to the remaining property caused by the taking. That is precisely what Ms. Morgan did after the trial court determined the size, duration, and extent of the City's taking. Ms. Morgan engaged the services of an appraiser to determine the value of the property taken and the loss in value to her remaining property from that taking and the public use for which the property was taken, Phase 3A. Requiring Ms. Morgan to allege – and then prove – those damages to the residue at the pleading stage would be to ignore the two-stage procedure set forth in Code §8.01-187 and create an impossible burden on owners.

II. The trial court erred by granting the Limitations Motion, excluding evidence of the City's violation of the Takings Clause during Phases 1 and 2 of the Project

The rulings below require an owner to sue within three years of each separate constitutional violation, even when the subsequent violations continue to accrue from the same construction project. As a result, property owners would be required to file multiple suits stemming from overlapping facts to vindicate their constitutional right to just compensation. The lower courts erred by rejecting the equitable principles enunciated in the U.S. Supreme Court's decision in *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947) and in numerous other state court decisions. *See Day v. State*, 166 Idaho 293, 458 P.3d 162 (2020); *C&G, Inc. v. Canyon Hwy. Dist. No. 4*, 139 Idaho 140, 143-44, 75 P.3d 194 (2003); *Foley v. Cedar Rapids*, 133 Iowa 64, 69, 110 N.W. 158, 161 (1907); *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 59 Tex. Civ. App. 367, 126 S.W. 324 (1910); *Gillam v. City of Centralia*, 14 Wash.2d 523, 529, 128 P.2d 661 (1942), overruled on other grounds by *Ackerman v. Port of Seattle*, 52 Wash.2d. 903, 329 P.2d 212 (1958). Additionally, the lower courts ignored this Court's precedence regarding breach of contract claim accrual for single purpose contracts.[16] This Court should grant *certiorari* to reverse

[16] During argument on the Limitations Motion, the trial court rejected *Dickinson* and the remaining colloquy focused on the accrual of her claims under Virginia law. R. 1153-57. Morgan's counsel argued that the City committed a "continuing breach of the [implied] contract; and that Ms. Morgan's right of action accrued "when all events occurred that caused damage. This is an ongoing project… the damages

the trial court's error in granting the Limitations Motion and the Panel's error in affirming that decision.

A. This Court should decline to adopt a rule requiring a private property owner to piecemeal inverse condemnation litigation

The City argued that because it took more than three years to complete its Project, it had no obligation to justly compensate Ms. Morgan for taking and damaging her property. R. 278-84. It took this position despite its own evidence that the Project was a single public use project and not three separate and distinct undertakings. R. 362-27, 1219. The trial court accepted the City's argument that Ms. Morgan's cause of action accrued "when any damage, however, slight," occurred and that each "slight" claim must be brought within a three-year statute of limitations. R. 545, 1142-1143, 1153-57. *See Richmeade, L.P.*, 267 Va. at 601, 604. But, in the case of ongoing constitutional violations, this rule would require an owner to either speculate as to the extent of a constitutional damaging or taking at the first instance it occurs; or risk losing out on some or all of her claim.[17] This rule also sets

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continued to accrue" during Phases 1, 2 and 3A, and that there "wasn't a single act that caused any possible damages to occur… These are ongoing acts by the City, ongoing project which didn't allow Ms. Morgan to determine the extent of the [taking and] damages" at the first instance. R. 1153-54, 1156.

[17] The trial court attempted to avoid this dilemma, stating a landowner could or should file suit within the three-year statute of limitations, wait a year to serve the Petition, and then hope that the trial is set far enough out or continued such that the construction is completed so that the extent of a claim could be determined. R. 1156. However, this too sets an unreasonable expectation or burden on landowners.

unreasonable standards for property owners and does not serve judicial economy or public policy. For this reason, other courts have rejected this rigorous and piecemeal principle.

Inverse condemnation claims are based on Section 11's implied contract that the government will "pay [a] landowner 'such amount as would have been awarded therefor, if the property had been condemned under the eminent domain statutes.'" *See Richmeade, L.P.*, 267 Va. at 602 (*quoting in part Nelson Cty. v. Coleman*, 126 Va. 275, 279 (2004), and *citing Burns v. Bd. of Supr's*, 218 Va. 625, 627 (1977)). By requiring an owner to sue within three years of each separate constitutional violation—even where the violations occur from the same ongoing construction project and the damages continue to evolve—the decisions below would have a different effect: requiring owners to "piecemeal" their inverse condemnation litigation claims when the government takes or damages private property without initiating eminent domain proceedings.

In *Dickinson*, the U.S. Supreme Court held that "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort to either a piecemeal or to premature litigation to ascertain the just compensation for what is really taken." *Dickinson*, 331 U.S. at 749. *See also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 660 (1981) (citing *Dickinson* favorably and noting that the Fifth

Amendment "expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding causes of action."). The Court continued that "the source of the entire claim … is not a single event; it is continuous. And there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." *Dickinson*, 331 U.S. at 749. Indeed, even the subsequent limitations of *Dickinson* by other courts notwithstanding, the doctrine still applies that an owner's claim does not necessarily accrue at the first instance of *any* taking or damaging, but when "the gradual process set into motion by the government has affected a permanent taking." *Etchegoinberry v. United States*, 165 Fed. Cl. 696, 711 (2023), *aff'd*, 132 F.4th 1374 (Fed. Cir. 2025).

Other states also recognize this rule—even outside of the flooding context of *Dickinson* – and this Court should adopt the same reasoning. *See Day v. State*, 458 P.3d at 168; *C&G, Inc. v. Canyon Hwy. Dist. No. 4*, 75 P.3d at 196-197(2003) (An owner "subjected to the taking of his or her property by [means of] a government construction project should not be required to prematurely bring an inverse condemnation claim before damages can be fully assessed…rather, [the owner] has the right to wait until completion of the project before his or her inverse condemnation claim accrues.... The project completion rule promotes judicial economy and certainty, which benefits all parties involved in a takings case.");

Gillam v. City of Centralia, , 128 P.2d at 664 (1942), overruled on other grounds by *Ackerman v. Port of Seattle*,329 P.2d 212 (1958); *Bigham Bros. v. Port Arthur Canal & Dock Co.*, 126 S.W. 324 (1910); *Foley v. Cedar Rapids*, 110 N.W. at 161 ("[P]laintiff, who had not been compensated [for a taking] before the work was commenced, was justified in waiting until the improvement [a viaduct] was completed before commencing his action.").

This Court should grant this appeal to prevent requiring landowners to speculate or piecemeal their inverse condemnation litigation where the government fails to appropriately exercise its eminent domain power.

B. Virginia law recognizes these principles in contract law

Virginia contract law supports the above principles and the reversal of the decisions below. The implied contract of Section 11 is a single purpose contract. *Richmeade, L.P.*, 267 Va. at 601. In the case of such an "entire" or "indivisible" contract:

> [A] party seeking to recover for a breach committed while the contract remained executory, or for an anticipatory breach committed before expiration of the time agreed upon for full and final performance, has the election of pursuing his remedy when the breach occurs, or of awaiting the time fixed by the contract for full and final performance. If he adopts the latter course, the statute of limitations does not begin to run against his right of action until the time for final performance fixed by the contract has passed.

City of Suffolk Sch. Bd. v. Conrad Bros., 255 Va. 171, 174-75 (1998) (*quoting Robert's Heirs v. Coal Processing Corp.,* 235 Va. 556, 561(1998)). *See also Andrews*

v. Sams, 233 Va. 55, 58 (1987); *Fairfax City Sch. Bd. v. A.A. Beiro Constr. Co.*, 223 Va. 161, 162 (1982); Code §8.01-230 codifies the above-quoted common law rule. *Conrad Bros.*, 255 Va. at 175-76. The failure of the trial court and Panel[18] to adopt these principles must be reversed.

Had the City condemned Ms. Morgan's property at the outset of its Project, she would have been entitled to just compensation for the full extent of the Project's effects on her property. Code §25.1-230. *See generally* Code Tile 25.1. Ms. Morgan had the right to await "the time fixed by the contract for full and final performance" to initiate her inverse condemnation action. *Conrad Bros.*, 255 Va. at 174-75. As the damage to (and taking of) Ms. Morgan's property progressed during the Project's three phases, the implied contract between her and the City remained executory. R. 1448 (project schedule). Her inverse condemnation claim did not accrue until the time for the City's final performance had passed. *Conrad Bros.*, 255 Va. at 174-75. The Project's completion signaled the time for the City's final performance, i.e., payment of just compensation to Ms. Morgan for the taking and damaging of her

[18] The Panel did not discuss these cases or principles, even though they were cited and argued to it. *See, e.g.*, Appellant Br. (Ct. App.) at pp. 33-35; Reply Br. (Ct. App.) at pp. 6-9. *See also* R. 1153-57. Instead, the Panel only cited *Bethel Inv. Co. v. City of Hampton*, 272 Va. 765, 770 (2006) to support its holding that the "statute of limitations for an inverse condemnation claim begins to run when the property first suffers damage as a result of the government's action." *See Morgan*, 86 Va. App. at 545. However, this Court in *Bethel* did not make such a holding, as the issue before the Court in that matter was whether the owner was entitled to a jury on claim-accrual issue for statute of limitations purposes. 272 Va. at 767-68, 770.

property. *Richmeade, L.P.*, 267 Va. at 601. At all times prior, her claim was only anticipatory. Instead, Ms. Morgan filed her petition within six months of Phase 3A's completion, concluding the Project and establishing the extent of her inverse condemnation claim. R. 4, 1447-48. *See* R. 1-66.

The Court's reversal of the trial court and Panel on this Assignment of Error would necessarily vacate and impact the trial court and Panel's decisions on the other Assignments; and thus, Ms. Morgan requests that the Court grant her appeal on all Assignments, reverse and remand to the trial court for further proceedings.

III. The trial court erred by striking Ms. Morgan's evidence of constitutional damages to her home caused by noise and vibration from the City's Project

At the liability trial, Ms. Morgan presented evidence that the City's construction of Phase 3A caused noise and vibration to invade her property, causing physical damage to her home, including cracks to walls and doorways which did not exist prior to Phase 3A construction. R. 1263-67, 1272-80, 1457-73. *See also* RA2, Ex. J. (pp. 26-27, 66-67). These constitutional damages have been compensable since this Court's 1907 decision in *Shartzer* and the lower courts erred in ignoring this precedent. *See Tidewater Ry. Co. v. Shartzer*, 107 Va. at 567. The City never contradicted this evidence; and the trial court improperly chose to completely disregard it when granting the City's motion to strike.

In reviewing the trial court's decision, the Panel was required to "consider the evidence and all reasonable inferences deducible therefrom in the light most favorable" to Ms. Morgan. *Jenkins v. Cnty. of Shenandoah*, 246 Va. at 469. "Any reasonable doubt as to the sufficiency of the evidence must be resolved" in her favor. *Id*. The City's motion to strike should only have been granted if it was conclusively apparent that Ms. Morgan failed to prove the City's actions during construction of Phase 3A effected a taking or constitutional damaging of her property for public use. *Glass v. Wheeler*, 302 Va. 258, 278 (2023) (citations omitted).

Ms. Morgan's testimony and evidence demonstrate the error of both lower courts. She testified to significant noise and vibrations that occurred constantly 24 hours a day. R. 1242, 1265-68. Ms. Morgan further testified to a specific instance during Phase 3A in which the City and its agents dropped a large piece of construction equipment which vibrated her home so severely it felt like an earthquake. R. 1266-67. She also provided expert testimony from her Class A General Contractor regarding the nature and extent of the noise and vibrations caused by the types of construction equipment used by the City. R. 1240-48.

The lower courts erred by denying Ms. Morgan's Petition as to her claims that the City invaded her property with noise and vibrations during Phase 3A. R. 6 (¶21), 9-10 (¶¶42-45), 1264-67, 1240-48, 1305-07. This testimony and evidence, considered in the light most favorable to Ms. Morgan, was more than sufficient to

survive the City's motion to strike. For over a century this Court has held that the physical invasion of property by noise, dust and vibrations from a public use project gives rise to a compensable taking or damaging. *See Tidewater Ry. Co. v. Shartzer*, 107 Va. at 567 (holding the 1902 amendment adding "or damaged" to the takings clause of the Constitution "should be held to embrace and give a remedy for every physical injury to property, whether by noise, smoke, gases, vibrations, or otherwise."). *See also Livingston*, 284 Va. at 156-57. Ms. Morgan's uncontroverted testimony established a *prima facie* case that her property was taken and damaged by the noise and vibration created by Phase 3A of the City's project. Considering the evidence in the light most favorable to her, the lower courts could not conclusively find that she failed to state a cause of action. For these reasons, the decision of the Court of Appeals should be overturned and this matter remanded for a new trial.

Likewise, the lower courts' findings that Ms. Morgan failed to prove that the cracks she described in her testimony were the result of Phase 3A construction activities instead of earlier phases were also in error, as Ms. Morgan specifically testified that she repaired all cracks in her home at the conclusion of Phases 1 and 2 and that she observed new cracks and physical damages appear during Phase 3A construction. R. 1272-80, 1457-73.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The trial court committed numerous reversible errors; and Ms. Morgan requests this Court grant her Petition for Appeal and reverse judgment and remand the case to the trial court for further proceedings.

1. The trial court incorrectly denied Ms. Morgan her right to have a jury determine just compensation for the taking which the Court found the City committed and also imposed an inappropriate pleading requirement on Ms. Morgan to assert her claim for damages to the residue.

2. The trial court erred by excluding Ms. Morgan's evidence of any taking or damaging of her property during Phases 1 and 2 of the Project as being outside the statute of limitations.

3. The trial court erred by failing to appropriately determine that the City had committed additional takings and damaging of her property during Phase 3A of the Project, despite uncontroverted evidence to the contrary.

Ms. Morgan also requests that this Court grant any other relief necessary to attain the ends of justice.

Respectfully submitted,

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CERTIFICATE

Pursuant to Rule 5:17(i) of the Supreme Court of Virginia, I hereby certify the following:

1. The appellant is Sharon Morgan.

2. Counsel for the appellant is:

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3. The appellee is the City of Norfolk.

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5. A true copy of the foregoing Petition for Appeal was filed, via VACES, with the Clerk of the Supreme Court of Virginia and was served, via email, upon counsel for the appellee this 30th day of March, 2026.

6. Counsel for the appellant desire to state orally and in person to a panel of this court the reasons why this petition should be granted.

7. This petition contains 32 pages, excluding those portions that by rule do not count toward the page limit.

/s/ Brian G. Kunze
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