IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0587

ROMAN REALTY, LLC, a West Virginia limited liability company,

Petitioner (Plaintiff below),

v.

THE CITY OF MORGANTOWN, WEST VIRGINIA, a West Virginia municipal corporation

Respondent (Defendant below).

(On Appeal from the Circuit Court of Monongalia County, West Virginia, Civil Action No. 20-C-109)

RESPONSE BRIEF ON BEHALF OF RESPONDENT, THE CITY OF MORGANTOWN, WEST VIRGINIA

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II. STATEMENT OF THE CASE

A. The Sunnyside Up Tax Increment Financing District

Petitioner, Roman Realty, LLC (hereinafter "Petitioner") has represented that it owns two parcels of property relative to its claims, with street addresses of 512 and 516 Grant Avenue, Morgantown, WV, 26505 (hereinafter "the Property").[1] *APP010 at ¶ 1.* Said tracts are described as two adjoining tracts of land running 30' wide on Grant Avenue and 100' back, abutting an alleyway owned by Respondent, the City of Morgantown (hereinafter "the City"). *APP020.* Petitioner has represented that it obtained 512 Grant Avenue for $121,000.00 and 516 Grant Avenue for $68,000.00. *APP189.* Darin Glitz, a member of Petitioner, Roman Realty, LLC, testified that the properties are rented out to tenants and that they have remained fully occupied at all times, even after the alleged damages. In fact, the rent for the properties has gone up over the years. *APP189.*

In 2008, the City was approved by the West Virginia Development Office ("WVDO") to create the Sunnyside Up Tax Increment Financing District ("Sunnyside TIF District") to generally allow for the improvement of waterlines, storm water management, sewer lines, road improvements, etc. *APP011-APP012 at ¶¶ 2-4.* In 2017, the City received approval from the WVDO to begin Phase 3 of the TIF Project Plan. *APP011 at ¶ 4.* As part of Phase 3 of the Sunnyside TIF District, the City entered into contracts for the installation of drainage systems in an undeveloped alleyway behind petitioner's property. *APP025-APP026.* The City contracted with Green River Group, LLC (hereinafter "Green River") to perform this work.

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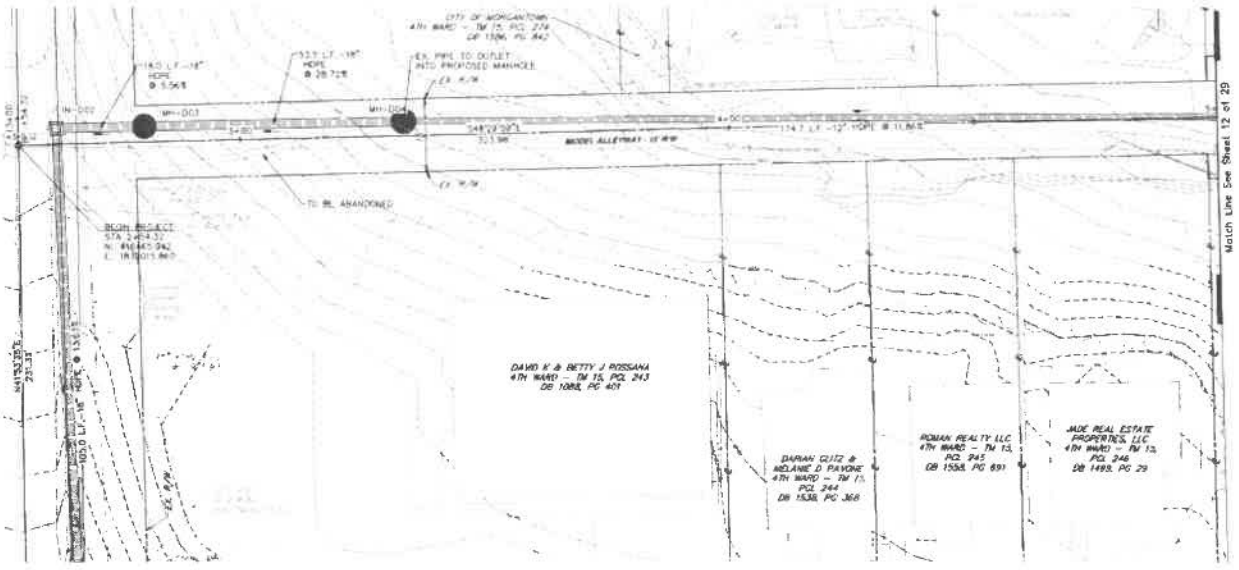
[1] With respect to 516 Grant Avenue, Petitioner did not own said property at the time of the improvement project at issue. Rather, at the time, 516 Grant Avenue was owned by Darian Glitz and Melanie Pavone, the sole members of Petitioner, Roman Realty, LLC. *APP198, APP272-273.*

Importantly, and despite the unsupported allegations to the contrary, the plans did not call for any work to be performed on any portion of Petitioner's property. Petitioner states: "[t]he *Construction Plans for Sunnyside TIF District Phase 3 – Model Alley Improvements, Monongalia County West Virginia January 3, 2019* ("Project Plan") [...] indicate that the work to be performed on Alley D will extend onto the Property (as shown on Page PL01 and PL04 of the Project Plan)." *Petitioner's Brief at 2-3.* However, there is simply no support for this allegation.

In support of the allegation that the Project Plan indicated that the work would extend to Petitioner's property, Petitioner refers to Sheets PL01 and PL04 of the Project Plan. Sheet PL04 does not even depict Petitioner's property but rather shows a stretch of the alley at issue that is not even adjacent to Petitioner's property. *APP242.*

PL01 does depict Petitioner's Property. However, PL01 simply does not show the Project entering any portion of Petitioner's Property. Rather, it shows that the plans called for a 12" drainage pipe to be installed in the center of the 15' wide alley behind Petitioner's Property, which is depicted as Parcels 244 and 245 below:



APP239.

Petitioner states that during the construction of Phase 3, certain inlet/manhole covers were not in the originally designated location and the pipe at issue had to be relocated. Petitioner also states that as a result the pipe was installed "closer to/on [Petitioner's] Property." *Petitioner's Brief at 4.* Petitioner does not cite to the Joint Appendix or any other document to support this assertion. Regardless, Darren Glitz, a member of Petitioner, Roman Realty, LLC, testified that he could not say for certain that the pipe was installed on any portion of his property: "So what I'm saying is, I'm not sure entirely if the pipe, after this movement that was approved in Work Order 3, I'm not sure that it doesn't catch a corner of our property. It sure looks like it from the photos in discovery, but again, I didn't see it as it was being installed." *APP344.*

Petitioner goes to great lengths alleging that no easements or right-of-ways of any sort were acquired for Petitioner's Property. While true, no easements or right-of-ways were necessary because the Project Plan did not call for any work to be performed on Petitioner's Property as demonstrated above. *APP239.* Moreover, to the extent necessary, the Project Manual required that "[a]ny additional lands required for the temporary construction facilities, construction equipment, or storage of materials and equipment, and any access needed for such additional lands are to be obtained and paid for by Contractor." *APP246.* Thus, to the extent necessary, Green River was required to obtain any necessary easements or right-of-ways.

On May 16, 2019, the City, through engineering firm Herbert, Rowland and Grubic, Inc., notified Green River that it would liable for any damages or compensation that property owners may seek related to the loss of trees, shrubs, or from the disturbance of private property outside of the City's right-of-way during construction. *APP248.* The City noted that Herbert, Rowland and Grubic had documented Green River exceeding the right-of-way on two (2) parcels

of property.[2] The City further advised Green River that the pursuant to the Project Manual, site clearing was required to remain within the limits of the permanent right-of-way or temporary construction easements and any additional lands required were to be obtained and paid for by Green River. *APP248.*

Notably, Petitioner has selectively quoted from the May 6, 2019 letter in its Brief. Petitioner states:

> The City's engineering company, HRG, by letter dated May 6, 2019, noted that "on several occasions HRG's Resident Project (RPR) has documented the Contractor exceeding the right-of-way..." App. 248. The letter further indicated that "Any additional lands required for temporary construction facilities, construction equipment, or storage of materials and equipment, and any access needed for such additional lands, are to be obtained and paid for by the Contractor." The City failed to obtain the required land and TCEs that it knew were required prior to beginning construction on Phase 3, and knowingly allowed its Contractor to proceed with construction without any effort to acquire additional property and easements needed along the way.

Petitioner's Brief at 4. However, the May 6, 2019 letter actually reads:

> On several occasions HRG's Resident Project Representative (RPR) has documented the Contractor exceeding the right-of-way, in particular on Parcel 264 and Parcel 261 along Alley D.

APP248 (emphasis added).

Thus, contrary to Petitioner's allegations, the letter does not show that the City "knowingly allowed [Green River] to proceed with construction without any effort to acquire additional property and easements needed along the way." *Petitioner's Brief at 4.* Rather, the letter shows that the Project Manual required the work performed to remain within the limits of the permanent right-of-way or temporary construction easements.[3] Further, the letter advised that

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[2] The parcels referenced in the May 6, 2019 letter were Parcel 264 and Parcel 261. *APP248.* These two parcels are not owned by Plaintiff and are not at issue in this litigation.

[3] With respect to clearing, the Project Manual states: "Confine clearing to within the limits of the permanent right-of-way or temporary construction easement." *APP247.* Similarly, with respect to grubbing, the

to the extent necessary, Green River was contractually required to obtain any necessary easements or right-of-ways to complete the Project. When the City learned that the Green River exceeded the right-of-way on other lots than Petitioner's Property, the City advised Green River of its contractual obligations and warned Green River that it would be liable for any damages as a result.

Prior to initiating the instant matter, on September 12, 2019, Petitioner sent a letter to the City threatening to file an inverse condemnation action against the City. *APP022.* The letter alleged that during the installation of the drainage system behind Petitioner's property, approximately 1040 square feet of Petitioner's property was "excavated and used as a dump site by [the City's] contractor." *APP022.* Petitioner also alleged that walnut trees were removed or damaged and that surface water flowing to his property had increased. *APP022.* Despite the combined purchase price of the properties being only $189,000 as noted above, Petitioner demanded over $300,000.00 in compensation and threatened to file an inverse condemnation proceeding if his demand was not met. *APP023.*

B. Petitioner's *Petition for Writ of Mandamus to Compel Eminent Domain Proceedings*

Petitioner filed its *Petition for Writ of Mandamus to Compel Eminent Domain Proceedings* (hereinafter "the Petition") on or about April 13, 2020. *APP010-APP018.* The Petition alleges "[d]uring the installation of the new drainage system along Alley D, an estimated eleven trees were removed and approximately 1,000 square feet of Petitioners property was excavated and used as a dump site by the City, constituting an illegal taking." *APP012.* In regards to specific damages, Petitioner alleges trees were damaged and/or removed. *APP012, APP014 at ¶¶ 11-12, 20, 24.* Petitioner alleges the area at issue was once gradually slopped [*sic*] but the slope

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Project Manual states: "Grub areas within the construction limits of the permanent right-of-way or temporary construction easement [...]". *APP247.*

is now steeper. *APP012 at ¶ 13.* The Petition also alleges water inundation occurred due to the construction.[4] *APP012, 014 at ¶¶ 9, 14, 21.*

Significantly, the Petition itself states that the City's actions with respect to Petitioner's property "constitute[] a trespass." *APP014 at ¶ 25.* The Petition seeks "damages as a direct and proximate of the Respondent's actions and inactions as set forth herein, including, but not limited to, damages for trespass, damages to property taken, damages to the residue of the property, costs to cure, temporary damages, expenses that Petitioner may be entitled to under the Federal Relocation Act[5], and attorney's fees and expenses." *APP015 at ¶ 26.*

C. Relevant Procedural History

On July 10, 2020, the City filed a *Motion to Dismiss*. *APP025-APP030.* Therein, the City argued that the Petition was devoid of sufficient specific allegations to determine the basis for Petitioner's claim for eminent domain proceedings. Additionally, the City argued that in order to be entitled to a writ of mandamus, Petitioner must show the lack of other adequate relief. The City argued Petitioner could not do so as other adequate relief exists in the form of a civil action sounding in tort.

After the matter was fully briefed, the Circuit Court denied the *Motion to Dismiss*, noting that the allegations of the Petition must be viewed in a light most favorable to Petitioner. *APP045-APP046.* The Circuit Court further instructed that the City may revisit its arguments at the summary judgment stage. *APP046.*

Unbeknownst to the City at the time, on September 14, 2021, Petitioner filed a civil action against Green River in the Circuit Court of Monongalia County, under Civil Action No. 21-

[4] In order to understand the pre-construction and post-construction site, screenshots from a pre-construction video and a pre-construction photograph can be found at *APP202-APP204* and post-construction photographs are located at *APP205-APP206.*

[5] No federal funds were involved in the project, and as such the Federal Relocation Act is inapplicable.

C-264. *APP421-APP428.* The allegations contained in the Complaint against Green River are nearly identical to those made against the City in the Petition.

The Petition against the City and the Complaint against Green River include, but are not limited to, the following identical allegations and requests for relief:

- "During the installation of the new drainage system along Alley D, an estimated eleven trees were removed and approximately 1,000 square feet of [Petitioners'] property was excavated and used as a dump site[.] *APP012 at ¶ 11, APP423 at ¶ 13.*

- "The eight trees that were not removed by [The City/Green River] were left heavily damaged, and have gravel, soil, and debris pushed up against the base of each tree which will cause each tree to eventually fall towards the residential buildings on the property." *APP012 at ¶ 12, APP423 at ¶ 14.*

- "[T]he Property was once gradually slopped [*sic*], with ample flat areas for gardening and recreational use. The illegal excavation, dumping, and removal of trees and their root systems on the [Petitioner's] Property has resulted in the slope of the property being severely altered, with a new slope of nearly four percent, [...] "[6] *APP012 at ¶ 13, APP424 at ¶ 15.*

- The project "included the installation of new bituminous pavement along Alley D, which occurred on or around July 31, 2019. This new pavement combined with the lack of erosion and sedimentation protection from the dumped soil and debris has led to a massive increase of surface water inundating [Petitioner's] Property." *APP012-APP013 at ¶ 14, APP424. at ¶ 16.*

- "Because of [Respondent's/Defendant's] actions, [Petitioner's/Plaintiff's] property now needs a retaining wall at least 60 feet in length with proper drainage facilities installed that will help support the slope and control and redirect the increased surface water, build at a cost to be determined. *APP014 at ¶ 22, APP425 at ¶ 24.*

- "Because of [Respondent's/Defendant's] Actions, [Petitioner's/Plaintiff's] property has lost several mature walnut trees, and will need to remove the remaining trees that have been damaged by [Respondent/Defendant]" *APP014 at ¶ 23, APP425 at ¶ 25.*

[6] Of note, the above referenced paragraphs take a deviation at the end where the Petition claims, ". . . so that the rear of the property is hazardously steep and unusable" *APP012 at ¶ 13.* To the contrary, the Complaint alleges, " . . . so that the rear of the property – that was once private and secluded – is now easily transversable and exposed." *APP424 at ¶ 15.*

- "[Respondent's/Defendant's] actions in accessing [Petitioner's/Plaintiff's] Property without permission and without ever securing a right-of-way, easement, or temporary construction easement, constitutes a trespass." *APP014 at ¶ 25, APP425 at ¶ 26.*

- "[Petitioner/Plaintiff] has suffered damages as a direct and proximate result of the [Respondent's/Defendant's] actions and inactions as set forth herein, including but not limited to, damages for trespass, damages to the property taken, damages to the residue of the property, cost to cure, temporary damages, expenses that [Petitioner/Plaintiff] may be entitled to under the Federal Relocation Act, and attorney fees and expenses." *APP015 at ¶ 26, APP425 at ¶ 27.*

- "That as a direct and proximate result of the [Respondent's/Defendant's] acts and failure to act, [Petitioner/Plaintiff] has suffered, and will continue to suffer in the future: loss of use and enjoyment of its Property; diminution in the value of their real property; diminution of the fair market value of said Property, damage to the Property, and annoyance and inconvenience." *at APP016 at ¶ 29, APP426 at ¶ 29.*

In Complaint against Green River, Petitioner seeks to recover attorney fees and expenses. *APP423-424 at ¶¶ 27 and "Wherefore".* In the Complaint against Green River, Petitioner also alleged:

- "Green River trespassed on Plaintiff's Property with full knowledge of the property lines, cut timber and vegetation, used the property as a dumping site and severely altered the slope of the property." *APP424 at ¶ 17.*

- "Green River's trespass was negligent and intentional and has caused significant damage to Plaintiff. Plaintiff is entitled to treble damages as a result of Green River's actions in this matter as to all damages." *APP425 at ¶ 22.*

After discovery, the parties filed cross-motions for summary judgment. *APP187-214, APP215-APP266.* The City argued that the Petition should be denied as Roman Realty could not prove the absence of another adequate remedy, which is required for a writ of mandamus to be issued. *APP192-APP195.* The City further argued that public policy, fairness, and the interests of justice required that the Petition be dismissed as the filing of the Petition seeking a writ of

mandamus as opposed to a civil action was an attempt to improperly recover attorney fees, which typically would not otherwise be available in a civil action. *APP196-APP198.* After the matter was fully briefed and argued, the Circuit Court denied both parties' motions for summary judgment, finding that "there exists material issues of fact with respect to whether Roman Realty has met its burden to be entitled to a Writ of Mandamus to compel the City of Morgantown to initiate condemnation proceedings." *APP387-APP389.*

At the time the initial summary judgment briefings were prepared and argued, the City was not aware that Petitioner had filed a civil action against Green River. Despite numerous representations in the summary judgment briefing that a civil action could not provide adequate relief, Petitioner failed to disclose that it previously filed (but did not serve) a civil action against Green River with practically identical allegations.

On February 22, 2021, the City filed its *Renewed Motion for Summary Judgment and Incorporated Memorandum of Law in Support. APP405-APP443.* The City argued that since the filing of the original *Motion for Summary Judgment*, it discovered that Petitioner filed the above-described civil action against Green River. *APP406-APP407.* The City argued that this demonstrated that another adequate alternative remedy was available to the Plaintiff. *APP407-APP410.* The City further argued that the Complaint against Green River demonstrated that a writ of mandamus to compel eminent domain proceedings is unavailable as the actions at issue constitute alleged trespass and negligence for which compensatory damages were the proper remedy, if proven. *APP413-APP416.*

Additionally, the City noted after the prior summary judgment hearing the City asked Petitioner to clarify the basis for its claimed damages, and also to confirm whether it was seeking conveyance of the subject Property to the City or seeking to retain possession of the

Property. In response, Petitioner made a monetary settlement demand on the City on January 6, 2022. *APP410-APP411.* In the demand, Petitioner stated that it was seeking monetary consideration in exchange for a full and complete release of the City and Green River and, importantly, stated that "[t]his would include [Petitioner] keeping the property." *APP411.* Petitioner's demand went on to state "[t]his is a fair number that will cover [Petitioner's] expenses for the excavation and construction of a retaining wall and to fix the drainage and erosion issues with the hillside, reimburse [Petitioner] for the removal and damage of the trees, and legal expenses." *APP411.* Thus, despite arguing repeatedly that it cannot be made whole through compensatory damages alone, Petitioner's own demand clearly proved that it is seeking compensatory damages and a retention of its land.

D. *Order Granting the City of Morgantown's Renewed Motion for Summary Judgment*

After the *Renewed Motion for Summary Judgment and Incorporated Memorandum of Law in Support* was fully briefed, the Circuit Court held a hearing on the pending motions on March 28, 2022. On June 14, 2022, the Circuit Court entered its *Order Granting the City of Morgantown's Renewed Motion for Summary Judgment. APP508-APP521.* For the reasons set forth in further detail below, the Circuit Court correctly found that summary judgment should be granted to the City. The Court correctly determined an adequate remedy existed to Petitioner in the form of a civil suit for compensatory damages. It is this Order from which Petitioner appeals.

III. SUMMARY OF ARGUMENT

The Circuit Court properly granted the City summary judgment as Petitioner has an adequate remedy available in the form of a tort action for property damage. The law is well settled that a writ of mandamus will not issue unless three (3) elements are proven: "(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the

thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *Shaffer v. W. Va. DOT, Div. of Highways*, 208 W. Va. 673, 674, 542 S.E.2d 836, 837 (2000).

Damages resulting from negligence, nuisance, and trespass are not recoverable in eminent domain proceedings but are subject to an independent action for damages. Moreover, the availability of an adequate remedy is easily proven in this case as Petitioner has filed a civil action for damages against Green River, which is practically identical to the Petition herein and seeks to recover the same damages.

The Circuit Court also property granted summary judgment as Petitioner's claim sounds in tort and is not a taking. The Project Plans did not call for any work to be performed on Petitioner's Property. Additionally, the Project Manual required Green River to obtain any additional easements or right-of-ways necessary to complete the work at issue. Courts find that a taking has occurred when an authorized act of a government official has occurred and there was an intent on the part of the government to take the plaintiff's property or an intention to do an act the natural consequence of which was to take the property. Here, to the extent Petitioner's allegations are true, the alleged damages were not the result of an authorized act of the City. The City did not authorize Green River to allegedly damage Petitioner's Property in violation of its contractual agreement with the City. Moreover, even if Petitioner's allegations are true, there was no intent by the City to take Petitioner's Property or an intention to do an act the natural consequence of which was to take the Property.

Petitioner's argument that because attorney's fees may be recoverable in an mandamus proceeding, a civil action is not an adequate remedy is flawed. There is no automatic entitlement to attorney fees in a mandamus action. Attorney fees are only awarded in a mandamus action where it is shown a public official has deliberately and knowingly refused to exercise a clear

legal duty or has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command. In a tort action, attorneys' fees can also be awarded in certain circumstances. In order to be entitled to a writ of mandamus, Petitioner must show the lack of an adequate remedy – not the lack of an identical remedy. Here, an adequate remedy exists in the form of a civil action for property damage.

Petitioner's argument that a civil action is not an adequate remedy because in an eminent domain proceeding it would be entitled to an impartial jury of twelve (12) freeholders whereas in a tort action a jury would be comprised of six (6) individuals also fails. Because there has been no taking, Petitioner is not entitled to a jury of twelve (12) freeholders. Furthermore, a civil trial with a jury of six (6) persons is an adequate remedy for Petitioner's property damage claim and, therefore, a writ of mandamus is not appropriate.

Last, the Circuit Court's Order granting summary judgment in favor of the City should be upheld in the interests of public policy, fairness, and justice. It is clear that Petitioner filed this matter as a writ of mandamus instead of a simple property damage claim in order to improperly attempt to obtain attorney fees. Petitioner is clearly attempting to turn what should be a simple property damage lawsuit into a writ of mandamus in order to attempt to recover an exorbitant amount of attorney's fees.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The City asserts that oral argument is unnecessary, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. However, if the Court believes oral argument is warranted, the City submits that any such argument would

be appropriate, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves the application of settled law.

V. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Additionally, "[a] de novo standard of review applies to a circuit court's decision to grant or deny a writ of mandamus." Syl. pt. 1, *Harrison Cty. Comm'n v. Harrison Cty. Assessor*, 222 W. Va. 25, 658 S.E.2d 555 (2008).

VI. ARGUMENT

A. The Circuit Court properly granted summary judgment in favor of the City as a civil tort action is adequate and, moreover, the required remedy Petitioner must pursue.

"A writ of mandamus will not issue unless three elements coexist (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." *Shaffer v. W. Va. DOT, Div. of Highways*, 208 W. Va. 673, 674, 542 S.E.2d 836, 837 (2000). Here, even if Petitioner can meet the first two elements, Petitioner cannot demonstrate the absence of another legal remedy for the reasons set forth below.

1. Petitioner's claim sounds in tort and therefore, a civil action for alleged damage to Petitioner's property is an adequate remedy.

The West Virginia Constitution provides that private property shall not be taken or damaged for public use without just compensation. W. Va. Const., Art. III, § 9. However, the law is well settled that "damages resulting from negligence, nuisance and trespass are not recoverable in eminent domain proceedings but are subject to independent actions for damages." *State ex rel. Firestone Tire & Rubber Co. v. Ritchie*, 153 W. Va. 132, 140, 168 S.E.2d 287, 291 (1969) (citing *B. & N. Railroad Co. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 83 S. E. 1031(1914); *State*

by State Road Commission v. Boyd, 129 W. Va. 715, 41 S. E.2d 665 (1047).

In other words, "[d]amages to the residue of land not taken which result from the negligent or unskillful conduct of the condemnor in the construction of a railroad or other public improvement upon the land taken may not be recovered in a condemnation proceeding. Damages so inflicted constitute the basis for a separate and independent action." *Strouds Creek & Muddlety R.R. v. Herold*, 131 W. Va. 45, 64, 45 S.E.2d 513, 525 (1947). "In a proceeding to ascertain the damages for property taken, nothing can be allowed on account of trespasses committed by the condemner or its agents outside the property sought to be taken, as by removing soil, injuring crops, casting debris upon the land, throwing down fences and cutting trees, or otherwise." *Buckhannon & N. R.R. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 440, 83 S.E. 1031, 1037 (1914).

In its briefing at the Circuit Court level, Petitioner relied on inapposite case law which allows for a writ of mandamus to compel eminent domain proceedings against the State. However, this line of cases allows a writ of mandamus in such a scenario because there is no other adequate remedy as the State is immune from a civil action:

> Section 9 of Article III of the Constitution of West Virginia provides that private property "shall not be taken or damaged for public use, without just compensation; * * *." Section 35 of Article VI of the Constitution provides that "The State of West Virginia shall never be made defendant in any court of law or equity, * * *." In the light of these two constitutional provisions, this Court has repeatedly held that the West Virginia Department of Highways, (formerly designated as The State Road Commission), an agency of the state, may be required by mandamus to institute eminent domain proceedings in order to ascertain just compensation for private land taken or damaged for state highway purposes.

State ex rel. Rhodes v. W. Va. Dep't of Highways, 155 W. Va. 735, 738, 187 S.E.2d 218, 220 (1972).

In *Hardy v. Simpson*, the Court explained the basis and principle for this exception by noting:

> This leads us to a consideration of the rights of the landowner in a case such as is presented here. That she has rights, and that some way should be found to enforce them is clear; the plain provision of the constitution, with respect thereto, cannot be ignored. If the landowner cannot sue the road commission to recover damages; if she cannot resort to the remedy of injunction to protect such rights; *and if she has no other remedy*; the plain provisions of the constitution are nullified. This cannot be.

Hardy v. Simpson, 118 W. Va. 440, 445, 190 S.E. 680, 683 (1937). The fact that mandamus is only available in such a scenario due to the State's immunity is reiterated throughout the case law on this topic. *See e.g., State ex rel. Griggs v. Graney*, 143 W. Va. 610, 615, 103 S.E.2d 878, 881-82 (1958) ("It should first be remembered that the petitioners are not afforded the right to institute an action against the State for their alleged grievances, and can only be afforded such right in a condemnation proceeding.").

On the other hand, it is beyond dispute that municipalities, like the City, or private contractors, like Green River, are subject to traditional civil suits for damages. This distinction is acknowledged in the cases which discuss the availability of mandamus against the State:

> The difficulty encountered when the State is involved with regard to private property under the provisions of Article III, Section 9 of the Constitution is not present where a private corporation or municipal corporation having the right of eminent domain is involved or an independent contractor doing work for the State in a tortious manner is involved because the provisions in the Constitution are self-executing in such cases where the parties have the right of eminent domain and in these instances common law or equitable actions will lie.

State ex rel. Firestone Tire & Rubber Co. v. Ritchie, 153 W.Va. 132, 140-41, 168 S.E.2d 287, 291-92 (1969). In other words, where a common law action is available, it is the remedy which must be pursued. This is consistent with the general principle addressed above – that claims for

negligence or trespass must be brought as a civil action for damages rather than eminent domain proceeding.

In a civil suit for damage to real property, a successful plaintiff can recover the following categories of damage:

> When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value, plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

Brooks v. City of Huntington, 234 W. Va. 607, 611, 768 S.E.2d 97, 101 (2014) *citing* Syl. Pt. 2 *Jarrett v. E.L. Harper & Son, Inc.,* 160 W.VA. 399, 235 S.E.2d 362 (1997). Thus, in a civil action for damages, Petitioner can recover the cost for repairing any alleged deficiencies -- putting it in the same place as prior to the alleged allegations. Conversely, Petitioner can recover the lost value of the land if such repairs cannot be completed. This is precisely the same remedy the Petitioner is seeking through its writ of mandamus.

Moreover, case law in West Virginia has made clear that claims based upon Article III, Section 9 of the Constitution against private individuals or municipalities are self-executing through the common law. In *Javins*, the plaintiffs brought "an action of trespass on the case" and the Court found that such an independent action was the proper remedy for relief. *Javins v. City of Dunbar,* 110 W. Va. 271, 157 S.E. 586 (1931). Similarly, in *Morgan,* the plaintiff filed an action for trespass on the case against the City of Logan to recover damages to the owner's property as the result of a street paving project. The plaintiff alleged that the work caused water inundation and further caused a landslide on her property. The Court ruled that a common law claim for damages was the proper and allowable remedy for the plaintiff. *Morgan v. Logan*, 125 W. Va.

445, 24 S.E.2d 760 (1943).

Indeed, the availability of an alternate remedy is proven by Petitioner's own pleadings and actions. In the Petition, Petitioner alleges the City, a municipal corporation, installed a drainage system in the alleyway between Beverly Avenue and Grant Avenue (*i.e.*, Alley D) and that Alley D is adjacent to its Properties. *APP010-APP011 at ¶¶ 2, 5.* The Petition further alleges "[d]uring the installation of the new drainage system along Alley D, an estimated eleven trees were removed and approximately 1,000 square feet of Petitioners property was excavated and used as a dump site by the City, constituting an illegal taking." *APP012.* In regards to specific damages, Petitioner alleges trees were damaged and/or removed. *APP012, APP014 at ¶¶ 11-12, 20, 24.* Petitioner alleges the area at issue was once gradually slopped [*sic*], with ample flat areas for gardening and recreational use, however, is now hazardously steep and unusable. *APP012 at ¶ 13.* Petitioner's Petition also alleges water inundation occurred due to the construction. *APP012 - 014 at ¶¶ 9, 14,* 21. The Petition itself states that the City's actions with respect to Petitioner's property "constitute[] a trespass." *APP014 at ¶ 25.*

Thus, regardless of how Petitioner seeks to reframe the allegations of the Petition, it is clear that the instant action is an attempt to recover damages from alleged negligence, nuisance, or trespass. These damages are not recoverable in eminent domain proceedings but are recoverable in a civil action for damages. *State ex rel. Firestone Tire & Rubber Co. v. Ritchie*, 153 W. Va. 132, 140, 168 S.E.2d 287, 291 (1969) ("damages resulting from negligence, nuisance and trespass are not recoverable in eminent domain proceedings but are subject to independent actions for damages"); *Strouds Creek & Muddlety R.R. v. Herold*, 131 W. Va. 45, 64, 45 S.E.2d 513, 525 (1947) ("[d]amages to the residue of land not taken which result from the negligent or unskillful conduct of the condemnor in the construction of a railroad or other public improvement

upon the land taken may not be recovered in a condemnation proceeding. Damages so inflicted constitute the basis for a separate and independent action"); *Buckhannon & N. R.R. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 440, 83 S.E. 1031, 1037 (1914) ("In a proceeding to ascertain the damages for property taken, nothing can be allowed on account of trespasses committed by the condemner or its agents outside the property sought to be taken, as by removing soil, injuring crops, casting debris upon the land, throwing down fences and cutting trees, or otherwise.").

Additionally, Petitioner's civil action against Green River demonstrates that an adequate alternate remedy exists. As set forth in more detail above, the allegations of the Petition herein and the Complaint against Green River are practically identical allegations and seek the recovery of the same damages. *APP421-APP428.* While Petitioner elected not to include the City in the Complaint against Green River, it could have done so as the City is not immune from civil cases as is the State.

Petitioner's monetary settlement demand also proves that an adequate remedy exists in the form of a civil action for property damages. As noted above, Petitioner stated that it was seeking monetary consideration in exchange for a full and complete release of the City and Green River and, importantly, stated that "[t]his would include [Petitioner] keeping the property." *APP411.* Petitioner's demand went on to state "[t]his is a fair number that will cover [Petitioner's] expenses for the excavation and construction of a retaining wall and to fix the drainage and erosion issues with the hillside, reimburse [Petitioner] for the removal and damage of the trees, and legal expenses." *APP411.* Thus, despite arguing repeatedly that it cannot be made whole through compensatory damages alone, Petitioner's own demand clearly proved that it was seeking compensatory damages and a retention of its land.

Petitioner argues that a civil action for compensatory damages is not adequate because of an alleged difference in recoverable damages. Petitioner argues that in an eminent domain action, it can recover the value of the property at the time it was taken, plus damages to the residue. However, Petitioner's argument is erroneous as equivalent damages are recoverable in a suit for compensatory damages. As noted above, in a suit to recover compensatory damages for injury to property, the owner can recover the cost of repairing the property, plus expenses stemming from the injury, including loss of use during the repair period. If the property cannot be repaired, then the owner may recover its lost value, plus expenses stemming from the injury including loss of use. *Brooks v. City of Huntington*, 234 W. Va. 607, 611, 768 S.E.2d 97, 101 (2014). Thus, upon a showing of proper proof, Petitioner can recover the lost value of the property at issue in a suit for compensatory damages, which would include the value of the property allegedly taken plus damages to the residue. In fact, in its civil action against Green River, Petitioner seeks to recover "damages to the property taken" and "damages to the residue of the property." *APP425*. Despite arguing that these damages cannot be recovered in a civil action, Petitioner has already filed a civil action against Green River seeking to recover these damages.[7]

2. A civil suit for property damage is the appropriate remedy as no "taking" has occurred.

As noted above, the Project Plans did not call for any work to be performed on Petitioner's Property. Rather, it shows that the plans called for a 12" drainage pipe to be installed in the center of the alley behind Petitioner's Property. *APP239*. Additionally, to the extent

[7] Additionally, during oral argument before the Circuit Court, Petitioner's counsel essentially conceded that, with the exception of attorney fees, Petitioner could be made whole through a civil suit. *APP483-APP489*. Petitioner's Brief alleges that the grade of a portion of Petitioner's Property was altered to provide lateral support for the pipe that was installed in the alleyway. However, Petitioner admitted during oral argument that this could also be remedied by suing for the cost of the installation of a retaining wall that would return the property to its original grade. *APP483-APP489*.

necessary, the Project Manual required that "[a]ny additional lands required for the temporary construction facilities, construction equipment, or storage of materials and equipment, and any access needed for such additional lands are to be obtained and paid for by Contractor." *APP246.* There is simply no evidence that the pipe or any other drainage system was installed on Petitioner's Property and Petitioner does not appear to directly allege otherwise in its Brief.

Petitioner alleges that trees on the Property were damaged, soil was dumped on the Property, the slope of a portion of the Property was altered, and that the work caused increased water flow on to the property. None of these allegations amount to a taking. Petitioner has not cited any legal authority to demonstrate that these types of alleged damages amount to a "taking" as opposed to simple property damage which can be remedied through a tort suit.

As recognized by Petitioner, federal courts distinguishing between torts and taking adopted a standard based on the intentions of the government or the natural consequences of the government's actions:

> Two factors relevant here serve to distinguish takings from torts. First, "takings result only from authorized acts of government officials. Challenges to the propriety or lawfulness of government actions sound in tort. Second, to state a taking claim, plaintiff must allege that there was an intent on the part of the defendant to take plaintiff's property or an intention to do an act the natural consequence of which was to take [his] property. The property loss must have been the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action. An accidental or negligent impairment of the value of property is not a taking, but, at most, a tort. Thus, the probability and foreseeability of the damage is a primary determinative element in whether a taking or a tort occurred.

Thune v. United States, 41 Fed. Cl. 49, 52 (1998) (citations and quotation marks omitted).

Petitioner argues that in this case "the damages to the Property as well as [Petitioner's] loss of dominion and control over it, are well beyond the natural and probable

consequences of the City's action, they are the direct result of the City dumping fill dirt [on] the Property." *Petitioner's Brief at 13.* However, this unsupported assertion could not be further from the truth. As stated above, contrary to Petitioner's assertion, the City did not perform any of the work at issue itself. The City contracted with Green River to perform the work at issue. The Project Plan did not call for any work to be performed on Petitioner's Property. *APP239.* If necessary, the Project Manual required that "[a]ny additional lands required for the temporary construction facilities, construction equipment, or storage of materials and equipment, and any access needed for such additional lands are to be obtained and paid for by Contractor." *APP246.* The City, through its engineer, advised Green River that it was required to obtain any necessary additional right-of-ways or easements and that it would liable for any damages related to the loss of trees, shrubs, or from the disturbance of private property outside of the City's right-of-way during construction. *APP248.* Thus, if any damage or impairment to Petitioner's property occurred, it was certainly not intentional or the natural and probable consequences of the Project from the City's perspective. For the same reasons, Petitioner cannot show that the alleged damage to Petitioner's Property resulted from the authorized acts of government officials. Any damage to Petitioner's Property by Green River was unauthorized by the City. *APP 246, APP248.*

This case is directly analogous to the *Thune* case, which Petitioner cites with approval. *Petitioner's Brief at 13, n. 6.* In *Thune*, the United States Forest Service began a project aimed at improving elk habitat in the Bridger-Teton National Forest. *Thune v. United States*, 41 Fed. Cl. 49, 50 (1998). The project called for controlled fires to reduce sagebrush. Part of the controlled burn took place near the plaintiff's hunting camp on national forest land not far from the burn area. Before igniting the fire there were favorable wind conditions. However, the hunting camp was destroyed by the fire after changing wind conditions spread the fire beyond the planned

burn area. *Id.* Petitioner brought suit in the United States Court of Federal Claims alleging that his property as taken without just compensation in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. *Id.* at 51. The United States moved to dismiss the complaint arguing that Petitioner's claims sounded in tort because the damage to plaintiff's property was not the direct consequence of any authorized government act. The plaintiff argued that the destruction of his property resulted from authorized government action, *i.e.*, the ignition of the fire. The plaintiff further argued that it was foreseeable that winds could change and that the fire could escape. *Id.*

The court first recognized that a taking results only from authorized acts of government and the plaintiff must show an intent on the part of the property to take the plaintiff's property or an intention to do an act the natural consequence of which was to take his property. *Id.* at 52. However, a claim for damages resulting from faulty, negligent, or improper implementation of an authorized project sounds in tort. The court found that even if wind changes were foreseeable, it would not convert plaintiff's tort claim into a taking. The court reasoned that although the damage was partially attributable to an authorized government project, it was not a direct, natural, and probable consequence of the project as designed. *Id.* at 53.

Here, as was the case in *Thune,* any damage to Petitioner's property was the result of the alleged improper implementation of a project. Such a claim sounds in tort and is not a taking. *See also Yawn v. Dorchester Cty.,* 1 F.4th 191, 198 (4th Cir. 2021) (no taking where spraying of pesticides to control mosquitos killed plaintiff's bees because the death of the bees was not the natural consequence of the mosquito control plan); *Nazelrod v. Garrett Cty. Sanitary Dist., Inc.,* 241 F. Supp. 2d 532, 538 (D. Md. 2003) (no taking where water leaking from municipal water lines damaged the plaintiff's property); *Williams v. City of Detroit*, No. 06-CV-12809-FL, 2008

U.S. Dist. LEXIS 132293 (E.D. Mich. July 28, 2008) (no taking where excavation of a trench by government allegedly damaged roots of tree causing it to fall on plaintiff's home).[8]

3. The general rule that attorney fees cannot be recovered in a civil action does not entitle Petitioner to a writ of mandamus.

Petitioner argues that a civil action for compensatory damages is not an adequate remedy as attorney's fees are not generally recoverable. Petitioner argues that because attorney's fees may be recoverable in a mandamus proceeding, a civil action is not an adequate remedy. Petitioner's argument is flawed in several regards.

As noted above, Petitioner's attempt to contort this matter into a taking case fails as this is a tort claim – as such further analysis is not required. That said, if the argument is given consideration, it still fails. It is true that Petitioner generally has no right to recover attorney fees and costs in a tort claim. *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986) ("As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement."). However, as discussed below, claims for attorney's fees related to a mandamus claim and a tort claim are actually similar and adequate in nature.

Petitioner's argument assumes that if the writ of mandamus is granted, all of its attorney fees are immediately recoverable. This is simply incorrect. "[c]osts and attorney's fees may be awarded in mandamus proceedings involving public officials because citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties." Syl. Pt. 1, *State ex rel. West Virginia Highlands Conservancy,*

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[8] This line of legal authority is consistent with, and analogous to, West Virginia law which holds that "damages resulting from negligence, nuisance and trespass are not recoverable in eminent domain proceedings but are subject to independent actions for damages[.]" *State ex rel. Firestone Tire & Rubber Co. v. Ritchie*, 153 W. Va. 132, 140, 168 S.E.2d 287, 291 (1969).

Inc. v. West Virginia Div. of Envtl. Prot., 193 W.Va. 650, 458 S.E.2d 88 (1995) (emphasis added).

"[T]he showing of a clear right to a writ of mandamus does not automatically shift a petitioner's costs and attorneys' fees onto the public officer involved." *Id.* at 653, 91. "Attorney's fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command." *Id.,* Syl. Pt. 1. Thus, contrary to Petitioner's argument, there is no automatic entitlement to the recovery of attorney's fees in a mandamus action and the premise of Petitioner's entire argument in this regard is therefore based upon a flawed premise.

In order to be entitled to a writ of mandamus, Petitioner must show the lack of an adequate remedy – not the lack of an identical remedy. Here, an adequate remedy in the form of a civil action for property damage is available to Petitioner. As explained above, this is an adequate remedy by which Petitioner may be compensated for the alleged injury to its property. In fact, similar to a mandamus proceeding, attorney fees can be awarded to a plaintiff in a tort action in certain circumstances. *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1983) ("A well established exception to the general rule prohibiting the award of attorney fees in the absence of statutory authorization, allows the assessment of fees against a losing party who has acted in bad faith, vexatiously, wantonly, or for oppressive reasons"). Thus, just as a party may seek fees if it proves a clear deviation from established legal duties in a mandamus claim, a party may also seek fees if it proves a party's actions in a tort case were similarly egregious.

4. A civil trial for property damages with six (6) jurors is an adequate remedy.

Petitioner argues that in an eminent domain proceeding it would be entitled to an impartial jury of twelve freeholders, whereas in a tort action a jury would consist of six individuals. *See* W. Va. Const. Art. III, § 9. Petitioner argues that a tort action is therefore not an adequate remedy.

Initially, as noted above, because this matter sounds in tort and not a taking, Petitioner has no entitlement to a jury of twelve (12) freeholders. Furthermore, as noted above, Petitioner is not entitled to an identical remedy. As long as an adequate remedy exists, Petitioner is not entitled to a writ of mandamus. A civil trial with a jury of six (6) persons is an adequate remedy for Petitioner's claimed property damage. In fact, Petitioner could request a jury of twelve (12) persons if it so desired. *See* W. Va. R. Civ. P. 47(b).

Moreover, the Court should find that Petitioner waived this argument by not adequately presenting it at the Circuit Court level. Petitioner did not raise this argument in response to the City's *Motion for Summary Judgment* or *Renewed Motion for Summary Judgment. APP183-APP267-APP289, APP339-APP364, APP444-APP451.* Instead, it appears that Petitioner only raised this argument in response to Green River's *Motion to Transfer and Consolidate. APP391-APP399.* Thus, the Court should find that Petitioner waived the argument that a jury of six individuals is not an adequate remedy. *See* Syl. Pt. 1, *State Road Commission v. Ferguson,* 148 W. Va. 742, 137 S.E.2d 206 (1964) ("Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.").

B. The Circuit Court's Order should be upheld in the interests of public policy, fairness, and justice.

It is clear that Petitioner improperly filed this matter as a writ of mandamus seeking

a condemnation hearing in order to attempt to obtain attorney fees. It is undisputed that the properties at issue had a combined purchase price of $189,000.00. *APP189.* Petitioner is not claiming the substantial value of the real property, the rental homes, was taken. Rather, Petitioner is simply arguing that approximately 1,000 feet of undeveloped slope behind the home was altered or damaged. Moreover, it is undisputed that the properties are rented out to tenants and have remained fully occupied at all times, even after the alleged damages. *APP189.* In fact, the rent for the properties has increased over the years since the alleged damages. *APP189.* Despite this, Petitioner demanded $300,000 in compensation prior to filing the writ of mandamus. *APP023.*

Petitioner's insistence of filing this matter as a request for a writ of mandamus instead of a civil action cannot be permitted as it would result in manifest injustice. Petitioner is clearly attempting to turn what should be a simple property damage lawsuit into a writ of mandamus in order to attempt to recover an exorbitant amount of attorney's fees. If this is permitted, it would likely lead to a deluge of similar suits. A property owner that has suffered some miniscule amount of property damage as a result of the work of a municipality could file an action as a writ of mandamus seeking condemnation proceedings and, even if only awarded or modest or even miniscule amount, would claim for all his attorney's fees.[9]

Thus, in addition to all those reasons previously set forth above, the Circuit Court's ruling should be affirmed in the interests of public policy, fairness, and justice.

VII. CONCLUSION

WHEREFORE, for all the reasons set forth above, the City respectfully requests that the Circuit Court's decision granting summary judgment in favor of the City be affirmed.

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[9] Additionally, Petitioner's insistence on improperly filing this matter as a writ of mandamus seeking inverse condemnation proceeds has caused significant prejudice to the City by raising questions regarding insurance coverage that would not otherwise exist.

Dated this 23rd day of November, 2022.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0587

ROMAN REALTY, LLC, a West Virginia limited liability company,

Petitioner (Plaintiff below),

v.

THE CITY OF MORGANTOWN, WEST VIRGINIA, a West Virginia Municipal corporation

Respondent (Defendant below).

(On Appeal from the Circuit Court of Monongalia County, West Virginia, Civil Action No. 20-C-109)

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, The City of Morgantown, West Virginia, does hereby certify on this 23rd day of November, 2022, that a true copy of the foregoing "***RESPONSE BRIEF ON BEHALF OF RESPONDENT, THE CITY OF MORGANTOWN, WEST VIRGINIA***" was filed with the Clerk of Court using File & ServeXpress system, which will send notification of such filing to the following:

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