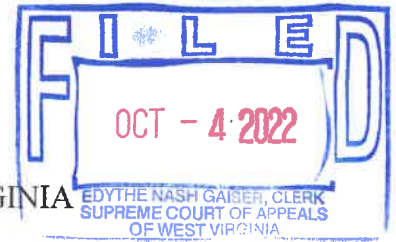


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 22-0380

TONY PALETTA, Petitioner,

vs.

Petition from Harrison County,  
West Virginia  
(Case No. 19-C-52-1)

NELSON PHILLIPS, III, NATHAN PHILLIPS,  
ROBERT NELSON PHILLIPS, II, AND WEST  
VIRGINIA DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS,  
Respondents.

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**SUMMARY RESPONSE OF RESPONDENTS NELSON PHILLIPS, III, NATHAN  
PHILLIPS AND ROBERT NELSON PHILLIPS, II**

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## INTRODUCTION

Petitioner's Brief ignores: (1) the claim actually asserted by Petitioner at the Circuit Court level; (2) the record, as developed by Respondents below; (3) the failure of the Petitioner to offer any evidence, affidavits, testimony or proof beyond speculation in opposition to Respondents' Motion for Summary Judgment; (4) the admissions and concessions of the West Virginia Department of Transportation, Division of Highways that no public road exists across Respondents' property; and (5) the central case cited by the Circuit Court's Order, Blamble v. Harsh, 163 W. Va. 733, 260 S.E.2d 273 (1979).

Stated succinctly, Petitioner should not receive the benefit of a "re-do" in responding to the motion for summary judgment granted below, which is not supported by the record/appendix, as Petitioner plainly submitted insufficient evidence to prevent the award of summary judgment to Respondents at the Circuit Court level.

Accordingly, the Circuit Court's Order granting Respondents' Motion for Summary Judgment should be affirmed.

## SUPPLEMENTAL FACTS

Petitioner's recitation of the factual record and characterization of the Circuit Court's Order in this matter is inadequate for the Court's consideration of the prior, case specific factual developments, proceedings, and rulings. Accordingly, Respondents supplement Petitioner's Statement of the Case as follows:

- A. The procedural background and admissions of the West Virginia Department of Highways, Division of Transportation – that no state road exists, presently or historically, on Respondents' real property.**

December 11, 2019, Petitioner filed his Amended Complaint. (Appx. 16-24).

Petitioner generally alleged in his Amended Complaint that Petitioner and Respondents own neighboring properties in Harrison County, West Virginia, and that "the only means of

ingress, egress and regress to and from [his property] . . . is along and over a road . . . that . . . was covered by overburden from a nearby strip mine a number of years ago.” (Appx. 17).

Petitioner, in his Amended Complaint, unequivocally failed to assert a claim for a prescriptive easement, or any other type of easement, in and through Respondents’ real property, and Petitioner fails to identify any legal instrument which would vest Petitioner with a right to travel in, across and through Respondents’ real property – nor was such a theory developed with formal discovery by Petitioner, as Petitioner conducted no depositions, performed no third party discovery, nor did Petitioner disclose any expert witness(es) who could delineate the metes and bounds description of the purported “state road”. (Appx. 16-24).

Rather, within this framework, Petitioner claimed that a state road exists across Respondents’ real property as a “state road” “is identified on the rolls, otherwise known as the scrolls, of the West Virginia Department of Transportation, Division of Highways (DOH) as West Virginia Secondary Route No. 35/6” – and Petitioner, in the underlying proceedings, asserted that the “scroll road” was, in fact, a part of the state highway system.

Premised upon the afore-noted allegations, Petitioner requested that the Circuit Court should afford, among others, Petitioner two types relief relevant on appeal, which, although vague, sound in declaratory relief: (1) “an Order requiring the . . . Defendants to immediately remove any fences, gates or other obstructions of any kind or character which may be placed in, on, upon, or over said access road to and from the tracts of parcels of land to and from West Virginia Secondary Route No. 36” and (2) “an Order which requires the Defendants to allow the Plaintiff and any other persons legally entitled to the use of said road to have free, unobstructed, and unimpaired access and use of said road for the purposes of ingress, egress and regress to and from said tracts or parcels of land to and from West Virginia Secondary Route No. 36.” (Appx. 22).

In response to the Amended Complaint, in addition to filing an Answer, Respondents filed a declaratory judgment counterclaim against the Petitioner seeking a declaration, pursuant to the Uniform Declaratory Judgments Act, that “Tony Paletta [the Petitioner], and/or his relatives and/or assigns and/or others, have no right, entitlement, or justification to cross or utilize Counter Claimants’ property or residential homesite(s) from what has been referred to by Tony Paletta as West Virginia Secondary Route No. 36 – and that no public road exists across the Counter Claimants homestead and/or real property.” (Appx. 28).

After limited discovery, Respondents moved for summary judgment as to their Counterclaim, as Petitioner conducted little to no discovery, offered no proof that a state road existed across Respondents’ real property, and failed to disclose an expert witness who could describe, by metes and bounds description, survey, et cetera, the location of the claimed “state road”. (Appx. 66-91).

Ultimately, by Order entered March 11, 2021, the Circuit Court held Respondents initial summary judgment motion in abeyance, and ordered that the West Virginia Department of Transportation, Division of Highways be joined as an indispensable party to the underlying action. (Appx. 37-42).

After the West Virginia Department of Transportation, Division of Highways was joined, Respondents timely submitted discovery to the West Virginia Department of Transportation, Division of Highways, and it was thereby determined that the purported “road” Petitioner wishes to invoke was only listed as a “scroll road in or around 1937” – and was thus never actually a physical state road, nor is 36/5 currently a state road on/across Respondents’ property. (Appx. 144).

Indeed, in discovery, the West Virginia Department of Transportation, Division of Highways admitted or conceded as follows:

- “At some point in the late 1960’s or early 1970’s, Secondary Route 36/5 was obliterated when overburden from a strip mine was discarded upon it.” (Appx. 144).
- “The road no longer exists in an identifiable form and is represented on all Harrison County Road maps dated after the 1970’s as impassable.” (Appx. 144).
- No public funds or resources have been used to improve or repair what was previously designated as West Virginia Secondary Route 36/5 in the previous thirty (30) year window. (Appx. 152).
- The West Virginia Division of Highways has no plans or designs/schematics to make repairs or improvements to the road previously designated as West Virginia Secondary Route 36/5. (Appx. 152-156).
- Secondary Route 36/5 was obliterated and all that remains are remnants of strip-mine material that was dumped there. (Appx. 156).
- There is no road present on the property at issue, there is no drainage on the property related to the existence of Route 36/5, there is no paving/asphalt on the property, and there are no traffic markers or signage on the property. (Appx. 152-156).

The West Virginia Department of Transportation, Division of Highways having admitted that no state road, as claimed by Petitioner, existed on the Respondents’ real property, Respondents ultimately renewed their Motion for Summary Judgment on March 4, 2022. (Appx. 5).

**B. The summary judgment hearing transcript and the Circuit Court’s Order Granting Respondents’ Motion for Summary Judgment.**

March 23, 2022, the Petitioner, Respondents and the West Virginia Department of Transportation, Division of Highways appeared for argument on Respondents’ Motion for Summary Judgment, in the context of a final pretrial conference. (Appx. 198). Petitioner and Respondents generally disagreed as to all issues; however, the statements of the West Virginia Department of Transportation, Division of Highways are worth noting. Specifically, when

questioned by the Circuit Court the West Virginia Department of Transportation, Division of Highways through its counsel stated as follows:

I just know that speaking with my people this road basically is considered just obliterated due to the overburden that was dumped on it. There's really nothing to maintain. I think these tax maps represent what was a proposed subdivision that was never built . . . in this instance there's just nothing to maintain. (Appx. 237).

Further, it is worth noting that a jury trial was not requested in this matter and, in fact, at the final pretrial conference the Petitioner and Respondent agreed that this matter would be a bench trial. (Appx. 199).

Following the March 23, 2022, hearing, by Order entered April 29, 2022, the Circuit Court granted Respondents' Motion for Summary Judgment, noting as follows in relevant parts:

This immediate case is about whether the evidence that has been presented shows that a road exists. The only evidence that the road exists are: (1) the road is listed as secondary route 36/5 on a scroll in the state road system and (2) there are tax maps that outline the possibility of a road that would be made in that area from a potential subdivision that was never built. This road was described as a "scroll road" by counsel for the WV DOH during the hearing on the motion for summary judgment. "Scroll Roads," as described by counsel, were roads that were essentially roads by name that were brought into the public road system in 1933, however, were never actually worked on. (emphasis added).

The subject of whether a scroll road automatically constitutes a public road was brought up in the case of Blamble v. Harsh, 163 W. Va. 733, 260 S.E.2d 273 (1979). The case was on appeal after trial and the Appellant argued that the "scroll" was the best evidence for the existence of the public road. The Court found that the best evidence did not apply to the case and that the jury had properly found that there was no existing road. Here, Paletta argues that the "scroll" is the controlling evidence in this case and shows that a public road exists. However, the Court in Blamble outlined that evidence of a scroll is not controlling and counter evidence can show the lack of a road.

As for the evidence as to why this is not a public road the evidence shows that: (1) there is no specific description of the length of the road or where it starts on the "scroll", (2) the WV DOH has stated that "at some point in the late 1960's or early 1970's, Secondary Route 36/5 was obliterated when overburden from a strip mine was discarded upon it," (3) the WV DOH has admitted "the road no longer exists in an identifiable form and is represented on all Harrison County Road maps dated after the 1970's as impassible", (4) the WV DOH has stated "no public funds have

been used to improve or repair what was previously designated as Secondary Route 36/5 in the past thirty year window”, (5) the photos provided to the Court of the area where the road is purported to be shows overgrowth and no type of road at the time that Phillips obtained the property, (6) in all the previous years before Phillips obtained the property, Paletta used alternative means to access his land, (7) the WV DOH has stated it “has no plans or designs/schematics to make repairs or improvements to the road previously designated as West Virginia Secondary Route 36/5,” and (8) the WV DOH admitted that there is no drainage or paving on the property associated with any road relating to the existence of a road. . . .

Finally, there have been questions as to whether Paletta’s land is landlocked. While Paletta stated that he cannot make a way to his property without the road, Paletta has never claimed any type of easement by necessity in this case. Even in the Amended Complaint by Counsel, there was no alternative claim for an easement through the area. (emphasis added).

The claim, itself, simply argues that the area in question contained a public road. Thus, the Court has no reason to make a determination as to whether Paletta’s land has been landlocked or not. Paletta’s counsel stated that he has not used this road in years and has in fact been using alternative means since the road was “obliterated” fifty years before. This Court makes no findings as to the whether or not Paletta’s parcel has been landlocked.

(Appx. 12-14).

Absent from the April 29, 2022, Circuit Court Order is any reliance upon: (1) a presumption of abandonment; (2) Baker v. Hamilton, 144 W.Va. 575, 109 S.E.2d 27 (1959); (3) Wilson v. Seminole Coal, Inc., 175 W.Va. 518, 336 S.E.2d 30 (1985); or (4) Miller v. Hoskinson, 189 W.Va. 189, 429 S.E.2d 76 (1993). See e.g. Appx., pg. 10 (distinguishing Miller, and noting that “this case involves a road that was not integrated into the public road system.”).

Rather, as noted above, the Circuit Court Order generally distinguished the cases presented by both Petitioner and Respondents, and relied upon Blamble v. Harsh, 163 W. Va. 733, 260 S.E.2d 273 (1979) as the legal basis for the Circuit Court’s Order. (Appx. 10-12).

## ARGUMENT

**A. As the Petitioner offered nothing more than conjecture and speculation in opposition to Respondents' Motion for Summary Judgment, the Circuit Court's Order should be affirmed.**

To survive a motion for summary judgment, the party opposing summary judgment must satisfy the burden of proof “by offering more than a mere ‘scintilla of evidence’ and must produce evidence sufficient for a reasonable jury to find in a non-moving party’s favor. . . . The evidence illustrating the factual controversy cannot be conjectural or problematic.” Williams v. Precision Coil, Inc., 194 W.Va. 52, 60, 459 S.E.2d 329, 337 (1995).

In Dellinger v. Pediatrix Medical Group, P.C., 232 W.Va. 115, 750 S.E.2d 668 (2013), the West Virginia Supreme Court further explained that “[w]hile it is true that ‘the non-moving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, [such evidence] ‘cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.’ ” Id. at 122, 750 S.E.2d at 675 (internal citations omitted.). Furthermore, “[s]elf-serving assertions without factual support in the record will not defeat a motion for summary judgment.” Precision Coil, 194 W.Va. at 61 n.14, 459 S.E.2d at 338 n.14 (citation omitted).

Stated succinctly, in the present case, the Petitioner only offered conjecture and speculation as the purported basis for the existence of a road, which left the Circuit Court in the position of addressing phantom and unsupported allegations as to the alleged existence of the road at issue.

For example, Petitioner’s foundation for his claims included the factual theory that “Plaintiff has personal knowledge that Route 36/5 has been in existence for many years and was used by his family and other families for access to and from Route 36” – without affidavit, factual support, or development. See Petitioner’s Brief, Pg. 13; see also State v. Kaufman, 227 W.Va. 537, 555 N.39, 711 S.E.2d 607, 625 N.39 (2011), quoting U.S. v. Dunkel, 927 F.2d 955, 956 (7th Cir.



1991) (stating that “[a] skeletal ‘argument,’ really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs.”).

Further, the record is unequivocal that Petitioner simply did not assert any claim or legal theory related to a prescriptive, or other, easement, i.e. a landlocked theory, as correctly found by the Circuit Court – which the Petitioner now wishes to improperly and untimely inject into this appeal. See Petitioner’s Brief, pgs. 5-6.<sup>1</sup>

Accordingly, viewing the record in the light most favorable to the Petitioner, the record is clear that Petitioner failed to offer evidence by affidavit, testimony or otherwise, which would contradict or rebut the afore-noted admissions and concessions of the West Virginia Department of Transportation, Division of Highways, contained in the record and delineated above, which plainly support the Circuit Court’s ruling, such that there is no error in the Circuit Court’s decision to grant summary judgment in favor of the Respondents.

**B. The Circuit Court properly held that “there is no public road Secondary Route 36/5” consistent with Blamble v. Harsh, 163 W. Va. 733, 260 S.E.2d 273 (1979), and the admissions and concessions of the West Virginia Department of Transportation, Division of Highways.**

Tellingly, Petitioner’s Brief does not address, and wholly ignores, the legal authority relied upon by the Circuit Court’s Order: Blamble v. Harsh, 163 W. Va. 733, 260 S.E.2d 273 (1979).

In Blamble, neighboring property owners disputed whether a 7/10ths of a mile section of road was a private road or a public road – with Lewis A. Blamble seeking a declaratory judgment

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<sup>1</sup> These issues are waived, and they are not properly before this Court, particularly as they were not plead below nor asserted in an Assignment of Error. See e.g. In re Edward B., 210 W.Va. 621, 625 FN 2, 558 S.E.2d 620, 624 FN 2 (2001)(“Because the errors, as assigned in the Appellant’s petition for appeal, were neither assigned nor argued in the Appellant’s brief, they are hereby waived.”); State v. LaRock, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996)(Although we liberally construe briefs in determining issues presented for review, issues which are not raised. . . are not considered on appeal); see also Tiernan v. Charleston Area Med. Ctr., Inc., 203 W.Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998)(“Issues not raised on appeal or merely mentioned in passing are deemed waived.”).

as to the “rights of the parties regarding the disputed 7/10ths mile section of road” – the exact procedure undertaken by Respondents in this litigation. Id., 735.

On appeal, the Appellant, like Petitioner herein, asserted that the “Scrolls” constituted the best evidence of the existence of a public road in arguing that the jury’s finding that the road “was not a public road” should be vacated.

Differing from Blamble, the Petitioner in this litigation, as well as the Respondents, waived a jury trial and stipulated that this matter would be a bench trial to the Court. (Appx. 199).

Bearing this reality in mind, the Circuit Court, after the Petitioner failed to offer any expert, affidavit or supporting testimony, found the following admissions and concessions of the West Virginia Department of Transportation, Division of Highways as determinative and prohibitive of Petitioner’s legal theory:

- “At some point in the late 1960’s or early 1970’s, Secondary Route 36/5 was obliterated when overburden from a strip mine was discarded upon it.” (Appx. 144).
- “The road no longer exists in an identifiable form and is represented on all Harrison County Road maps dated after the 1970’s as impassable.” (Appx. 144).
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Unequivocally, Blamble confirms that the Circuit Court’s decision does not erode the jurisdiction of the West Virginia Department of Transportation, Division of Highways, as argued

by Petitioner – and the factual hurdles presented by the West Virginia Department of Transportation, Division of Highways’ admissions and concessions are simply too high for Petitioner to overcome.

Indeed, Blamble evidences the reality that West Virginia Circuit Courts retain jurisdiction to declare the status of a road as private or public, consistent with Respondents’ counterclaim, such that the award of summary judgment should be upheld – as the Circuit Court’s Order is consistent with Blamble.

This is particularly true in this case as, differing from Blamble, the West Virginia Department of Transportation, Division of Highways was, in fact, made a precautionary/indispensable party to this litigation and did not object to the Court’s jurisdiction over the declaratory judgment proceeding/summary judgment ruling – and in fact the West Virginia Department of Transportation, Division of Highways stated that a road does not exist across Respondents’ property. See Blamble at 275-276 (stating that, in the context of dispute as to the status of a private versus public road, the West Virginia Department of Transportation, Division of Highways was not an indispensable party in the context of a dispute over the current status of a “scroll” road.). Given this reality, under no facts/inference can Petitioner survive summary judgment.

Further, as no good purpose would be served by reversing the judgment of the Circuit Court, given the clarity of the West Virginia Department of Transportation, Division of Highways’ admissions and concessions, the summary judgment award should be upheld. See Carbon Fuel Co. v. Gregory, 131 W. Va. 494, 498, 48 S.E.2d 338 (1948) (stating that “[n]o good purpose would be served by reversing the judgment and granting a new trial, if on such new trial the same result would be reached by the direct action of the court without the use of a jury.”).

## CONCLUSION

Respondents respectfully request that this Court affirm the award of summary judgment ordered by the Circuit Court of Harrison County, West Virginia, preserving dismissal of this action from the Circuit Court's docket.

Respectfully submitted,  
Nelson Phillips, III, Nathan Phillips and Robert Nelson Phillips,  
By Counsel:

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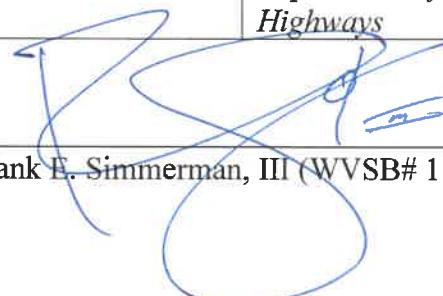
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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that the attached “**SUMMARY RESPONSE OF RESPONDENTS NELSON PHILLIPS, III, NATHAN PHILLIPS AND ROBERT NELSON PHILLIPS, II**” was served upon the following counsel of record and the Honorable Timothy L. Sweeney, by U.S. Mail, on October <sup>3<sup>rd</sup></sup>, 2022, addressed as follows:

WEST & JONES Attn: Norman T. Farley, Esq. 360 Washington Avenue P.O. Box 2438 Clarksburg, WV 26302-2348 <i>Counsel for Petitioner</i>	Travis S. Haley, Esq. West Virginia Division of Highways, Legal Division Room A-517, Building 5 1900 Kanawha Boulevard East Charleston, WV 25305-3035 <i>Counsel for Respondent West Virginia Department of Transportation, Division of Highways</i>
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