IN THE
Supreme Court of Virginia

RECORD NO. 170282

COMMISSIONER OF HIGHWAYS,

Appellant,

v.

KARVERLY, INC.,

Appellee.

BRIEF OF *AMICUS CURIAE* LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC. ON BEHALF OF APPELLANT

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Come now the Local Government Attorneys of Virginia, Inc., by counsel. LGA files its brief *Amicus Curiae*, pursuant to Rule 5:30 of the Supreme Court of Virginia, in support of Appellant Commissioner of Highways ("Appellant"/ "Commissioner") and its appeal on the issue that the trial court erred by excluding the Commissioner's expert witness from testifying as to damages to Appellee Karverly's ("Appellee"/ "Karverly") remaining property after the take.

IDENTITY AND INTEREST OF THE AMICUS CURIAE

Amicus Curiae Local Government Attorneys of Virginia, Inc. ("LGA" or "Amicus") is a nonprofit professional corporation created to promote the continuing legal education of local government attorneys, furnish information to local government attorneys and their offices that will enable them to better perform their functions, offer a forum through which LGA members may meet and exchange ideas of import to local government attorneys, and initiate, support or oppose legislation and litigation that, in the judgment of the LGA, is significant to Virginia's localities.

The LGA was founded in 1975. Its 847 public and private attorney members currently represent 77 counties, 37 cities, 59 towns of the Commonwealth, and a variety of authorities and other special units of local government. LGA regularly is asked by the Virginia General Assembly and agencies of the Commonwealth to offer legal advice on matters of state policy and to recommend knowledgeable attorneys to serve on legislative study committees and commissions.

Amicus, as part of its mission of service to localities, occasionally submits briefs on matters of import to it and its members, and that may impact not only the present litigants but all Virginia local governments and their citizens.

Amicus requested and obtained consent from both parties to file this brief.

STATEMENT OF THE *AMICUS CURIAE*

The trial court erred by excluding the Commissioner's expert witness testimony with respect to damages to the residue of a condemned property, because it improperly shifted the burden of proof to the condemnor.

This case presents an issue of potential broad and precedential impact to the state, localities and other governmental authorities in the Commonwealth, which provide public services and necessarily must acquire land and easements for such public purposes. The law concerning condemnation proceedings is clear. It should not be expanded to force condemnors to prove an absence of damages to the residue by appraising property that is unrelated to the take. Appellant wants this Court to reverse the decision of the trial court, which has upset the careful balance and clearly defined roles concerning the landowner, who has the burden of proving damages, and the condemnor. On the contrary, Appellee wants this Court to ignore its longstanding precedent and force the condemnor to value the entire property, even if its expert opines that there are no damages.

Allowing the trial court's decision to stand would set a dangerous precedent and lead to absurd results, which ignore the realities of the take. It would create a presumption of damages for every condemnation and shift the burden of proof by forcing the condemnor to prove damages, or lack thereof, to the residue.

Such a ruling would make public uses more costly. Localities may be reticent to perform many essential takings that involve utilities, highways, trails, sidewalks and other uses because the benefit would be substantially outweighed by the cost of paying for an expert to perform needless valuations on property and fixtures that are not impacted by the take. The addition of such irrelevant evidence would increase the likelihood of higher damage awards. Finally, sustaining the trial court's decision would be inconsistent with this Court's precedent in condemnation proceedings and longstanding Virginia law concerning expert testimony.

STATEMENT OF THE CASE

Amicus adopts Appellant's Statement of the Case submitted by the Commissioner in its Brief.

ASSIGNMENT OF ERROR

Amicus respectfully submits the following brief in support of the Commissioner's Assignment of Error.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts submitted by the Commissioner in its Brief.

STANDARD OF REVIEW

Amicus adopts the Standard of Review submitted by the Commissioner in its Brief.

ARGUMENT

I. The Trial Court Erred by Improperly Applying Virginia Law and Not Allowing the Commissioner's Expert Witness to Testify as to Damages.

The trial court's ruling misapplies Virginia law and confuses longstanding Virginia law on condemnation proceedings and expert testimony. The trial court ruled that, because the Commissioner's expert had not appraised the entire property before and after the small take for a trail, the expert's testimony concerning damages to the residue was excluded. Brief at 3-5. Karverly essentially claims that, in order to have a proper foundation for an opinion on damages, an expert must always measure damages by examining the entire property before and after the take. Appellee's Brief in Opposition to Petition for Appeal at 2-6 (hereinafter "Opp. at __"). This argument is nonsensical and contradicted by Virginia law, which places the burden of proof "upon a landowner to prove the value of the land taken and the

resulting damages." *Commonwealth Transp. Comm'r v. Glass*, 270 Va. 138, 149, 613 S.E.2d 411, 417 (2005) (citation omitted).

The trial court's troubling misapplication of fundamental condemnation law threatens to create mass confusion in condemnation proceedings, as it (1) leads to absurd results by forcing experts to value the entire property regardless of the size or the location of the take; (2) reverses the burden of proof; and (3) misapplies Virginia law concerning condemnation and expert testimony.

A. The Trial Court's Ruling Creates an Absurd Result That Ignores the Realities of the Take.

Affirming the trial court's ruling would be extremely dangerous for local governments because this circuit court case holds that a condemnor must now value the entire property, no matter how small the taking is in relation to the whole property. This ruling would inevitably lead to confusion and waste.

Under Va. Code § 15.2-1901.1, a governing body of a locality is authorized to condemn:

> i) land, buildings and structures, (ii) any easement thereover or (iii) any sand, earth, gravel, water or other necessary material for the purpose of opening,

> constructing, repairing or maintaining a road or for any other authorized public undertaking if the terms of purchase cannot be agreed upon . . .

Thus, localities can condemn nearly any property interest necessary for a public use, and the trial court's ruling would affect nearly all of these partial takes.

The clear issue with affirming the trial court's ruling is that it creates a new presumption (contrary to the law) that a condemnation of any part of a property damages the rest of the property. This is not the case. Although there may be instances where the rest of the property is damaged, this is not true in every case. Experts should not have their opinion discarded because they failed to undertake an unnecessary exercise in proving a negative.

Based on *Karverly*, even if the property interest taken were less than one percent of the property, an expert must value the entire property. This rule creates waste where a condemnor must spend potentially thousands of dollars more for a valuation that is irrelevant to assessing the damage. Moreover, it leads to confusion for the commission, which must then hear testimony

from the condemnor's expert as to the measure of damages even if the expert makes no finding of damages.

Merely examining certain condemnations provides a clear picture of the legal chaos that this ruling will produce.

For instance, if a locality condemns a certain strip of land to widen a sidewalk on a commercial street, under this ruling, an expert would need to appraise the hotels, restaurants and other commercial buildings, including the fixtures,[1] along with the small improvements of the take.

Second, in order to put a sewer line underground, a condemnor simply needs an easement from the landowner. However, if the *Karverly* ruling is allowed to stand, an expert

[1] *See Taco Bell of Am., Inc. v. Commonwealth Transp. Comm'r of Va*., 282 Va. 127, 133, 710 S.E.2d 478, 482, fn. 2 (2011) ("the items, which Taco Bell contends are fixtures and thus part of the realty, must be considered in conjunction with all property taken in determining just compensation"). Under *Taco Bell*, an appraiser cannot determine whether or not an item is a fixture or personal property without some cooperation from the landowner since this Court has made it clear that the question of whether certain property is personal property or a fixture is controlled by "(t)he intention of the party making the annexation." *Id*. at 132, 710 S.E.2d at 481 (citation omitted). At the time the condemnor's appraiser inspects and appraises the property for the bona fide effort appraisal, he or she has no means of requiring the landowner to state his or her intention.

would need to value all the buildings and their fixtures that run above the sewer line.

Third, highway projects and all linear infrastructure projects routinely involve multiple parcels, potentially hundreds, and many of these are strip/partial takes. Under *Karverly*, for every partial take on a highway, an expert must appraise all buildings and fixtures on every parcel connected to the take property, even those which are hundreds of acres in size.

Fourth, even more absurd, if a locality condemns property in a shopping center to simply plant trees on a small strip, an expert would have to value each unit in the shopping center.

Last, consider the example of a hotel resort located on a large parcel. If a locality takes a temporary easement of 10 square feet, the take may be valued at less than $1,000. However, an expert's appraisal of the entire property, including the resort, would be outrageously expensive. And to what end- likely only confusion.

The list of absurdities goes on and on when the take involves easements or partial takes, such as those involving telephone lines, sewer lines, utilities, highways, sidewalks, and trails.

The trial court's decision also undermines the public policy concerning condemnation proceedings because it prolongs the process. As stated by the Virginia Supreme Court:

> Clearly, such an approach would undermine the purposes served by Code § 25.1-204 and the public policy of avoiding the expense and delay of condemnation litigation by consensual bargain and sale that serves as the cornerstone of our condemnation statutes.

Va. Elec. & Power Co. v. Hylton, 292 Va. 92, 108, 787 S.E.2d 106, 115, fn. 4 (2016) (internal quotation marks and citations omitted). This passage demonstrates that condemnation proceedings must serve public policy by avoiding expense and delay. The trial court's decision undermines this policy because the condemnor must painstakingly inspect the interior and appraise all buildings and fixtures on the property. Affirming the *Karverly* ruling would transform the process into a slow, intrusive, and costly process, where the experts likely stand to gain the most through additional fees.

Karverly unpersuasively argues that "one must accept on faith that the added cost to condemnors of obtaining before-and-after values would be ruinous." Opp. at 3. Contrary to Karverly's claim, it is not that the requirement is "ruinous," but that affirming the trial court's ruling will produce absurd results and cause condemnors to waste funds on irrelevant valuations.

Simply put, affirming the trial court's decision is not economically feasible. It forces the expert to ignore the realities of the take, such as those involving an easement for a sewer line below ground, and value property and fixtures that are completely unrelated and unaffected by the take. This produces an absurd result that affects both the condemnor and the landowner. In particular, it inhibits certain public use projects, particularly where the proposed take is so small that it does not justify an expensive valuation of the remaining property. In addition, this ruling creates mass confusion, not only for the commission, but also for future condemnors and landowners concerning longstanding Virginia law.

B. The Trial Court's Ruling Improperly Shifted the Burden of Proof for Damages to the Commissioner.

The trial court misapplied the burden of proof in condemnation proceedings to the condemnor. Virginia law places the burden of proving damages to the residue on the landowner. *See Glass*, 270 Va. at 154, 613 S.E.2d at 420 (citation omitted); *Rocky Mount v. Hudson*, 244 Va. 271, 273, 421 S.E.2d 407, 408, (1992) (citations omitted). A landowner "may not recover damages to the residue if such damages are remote or speculative." *City of Va. Beach v. Oakes*, 263 Va. 510, 516, 561 S.E.2d 726, 729 (2002) (citations omitted). In the instant matter, the *Karverly* court reversed the burden of proof because it excluded the Commissioner's expert witness testimony concerning damages, not based on the above principles, but simply because the Commissioner's expert did not value the entire property.

This Court has never ruled that a condemnor's expert must value the entire property in order to offer an expert opinion on damages. In fact, in both *Rocky Mount* and *Glass*, this Court makes abundantly clear that the onus is on the landowner to prove damages to the residue, and not the condemnor. *Rocky*

Mount involved a landowner's claim of damage to the residue based purely on his unsubstantiated statement, in which he stated in part: "I would say it has hurt me $20,000, at least." 244 Va. at 274, 421 S.E.2d at 409 (internal quotations omitted). The Court noted that only the landowners presented evidence on residual damage. *Id*. at 273, 421 S.E.2d at 408. The Court ruled: "the landowner has failed to carry the burden of proving the amount of such damage." *Id*. at 274, 421 S.E.2d at 409. In addition, the Court stated:

> The burden is upon the owner of the property condemned to prove by a preponderance of the evidence that there has been damage to the residue.

Id. at 273, 421 S.E.2d at 408 (citations omitted). Notably, the Court only analyzed the damage to the residue, based on the landowner's burden of proof, and made no ruling affecting the condemnor's ability to put forth evidence.

Similarly, *Glass* reiterates that the landowner has the burden of proof concerning damages to the residue, but it is up to the commissioners to weigh the evidence and testimony of the parties' experts to determine if there are in fact damages. *Glass*, 270 Va.

at 154-55, 613 S.E.2d at 420 (citations omitted). *Glass* involved a claim of damages to the residue of the take parcels. *Id.* at 155, 613 S.E.2d at 420. The Court once again held that the burden is on the landowner to prove damage to the residue. *Id.* at 154, 613 S.E.2d at 420 (citations omitted).

In upholding the trial court's decision, the Court reasoned:

> the commission was entitled to weigh the testimony of the parties' experts and find for [the landowner]. With respect to damages to the residue, the commissioners were not bound to accept the value opinions of the experts if they determined that they were not fairly supported by facts and circumstances.

Id. at 154-55, 613 S.E.2d at 420 (citation and internal quotation marks omitted). Importantly, the Court does not state that a party's expert opinion can be excluded simply because it does not follow the same approach as the other party. Rather, it is up to the commission to "weigh the testimony of the parties' experts" and determine if they were supported by "facts and circumstances."[2]

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[2] *See also State Highway Comm'r v. Foster*, 216 Va. 745, 748, 222 S.E.2d 780, 782 (1976) ("The experts' value opinions are part of the testimonial evidence the commissioners are required to consider. The facts and circumstances upon which those opinions

Virginia law is clear. The landowner has the burden in proving damage to the residue. The condemnor does not carry that burden. Further, the Virginia Supreme Court does not require the condemnor's expert to value the entire property simply to have an opinion on damages. Rather, it is up to the commission to weigh the opinions of the respective experts as testimonial evidence and determine which most aligns with the facts and circumstances of the case. Allowing the trial court's decision to stand would cause legal chaos for both condemnors and landowners by altering core concepts concerning condemnation proceedings and expert testimony case law.

C. The Trial Court Misapplied Virginia Case Law Concerning Condemnation Proceedings and Expert Testimony.

Karverly's unpersuasive attempt to convince this Court that the trial court correctly applied Virginia law is fundamentally flawed and does not rely on condemnation case law. Contrary to Karverly's bald assertions, the Commissioner's appeal to this

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were based are another part. The commissioners are entitled to weigh the facts and circumstances and determine whether they fairly support the opinions, and in making that determination, they may consider knowledge acquired on view.")

Court to follow Virginia law does not require "leaps of faith." Opp. at 3. Rather, the Court need only follow the clearly articulated precedent regarding condemnation proceedings and expert opinion testimony.

Karverly argues that, in order to accept the Commissioner's argument, the Court "must accept on faith that in all this Court's caselaw defining damage to the residue, the Court silently meant to apply that definition only to landowners." Opp. at 3. This is simply incorrect. As previously noted, the Court is quite clear that the burden of proof rests on the landowner.

Further, the law does not require an expert to value the entire property in order to have an opinion on damages:

> In every eminent domain case involving a partial taking, the measure of damages to the residue of the property not taken is the difference in the fair market value of the residue immediately before and immediately after the taking.

Glass, 270 Va. at 154, 613 S.E.2d at 420 (citation omitted) [Emphasis added.]. Notably, "the measure of damages . . . is the difference in the fair market value of the residue." The test does not involve assessing the fair market value of the entire property,

improvements and fixtures that were not affected by the taking. Nor does it require a valuation simply to have an opinion on damages. Consequently, the Court does not have to silently read anything into the case law. Rather, the case law is clear that the landowner has the burden, and the expert does not need to value the entire property to simply have an opinion on damages.

Moreover, Karverly essentially claims that, if the expert has made no valuations concerning the measure of damages to the residue, the expert cannot testify as to damages. Opp. at 6. No case law supports Karverly's claim. Rather, valuations must only be made in determining "the measure of damages." *Glass*, 270 Va. at 154, 613 S.E.2d at 420 (citation omitted). The use of the word "measure" demonstrates that valuations are necessary only when an expert makes a determination of damages. If the expert finds no damages, there is no need for a valuation.

Accordingly, ascertaining damages requires two steps. First, the expert must determine whether damages exist. Second, if there are damages, the expert must determine the measure of

damages. The law does not preclude expert testimony on the preliminary question as to whether damages even exist.

The Commissioner's appraiser, Mr. J.B. Call III, completed the *first step* in determining that the Commissioner's taking did not damage the remainder of the property. *See* Brief at 5 (citations omitted). Mr. Call based his conclusion on the fact that the residue of the property would contain 5.17 acres after the take, that the grade of the road would not change, that the existing utilities would not be impacted, that the zoning of the property would remain the same, and that access to and from the property would not change. *Id*. Mr. Call concluded that the remainder "would have the same highest and best use and value after as compared to before and the property suffers no diminution as a result of the proposed acquisition." *Id*. Based on these factors, Mr. Call should have been able to testify that the residue of the subject property was not damaged. Therefore, it was unnecessary for him to take the *second step* of measuring the value of the residue, as improved, before the take and the value of the residue, as improved, after the take. Consequently, if a

qualified expert opines that there are no damages based on his/her expertise, experience and review of the property. There simply is no need for further analysis.

Grasping at straws, Kaverly claims that "one must accept on faith that condemnors . . . will always hire appraisers who are qualified to tell at a glance without performing any calculations, that the residue is undamaged," and further asserts that the Commissioner's expert opinion lacked adequate foundation. Opp. at 3-4. Once again, the Court is clear and has already held that the commission weighs the expert testimony. *See Glass*, 270 Va. at 154-55, 613 S.E.2d at 420 (citation and internal quotation marks omitted). The commission is entitled to consider the facts upon which the expert made his/her opinion, but the trial judge cannot exclude the testimony outright, simply because it is based on a different approach than the one posited by the landowner.

Karverly argues that the Commissioner's expert opinion did not "take into account all the relevant variables" as required by *CNH America LLC v. Smith*, 281 Va. 60, 67, 704 S.E.2d 372, 375 (2011), because the expert made no valuation of the residue.

Opp. at 3-4 (citation omitted). However, as noted, Virginia law only requires valuations to measure the amount of damages. Here, in the expert's opinion there were no damages and thus no need to make a valuation for the measure of damages.

By omitting step one, the trial judge did not consider whether there was any foundation for damages. The trial court's approach allows a landowner to skip directly to the measure of damages without ever providing an opinion as to whether damages even exist. This approach incorrectly presumes the existence of damages without any testimony. It also substitutes the trial court's judgment for that of the expert's ability to exercise his/her own independent judgment.

Karverly's weak claim that experts cannot possibly tell damage without valuing the residue is contradicted by *Smith*. As the Court states:

> 'An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond that of persons of common knowledge and ordinary experience.' Additionally, under Code § 8.01-401.1, an expert's opinion may be based upon 'facts, circumstances or data made known to or perceived by such witness.'

Id. at 67, 704 S.E.2d at 375 (citation omitted). [Emphasis added.]. Accordingly, experts can make an opinion on damages based on their experience, facts, circumstances, and data without measuring damages that, in their opinion, do not exist. Tellingly, Karverly cites to no similar condemnation case excluding the condemnor's expert opinion because the expert did not first measure damages.[3]

Sustaining the trial court's decision sets a dangerous and absurd precedent, whereby local governments would be forced to make valuations of damage to the residue, even when in their opinion no such damage exists.

II. Conclusion

The Court should reverse the judgment and remand to the trial court in order to correct the fundamental errors of the trial

[3] Additionally, Karverly's citations to case law where the Court considered supposed "similar testimony from experts" is irrelevant as these cases do not concern condemnation law. *See* Opp. at 4 (citing *Holiday Motor Corp. v. Walters*, 292 Va. 461, 483, 70 S.E.2d 447, 458 (2016) (expert opinion on defective design); *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 154, 766 S.E.2d 893, 896-897 (2015) (expert opinion on "unreasonably dangerous" vehicle)).

court. Principally, the trial court's ruling will lead to absurd results for numerous condemnation proceedings. In particular, it would impact public uses that involve utilities above and below ground, highways, trails, sidewalks, and other situations where the take is substantially smaller than the property on which it is located.

In addition, the trial court erred in its misapplication of Virginia law. This Court has been clear that the burden of proof in determining damages to the residue is on the landowner. The instant case abruptly shifts the burden to the condemnor and essentially assumes that damages always exist. This misapplication sets a dangerous precedent for local governments and landowners by muddying the waters on both condemnation proceedings and expert testimony. Condemnors would need their experts to value the entire property and make valuations, even if they found no damage to the residue. This inevitably forces localities to abstain from certain condemnation proceedings, simply because the cost of the expert's valuation substantially outweighs the cost of the take, such as those potentially involving

narrow strips or easements for telephone lines, sewer lines, utilities, highways, sidewalks, and trails.

Amicus asks that the Court reverse the trial court's decision and remand, and uphold longstanding Virginia law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify compliance with Rule 5:26 and 5:30 of the Rules of the Supreme Court of Virginia. I further certify that on December 8th, 2017, I complied with Rule 5:26 (e), and one PDF copy was sent, via email, to the following counsel of record:

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