IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

BRADLEY A. REED,	)	
	)	
Plaintiff Below, Petitioner,	)	
	)	
vs.	)	**No. 24-ICA-455**
	)	
P. TODD PHILLIPS,	)	
	)	
Defendant Below, Respondent	)	

Appeal from the Circuit Court of Monongalia County, Civil Action No. 22-C-124

RESPONDENT'S BRIEF

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I. COUNTER-STATEMENT OF THE CASE

This case involves a claim for attorney negligence during the course of the Respondent's previous representation of the Petitioner. The Petitioner owns property located in the Town of Beverly, West Virginia, upon which he operates an automobile repair business known as the "Beverly Marathon." In April 2018, the Petitioner was served with a Notice of Violation of the Ordinances of the Town of Beverly (hereinafter "2018 Notice of Violation"). *See* Appx. 49-51. The Notice contained four (4) Violations of the 2015 International Property Maintenance Code ("IPMC"). *See id.* The Town of Beverly had adopted the IPMC by virtue of an Ordinance passed in 2017 (hereinafter the "2017 Ordinance"). Petitioner, proceeding *pro se* at that time, disputed the Notice of Violation, ultimately appearing at a hearing held before the Appeals Board of the Town of Beverly. *See* Appx. 52-54. The Appeals Board rendered a decision on July 16, 2018, in which it denied the Petitioner's appeal. *See id.*

Petitioner subsequently filed an appeal with the Circuit Court of Randolph County on or about August 6, 2018.[1] *See* Appx. 55. On the same date, Petitioner entered into a retention contract with Respondent. *See* Appx. 56-59. Notably, the contract specifically provides that Petitioner "empowers Attorney to commence such legal action as may be advisable in Attorney's judgment, **not including the appeal of any final judgment** . . ." Appx. 56 (emphasis added).

In March 2019, the Town of Beverly agreed to voluntarily dismiss Violations 1 through 3 of the Notice of Violation, and those Violations subsequently were, in fact, dismissed. *See* Appx. 60-61. The Town of Beverly filed a Motion for Partial Summary Judgment on the remaining Violation. After approximately two years of litigating the Randolph County Circuit Court case,

[1] The Complaint erroneously indicates that the appeal was filed in the Circuit Court of Randolph County by Respondent. *See* Appx. 0258, para. 12. Respondent did not serve his Notice of Appearance as counsel for the Petitioner until August 9, 2018. However, this distinction has no bearing on the instant appeal.

that Court granted the Town of Beverly's Motion for Partial Summary Judgment, finding in favor of the Town of Beverly on the only remaining Violation pending against the Petitioner, which relates to § 302.8 of the IPMC. *See* Appx. 62-65. The Randolph County Circuit Court determined as a matter of law that the IPMC "is applicable to the facts of this case, and plaintiff is in violation of § 302.8." Appx. 65.

Respondent sent a letter to the Petitioner dated May 30, 2020, advising him of the Circuit Court's decision, and the deadline for him to file a Notice of Appeal. *See* Appx. 66, 67. The letter further encouraged the Petitioner "to speak with [Respondent] or to contact another attorney if you want to appeal the Order," and advised the Petitioner that Respondent "is not now representing you on an appeal. A new cont[r]act would have to be negotiated." Appx. 66.

After the summary judgment award in its favor, the Town of Beverly recorded a lien on the Petitioner's property for unpaid fines. Petitioner did not contact or retain Respondent to appeal the Circuit Court's May 22, 2020 Order. *See* Appx. 67. Petitioner did, however, contact at least two (2) other attorneys, both of whom have represented the Petitioner at different points in time during the pendency of this matter.

Initially, in the Complaint, Petitioner claimed herein that Respondent was negligent in not filing an appeal of the May 22, 2020 order[2], in not advising the Petitioner that no appeal was filed, and in not properly advising and representing Petitioner's interests in the previous matter. *See* Appx. 4. However, in Petitioner's Preliminary Expert Disclosure, he indicated the intention to also contend at trial that Respondent's "failure to assert the 'grandfather clause' as a defense fell below the standard of care." Appx. 69.

[2] The Complaint erroneously refers to the final Order as having been entered on May 21, 2020. *See* Appx. 62.

Respondent filed a Motion for Summary Judgment on the claims asserted in the Complaint, i.e. Count I, negligence, and Count II, breach of the duty of good faith and fair dealing. *See* Appx. 35 *et seq.* The Respondent argued that neither of the Petitioner's theories of negligence could serve as the basis for a claim against the Respondent. *See id.* In response to the Respondent's Motion for Summary Judgment, Petitioner argued that the "grandfather clause" should have been raised as a defense to the Town of Beverly's citation during the course of Respondent's representation of the Petitioner. *See* Appx. 158 *et seq.* Petitioner also asserted a cross-motion for summary judgment on this issue. *See* Appx. 165.

Petitioner did not present any argument in his written opposition to the Respondent's motion insofar as it argued that (1.) Respondent had no duty to file an appeal on Petitioner's behalf or (2.) that Petitioner could not recover on a separate claim for breach of the duty of good faith and fair dealing. *See* Appx. 158 *et seq.* *See also* Appx. 177 *et seq.* At the hearing on Respondent's Motion for Summary Judgment, Petitioner raised a new theory of negligence for the first time based upon Respondent's alleged failure to file an expert affidavit in response to the Town of Beverly's Motion for Partial Summary Judgment. The trial court granted partial summary judgment to the Respondent insofar as the Petitioner sought to assert a negligence claim based upon the failure to file an appeal and the failure to file the expert affidavit. *See* Appx. 245. Notably, Petitioner has not appealed from that Order or those rulings. *See generally*, Notice of Appeal filed herein.

Subsequently, on October 18, 2024, the trial court entered an Order granting summary judgment in favor of Respondent on the Petitioner's negligence claim insofar as it was based upon the failure to assert the "grandfather clause" as a defense to the Town of Beverly's Motion for Partial Summary Judgment in the Randolph County Circuit Court action. *See* Appx. 253. The

sole basis of the instant appeal is the trial court's October 18, 2024 Order. Therein, the trial court correctly determined that the "grandfather" clause was not a valid defense to the Town of Beverly's 2018 Notice of Violation, and therefore the Respondent had no duty to raise it in opposition to the Town of Beverly's Motion for Partial Summary Judgment. That decision was correct, and should be affirmed by this Honorable Court.

II. SUMMARY OF ARGUMENT

In order to recover in a lawsuit against an attorney for negligence, a plaintiff is required to provide the following: "(1) the attorney's employment; (2) his/her neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the Plaintiff." *Calvert v. Scharf*, 217 W.Va. 684, 619 S.E.2d 197, syl. pt. 1 (2005). Petitioner erroneously frames the issue that was before the trial court, and this Court, as dependent on whether he violated the prior Litter Ordinances for the Town of Beverly. However, that is not the question answered by the trial court, and is not the question to be answered by this Court. Rather, the properly framed question is whether the Respondent had a legal duty to raise the "grandfather clause" as a defense to the Town of Beverly's 2018 Notice of Violation.

In ruling that the Respondent did not have any such duty, the trial court concluded that the "grandfather clause" was not a valid defense to the Town of Beverly's 2018 Notice of Violation. For the "grandfather clause" to be a valid defense, the Petitioner must have had the legal right, prior to the adoption of the IPMC, to maintain the subject property in the condition on which the Town of Beverly's 2018 Notice of Violation was based. The trial court correctly determined that he did not, and therefore the award of summary judgment in Respondent's favor should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is appropriate under Rules 18(a) and 20 of the West Virginia Rules of Appellate Procedure, as all parties have not waived oral argument, and one of the issues presented in this appeal has not previously been decided. Specifically, the West Virginia appellate courts have not considered the question of whether an attorney has a duty to assert the "grandfather clause" as a defense to a municipal citation for violation of the 2015 IPMC. As this is a case of first impression on this issue, oral argument is appropriate in accordance with Rule 20(a).

IV. ARGUMENT

A. The trial court correctly concluded that the "grandfather clause" contained in the 2015 IPMC did not provide Petitioner with a valid defense to the Town of Beverly's Notice of Violation.

Petitioner's claim against the Respondent is one of negligence. In order to maintain a claim for attorney negligence, Petitioner is required to provide the following: "(1) the attorney's employment; (2) his/her neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the [Petitioner]." *Calvert v. Scharf*, 217 W.Va. 684, 619 S.E.2d 197, syl. pt. 1 (2005) (alteration added). The only issue to be determined on appeal is whether the Respondent had a reasonable duty to raise the "grandfather clause" as a defense to the Town of Beverly's Notice of Violation issued to the Petitioner in 2018. *See* Appx. 49. *See also* Appx. 257 (para. 5). The existence of a duty is a question of law to be decided by the Court. *See Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197, syl. pt. 4 (2004). It is not a question of fact for the jury. *Id.* "[T]he threshold question in all actions in negligence is whether a duty was owed." *Id.*, 216 W.Va. at 182, 603 S.E.2d at 204. *See also* Appx. 296, 307.

The "grandfather clause" relied upon by the Petitioner is contained in the Town of Beverly's 2017 Ordinance (not the IPMC itself), which states, in pertinent part:

> (d) Nothing in this legislation or in the International Property Maintenance Code hereby adopted shall be construed to affect any suit or proceeding impending in any court, or any rights acquired, or liability incurred, or any cause or causes of action acquired or existing, under any act or ordinance hereby repealed of this law. Nor shall any just or legal right or remedy of any character be lost, impaired, or affected by this legislation.

Appx. 73. *See also* Appx. 254 (para. 5). Petitioner's first argument on appeal is that "his 'grandfather' rights were acquired and established by the Town of Beverly's 1988 ordinance; and, it [sic] that the trial court should have evaluated the [sic] whether Petitioner was in compliance with the 1988 ordinance, not the 2007 ordinance." Petitioner's Brief, p. 9-10. Notably, Petitioner did not raise this argument in his written response to Respondent's Motion for Summary Judgment, wherein he solely relied upon the argument that Petitioner's use of the property prior to the adoption of the IPMC was not "found" to be unlawful.[3] *See* Appx. 158 *et seq.*

Petitioner's counsel did briefly argue at the hearing held by the trial court that the 1988 Ordinance permitted Petitioner to keep junked and/or abandoned vehicles on his property (*see* Appx. 314-316), but does not cite to the hearing transcript in the Petitioner's Brief. However, Petitioner did not argue, either in his responsive brief or orally at the hearing, to the trial court that the 1988 Ordinance was still in effect when the 2017 Ordinance was enacted, in reliance upon *Bittinger v. Corporation of Bolivar*, as he now argues on appeal. To the extent that this Court considers the Petitioner's argument in this regard, it should be rejected.

In the *Bittinger* case, the West Virginia Supreme Court of Appeals held that "the town council had no authority to suspend the valid ordinance" by way of declaring a moratorium via motion. *Bittinger v. Corporation of Bolivar*, 183 W.Va. 310, 315, 395 S.E.2d 554, 559 (1990). In

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[3] This argument is addressed in Section (C) (1) below.

a syllabus point, the Court stated: "In order to suspend the operation of an ordinance, the ordinance must be repealed or succeeded by another ordinance or an instrument of equal dignity." *Id.* at syl. pt. 3. There is no question that the 2007 Litter Ordinance (Appx. 116) is an "instrument of equal dignity" to the 1988 Litter Ordinance (Appx. 103). In passing the 2007 Litter Ordinance, the Town of Beverly "enact[ed] a new ordinance to replace or improve upon the existing ordinance." *Bittinger*, 183 W.Va. at 315, 395 S.E.2d at 559. Both ordinances reflect the necessary public readings and signatures. *See* Appx. 111, 119. In addition, the two ordinances address many of the same subject matters, and are virtually identical in some respects.

To the extent that there is any doubt that the 2007 Ordinance replaced the 1988 Ordinance, there is no indication, and Petitioner does not assert, that the 2007 Ordinance contained any "grandfather clause." Therefore, to the extent that the 2007 Ordinance *did not* replace the 1988 Ordinance, it also *did not* preserve any pre-existing legal rights that a property owner might have held under the 1988 Ordinance. The trial court correctly found that the conditions upon which the 2018 Notice of Violation was premised were not a legal use of Petitioner's property under the 2007 Litter Ordinance. *See* Appx. 259, para. 10. As such, the "grandfather" clause was not a valid defense to the 2018 Notice of Violation, and the Respondent had no duty to assert it on behalf of the Petitioner. There are no questions of fact on this issue and the trial court's judgment should be affirmed.

B. West Virginia common law also provides no basis for applying a "grandfather" exception to Petitioner's violation of the IPMC.

Petitioner's reliance upon the case of *McFillan v. Berkeley County Planning Commission* as support for his position is misplaced. *See* Petitioner's Brief, pp. 11-12. The *McFillan* case dealt with zoning regulations, from which a mobile home park was exempt because it existed prior to the enactment of the regulations. However, McFillan's attempt to expand a separate newly

purchased mobile home park, Rocky Glen, failed, and was found to be in violation of the regulations and therefore not a nonconforming use. The West Virginia Supreme Court noted that the regulations at issue were subdivision regulations enacted pursuant to the Planning and Zoning provision of the West Virginia Code. McFillan argued that Rocky Glen pre-existed the regulations and therefore was a valid nonconforming use of the property. The Court has "recognized the concept of a nonconforming use, which occurs when land is lawfully used prior to the adoption of an ordinance that restricts its use," and "generally may be continued until it is abandoned." *McFillan*, 190 W.Va. at 463, 438 S.E.2d at 806.

In *McFillan*, the Court determined that a "nonconforming use" allows a property owner "to avoid conforming to a land-use regulation that effects his property. However, the nonconforming use is limited to use existing at the time the regulation was adopted. . . ." *McFillan* at syl. pt. 4. However:

> [a] nonconforming use is a use which, although it does not conform with existing zoning regulations, existed lawfully prior to the enactment of the zoning regulations. These uses are permitted to continue, although technically in violation of the current zoning regulations, until they are abandoned. An exception of this kind is commonly referred to as a 'grandfather' exception.

Id. at syl. pt. 3. Additionally, even if the "grandfather" argument could be applied to the condition Petitioner's property based upon this case law, in order for a property use to be grandfathered after the adoption of a particular restriction, it must have been a *legal* use prior to that adoption. *See, e.g., Witteried v. City of Charles Town*, 2018 W.Va. LEXIS 352 at *19-20 (Memorandum Decision). As discussed above, this simply was not the case, and the "grandfather exception" would not apply.

The *McFillan* case is not applicable to the instant matter for another broader reason. The West Virginia Supreme Court also has held that nonconforming use "is a concept which is part of

the law of zoning." *McClure v. City of Hurricane*, 227 W.Va. 482, 489, 711 S.E.2d 552, 559 (2010). It is clear the Town of Beverly Ordinances are not zoning ordinances. Neither the Town of Beverly Ordinances nor the IPMC purport to govern the use of property, including the Petitioner's property. Rather, the IPMC clearly defines its scope as follows:

> **301.1 Scope.** The provisions of this chapter shall govern the minimum conditions and the responsibilities of persons for maintenance of structures, equipment and *exterior property*.

Appx. 87 (IPMC § 301.1). In fact, Petitioner testified that when he purchased the property in 2003, it was being used by the prior owners as an auto repair shop, service station, and convenience store. *See* Appx. 97-98 (Reed Deposition, p. 8-9). Since the Petitioner purchased the property, he has sold gasoline and repaired automobiles:

> Q. And aside from the period of time that you were selling gasoline, were you doing anything else at that location other than repairing automobiles?
> A. Just repairing automobiles.

Appx. 100 (Reed Deposition, p. 17-18). Petitioner also admitted that the Town of Beverly never said he could not operate his business:

> Q. Has the town of Beverly ever indicated to you that you could not operate your auto repair business at that location?
> A. No.
> Q. Okay.
> A. I could always operate.

Appx. 100 (Reed Deposition, p. 19). It is without question that the IPMC does not, and has not, governed the Petitioner's use of the subject property. Rather, the IPMC and the Town of Beverly only have sought to regulate the condition of the property, which has been unacceptable for a number of years.

There is no question that the presence of inoperative and unlicensed vehicles on the Petitioner's property was not a legal condition prior to the adoption of the IPMC, and therefore it

cannot be considered a nonconforming use. Thus, the trial court correctly entered judgment as a matter of law in favor of Respondent, and that decision should be affirmed.

C. No issues of material fact precluded the trial court's award of summary judgment in Respondent's favor.

Petitioner also argues that the trial court erred in awarding summary judgment in favor of Respondent because "material factual issues . . . remain in dispute. . ." Petitioner's Brief, p. 13. Contrary to Petitioner's contentions, the trial did not err in this regard and its decision should be affirmed.[4]

1. Whether Petitioner was "found" to be in violation of the 1988 or 2007 Litter Ordinances is irrelevant.

Petitioner contends that the trial court erred because a material disputed factual issue exists as to whether "Petitioner was found to be in violation of the Town of Beverly's 2007 ordinance. . . ." Petitioner's Brief, p. 13. Petitioner has argued that because he was never found to have violated any ordinance or fined for such a violation in relation to his storage of unlicensed and inoperable vehicles on his property, the enactment of the IPMC could not preclude him from doing so. However, this is not the operative question, and is of no import to this case. To be entitled to the benefit of the "grandfather clause," the Petitioner must demonstrate that he had a legal right to have inoperable and unlicensed vehicles on his property prior to the adoption of the IPMC, and he has failed to make this showing.

The pertinent portion of the 2017 Ordinance, referred to as the "grandfather clause," states:

> (d) Nothing in this legislation or in the International Property Maintenance Code hereby adopted shall be construed to affect any suit or proceeding impending in any court, or any rights acquired, or liability incurred, or any cause or causes of action acquired or existing, under any act or ordinance hereby repealed of this law.

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[4] To the extent that Petitioner argues in Argument Section II of Petitioner's Brief that the trial court erred in ruling in favor of Respondent on the "grandfather clause" issue, that argument is addressed in Respondent's Brief at Argument Section A above.

> Nor shall any just or legal right or remedy of any character be lost, impaired, or affected by this legislation.

Appx. 73, 254. Neither the 2017 Ordinance nor any legal authority cited in this matter requires Petitioner to have been cited, fined, or found by a tribunal to be in violation of a prior ordinance in order to preclude enforcement of the IPMC. To the contrary, *Witteried v. City of Charles Town*, the West Virginia Supreme Court noted the Circuit Court's finding in a remarkably similar situation that "since the vehicles never constituted a legal use of the real estate, they were not a grandfathered us when the City adopted its most recent 2012 Ordinance." *Witteried v. City of Charles Town*, 2018 W.Va. LEXIS 352 at *19-20 (2018) (Memorandum Decision). *See also McFillan v. Berkeley County Planning Commission*, 190 W.Va. 458, 463, 438 S.E.2d 801, 806 (1993) (a non-conforming use "occurs when land is lawfully used prior to the adoption of an ordinance that restricts its use").

While there is no evidence in the record indicating that Petitioner was ever fined for violating an ordinance, it is clear that on several occasions representatives of the Town of Beverly concluded that he was in violation of its prior Litter Ordinances and notified him of such violations. Petitioner was contacted multiple times by the Town of Beverly's attorneys advising him in no uncertain terms that he was in violation of the Town's ordinances in relation to inoperable vehicles, among other things. *See* Appx. 101 (July 26, 2006 Weese Letter); Appx. 112 (October 11, 2006 Resolution); and Appx. 114 (April 21, 2008 Sims Letter). In addition, in 2011, the Town Council voted to deny Petitioner's request for a business license because his business, the Beverly Marathon (located on the property in question), was in violation of the property maintenance code. *See* Appx. 189 (July 11, 2011 Minutes). Thus, Petitioner's assertion that "[t]here was no evidence presented that established that Petitioner ever violated either the 2007 ordinance or the 1988 ordinance" is simply incorrect. Petitioner never denied before the trial court that he was in

violation of the prior ordinance, or presented any factual evidence to contest this argument. Rather, he simply argued that he was "never found" to be in violation, and therefore, as a matter of law, his use of the property was lawful, an argument which is legally incorrect. Appx. 158.

In that vein, the Petitioner argues to this Court that "[t]he trial court basically reasoned that Petitioner was guilty of the violation [of the 2007 Ordinance] based on the allegation alone." Petitioner's Brief, p. 13. However, this is an inaccurate statement and an important distinction. The trial court did not conclude that the Petitioner was in violation of the 2007 Ordinance at any time prior to the enactment of the IPMC. Rather, the trial court concluded that the Petitioner's use of the property for which he was cited in 2018 would not have been a legal use under the 2007 Ordinance. *See* Appx. 257 (para. 6), 259 (para. 10). Notably, Petitioner admitted to the underlying facts (i.e. the storage of inoperative vehicles on his property) upon which the Randolph County Circuit Court relied in awarding partial summary judgment to the Town of Beverly. *See* Appx. 86-87, 258 (para. 9).

The argument that Petitioner was "never found" to be in violation of Town ordinances, and therefore has a vested right to violate them, is plainly wrong and nonsensical. For example, a person does not obtain a vested right to exceed the speed limit merely because he has not been cited while speeding on prior occasions. Similarly, a person does not obtain a vested right to sell drugs out of his house or business merely because he has not been cited for doing so on past occasions. As the trial court correctly determined, "there is no presumption that the [Petitioner's] prior use of his property was legal in the absence of a finding that it was illegal." Appx. 259 (para. 11).

As argued by the Petitioner in his response to Respondent's Motion for Summary Judgment filed below, there are no genuine disputes concerning the material facts. *See* Appx. 163. Whether

Petitioner was cited, fined, or "found" by a tribunal to be in violation of the Town of Beverly's past Litter Ordinances is not material to the decision of the trial court. The trial court correctly concluded that Petitioner's storage of "the unlicensed and/or inoperable vehicles that were the subject of the Notice of Violation," actions to which Petitioner admitted, was not a legal use of the property. Appx. 257 (para. 6), 259 (para. 10). Accordingly, the award of summary judgment in Respondent's favor should be affirmed.

2. Whether Petitioner was issued a business license in 2011, or ever was denied a business license, has no bearing on whether he was entitled to store inoperative and unlicensed vehicles on his property.

For the first time, Petitioner has raised on appeal the argument that whether he was issued a business license by the Town of Beverly somehow is a genuine issue of material fact that precludes an award of summary judgment in Respondent's favor. *See* Petitioner's Brief, pp. 13-14. Petitioner fails to make any reference to the record in which this argument was raised in, or considered by, the trial court. It is well-settled that "theories raised for the first time on appeal are not considered." *Zaleski v. W.Va. Mut. Ins. Co.*, 224 W.Va. 554, 550, 687 S.E.2d. 123, 129 (2009), quoting *Clint Hurt & Assocs. v. Rare Earth Energy, Inc.*, 198 W. Va. 320, 329, 480 S.E.2d 529, 538 (1996). Moreover, Petitioner's unsupported declaration that "there was never an occasion in which he operated without a business license" (Petitioner's Brief, p. 14) is not evidence that may properly be considered in opposition to a motion for summary judgment. *See* W.Va. R.C.P. 56. Furthermore, "unsupported speculation is not sufficient to defeat a summary judgment motion." *Williams v. Precision Coil*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995), quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

Even if this Court does consider Petitioner's new argument, it is without merit. Petitioner fails to explain how the issuance or denial of a business license has any bearing on whether he possessed the legal right to store inoperative and unlicensed vehicles on his property prior to the

Town of Beverly's adoption of the IPMC. The issuance or denial of a business license to the Petitioner also is irrelevant to the question of whether the Respondent had a reasonable duty to raise the "grandfather clause" defense to the Town of Beverly's Notice of Violation. Thus, it is not a material fact that can—or should—preclude summary judgment in Respondent's favor. "A material fact is one 'that has the capacity to sway the outcome of the litigation under the applicable law.' . . . 'Factual disputes that are irrelevant or unnecessary will not be counted.'" *Jividen v. Law*, 194 W. Va. 705, 714, 461 S.E.2d 451, 460 (1995), quoting *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329, n. 13 (1995), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Accordingly, the trial court's decision should be affirmed.

V. CONCLUSION

The Circuit Court of Monongalia County correctly determined that the Respondent had no duty to raise the "grandfather clause" as a defense to the 2018 Notice of Violation issued to the Petitioner by the Town of Beverly. The trial court also was correct in concluding that Petitioner's use of the subject property in 2018 was not a legal use under the prior Litter Ordinance. Therefore, the Respondent, P. Todd Phillips, respectfully requests that this Honorable Court affirm the trial court's Order of October 18, 2024, awarding summary judgment in his favor.

Respectfully submitted this 20th day of February, 2025.

DICKIE, MCCAMEY & CHILCOTE, L.C.

By: */s/ Michelle D. Baldwin*

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P. TODD PHILLIPS,	)	
	)	
Defendant Below, Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2025, the foregoing *Respondent's Brief* was electronically filed via File & Serve Express, and served via electronic mail upon the following counsel of record:

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