
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Bradley A. Reed
Plaintiff Below, Petitioner

v.

P. Todd Phillips
Defendant Below, Respondent

On Appeal from the Circuit Court of
Monongalia County, West Virginia
The Honorable Perri Jo DeChristopher
(Civil Action No. 22-C-124)

BRIEF IN SUPPORT OF PETITION FOR APPEAL

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**TO: THE HONORABLE JUSTICES OF THE INTERMEDIATE COURT OF
APPEALS OF WEST VIRGINIA**

ASSIGNMENTS OF ERROR

1. The trial court committed reversible error in failing to find that Petitioner, Bradley A. Reed, was entitled to the benefit of the “grandfather clause”.
2. The trial court committed reversible error in granting summary judgment in favor of Respondent.

STATEMENT OF THE CASE

This case involves an attorney malpractice action filed by Petitioner against Respondent on May 23, 2022, based on his failure to assert the “grandfather clause” as a defense to a *Notice of Violation* issued by the Town of Beverly on April 12, 2018. *See, Appendix p. 0004, 0257 (Conclusion No. 5)*. Petitioner maintains that the trial court erred when it concluded that he was not entitled to the benefit of a “grandfather clause” regarding the uses he lawfully made of his property pursuant the Town of Beverly’s 1988 *Litter Ordinance* that was in effect when he purchased his property in 2003.

Petitioner purchased a service station and garage located in the Town of Beverly, West Virginia, in 2003. *See, Appendix p. 0253 (Finding No. 2)*. After purchasing the garage, Plaintiff regularly kept and stored motor vehicles on his lot that were inoperable and unlicensed. *See, Appendix 0258 (Finding No. 9)*. The Town of Beverly felt that Plaintiff’s property was an “eyesore” and tried to coerce him to remove the unlicensed and inoperable vehicles from his lot to make it more in line with the aesthetics that the Town of Beverly promotes. *See, Appendix p. 0138*. Respondent went so far as to testify that the Town of Beverly was targeting Petitioner because his property was an eyesore. *See, Appendix p. 0170*.

Petitioner was never found to be in violation of any Ordinance adopted by the Town of

Beverly from the time he purchased the property until receiving a *Notice of Violation* on or about April 12, 2018, which cited him for violating the 2015 *International Property Maintenance Code* (hereafter “*IPMC*”) as adopted by the Town of Beverly on November 13, 2017. *See, Appendix p. 0149*). Respondent has admitted that he was not aware of Petitioner ever being found in violation of an Ordinance of the Town of Beverly. *See, Appendix p. 0175*. Respondent admitted that on January 7, 2019, Petitioner’s expert witness in the underlying matter advised him that the *IPMC* violation did not apply to Mr. Reed as he was “grandfathered in”. *See, Appendix p. 0170*.

The *Notice of Violation* cited Petitioner with six violations, but all were dismissed except for the alleged violation of §302.8 of the *IPMC* which provides that “no inoperative or unlicensed motor vehicle shall be parked, kept or stored on any premises, and no vehicle shall at any time be in a state of major disassembly, disrepair, or in the process of being stripped or dismantled.” *See, Appendix p. 0087*. Petitioner appealed the *Notice of Violation* to the Circuit Court of Randolph County. *See, Appendix p. 0254*.

On February 25, 2020, Respondent filed *Plaintiff’s Response to Defendant’s Motion for Partial Summary Judgment* in the underlying case and did not raise the “grandfather clause” as a defense to the Town of Beverly’s alleged violations of the *IPMC*. *See, Appendix p. 0172, 0255*. In fact, during his deposition, Respondent admitted that he did not raise “grandfathering” or the “grandfather clause” as a defense of behalf of Petitioner. *See, Appendix p. 0172, 0255*.

Petitioner has alleged that Respondent breached the duty of care owed to him by failing to raise the issue of “grandfathering” or the “grandfather clause” as a defense to the Town of Beverly’s *Notice of Violation*. *See, Appendix p. 0253*. Respondent filed his motion for summary judgment and memorandum of law in support thereof on April 23, 2024. *See, Appendix p. 0002*,

at line lines 32, 33. Petitioner filed a motion to strike Respondent's untimely filed motion for summary judgment on May 2, 2024. *See, Appendix p. 0002 at line 46.* The parties appeared for the final pre-trial conference on May 6, 2024. *See, Appendix p. 0002 at line 48.* The Court heard brief arguments at this hearing; continued the same to August 12, 2024; permitted Petitioner until June 5, 2024, to file a further response to Respondent's motion for summary judgment; and, permitted Respondent until July 8, 2024, to file a reply, if Petitioner filed an additional response. *See, Appendix p. 0154.* Petitioner filed his response on June 5, 2024. *See, Appendix p. 0002 at line 50, 0158.* Respondent, thereafter, filed his reply to Petitioner's response and a response to Petitioner's cross-motion for summary judgment. *See, Appendix p. 0003 at line 52, 0177.*

A final pre-trial conference was held on August 12, 2024. On October 18, 2024, the trial court entered an *Order Granting Defendant's Motion for Summary Judgment on the Issue of the Application of the "Grandfather Clause."* *See, Appendix p. 0253.* The order further granted Respondent's motion for summary judgment as to the legal malpractice claim based on the conclusion that Petitioner was not entitled to the benefit of a "grandfather clause." Petitioner has timely appealed the trial court's order granting Respondent's motion for summary judgment.

SUMMARY OF ARGUMENT

The trial court committed reversible error in concluding that Petitioner was not entitled to the protection of any "grandfather clause" in defense of the *Notice of Violation* issued to him on April 12, 2018; and, 2) granting summary judgment in favor of Respondent based on its erroneous conclusion that Petitioner was not entitled to the benefit of the a "grandfather clause."

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument pursuant to Rule 19 of the Rules of Appellate Procedure is appropriate as this appeal involves assignments of error in the application of settled law.

STANDARD OF REVIEW

Petitioner appeals from an order granting Respondent's motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. Appellate review of a circuit court's order granting a motion for summary judgment is *de novo*. Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting its *de novo* review, this Court is obligated to apply the same standard for granting summary judgment that was applied by the trial court, namely, that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

Rule 56 of the *West Virginia Rules of Civil Procedure* provides that a party is entitled to summary judgment if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Ibid. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl Pt. 4, *Painter, supra*. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 6, *Hatton v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964); *quoting, Aetna, supra*, 148 W. Va. 160. "The province of

the jury as the trier of fact is fundamental in our system of jurisprudence. R. C. P. 56, relating to summary judgment, does not create a right on the part of the court to invade the province of the jury, but, on the contrary, the function of the jury as the trier of fact remains unimpaired by that rule.” *Hatten, supra*, 148 W. Va. at 391. “Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.” *Id* at Syl. Pt. 5.

ARGUMENT

I. The trial court committed reversible error when it concluded that Petitioner was not entitled to the benefit of the “grandfather clause”.

The trial court committed reversible error when it concluded that Appellant was not entitled to the benefit of a “grandfather clause” provided by the Town of Beverly’s in its *Ordinance*, *See, Appendix, p. 0259 (Conclusion No. 12)*, or at common law as provided in *McFillan v. Berkeley County Planning Comm’n*, 190 W. Va. 458, 438 S.E.2d 801 (1993). In its October 8, 2024, order, the court properly set forth the relevant language regarding the “grandfather clause” provided in the Town of Beverly’s 2017 *Ordinance* which adopted the *International Property Maintenance Code*. *See, Appendix p. 0253 (Finding No. 5)*. The trial court recognized that the Town of Beverly’s 2017 *Ordinance* adopting the *IPMC* provided as follows:

(d) Nothing in this legislation or in the International Property Maintenance Code 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 altered by this legislation** (Emphasis added).

See, Appendix p.0253 (Finding No. 5). After acknowledging the existence of the “grandfather

clause”, the trial court concluded that it did not apply to Petitioner as he was in violation of the IPMC prior to the adoption of the Town of Beverly’s *Ordinance* adopting the IPMC. *See, Appendix 0259 (Conclusion Nos. 10, 12).*

In reaching its conclusion, the trial court failed to acknowledge or understand that when Appellant purchased his business property in 2003, the property was subject to, and his rights derived from, the Town of Beverly’s *Litter Ordinance* that became effective in January 1988. *See, Appendix p. 0103.* The 1988 *Litter Ordinance* provided the following provision:

Section 12a. Exterior storage of nonoperating vehicles prohibited. No person in charge of or in control of premises, whether as owner, lessee, tenant, occupant or otherwise shall allow any partially dismantled, wrecked, junked, discarded or otherwise nonoperating motor vehicle to remain on such property longer than ten days; and no person shall leave any such vehicle on any property within the town for a longer time than ten days; except that this section shall not apply with regard to any vehicle in an enclosed building or so located upon the premises as not to be readily visible from any public place or from any surrounding private property. **This ordinance shall further not apply with regard to any vehicle on the premises of a business enterprise operated in a lawful place, other than in a residential district, and operated in a lawful manner, when the keeping or maintenance of such vehicle is necessary to the operation of such business enterprise;** or with regard to a vehicle in an appropriate storage place or depository maintained in a lawful place and manner by the town or any other public agency or entity. *See, Appendix at p. 0103 (emphasis added).*

Regarding the “grandfather clause” included in the Town of Beverly’s 2017 ordinance, the trial court relied solely on the Town of Beverly’s 2007 *Litter and Property Maintenance Ordinance* in concluding that Petitioner was not entitled to the benefit of the same. *See, Appendix p. 0116, 0253 – 0260.* Specifically, the trial court concluded that Petitioner was found in violation of the 2007 ordinance and, therefore, was not entitled to the benefit of the “grandfather clause” provided by the Town of Beverly’s 2017 ordinance. *See, Appendix p. 0253-0260 (Conclusions No. 6 – 12).* Petitioner maintains that the 2007 ordinance is irrelevant to the “grandfather” issue; that his “grandfather” rights were acquired and established by the Town of

Beverly's 1988 ordinance; and, it that the trial court should have evaluated the whether Petitioner was in compliance with the 1988 ordinance, not the 2007 ordinance.

Relevant to the trial court's inquiry is that fact that the Town of Beverly's 2007 ordinance did not include any language suggesting that the 1988 ordinance was being repealed, replaced, modified or succeeded. Consequently, the 1988 ordinance was still in effect when the Town of Beverly included the "grandfather clause" in the 2017 *Ordinance* adopting the *International Property Maintenance Code*. See, Syl. Pt. 3, *Bittinger v. Corporation of Bolivar*, 183 W. Va. 310, 395 S.E.2d 554 (1990).

Finally, the language utilized by the Town of Beverly in its 2017 ordinance is clear and unambiguous in providing that "[n]othing in this legislation or in the *IPMC* shall be construed to affect . . . any rights acquired or existing, under any act or ordinance hereby repealed of this law" See, *Appendix*, p. 0072. As such, the language is not subject to interpretation and must be applied as written.

"The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. Pt. 8, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953). "A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (quoting *Hereford v. Meek*, 132 W.Va. 373, 386, 52 S.E.2d 740, 747 (1949)). "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Division v. Public Service Commission*, 182 W.Va. 152, 386 S.E.2d 650 (1989).

Petitioner maintains that the “grandfather clause” provided in the Town of Beverly’s 2017 ordinance is clear and unambiguous and must be applied and not interpreted or construed. Petitioner maintains and believes that his “grandfather” rights were established by the Town of Beverly’s 1988 *Litter Ordinance* and that said ordinance was in effect until it was repealed by the Town of Beverly’s 2017 ordinance, at which time he was entitled to all rights he had acquired pursuant to the “grandfather clause.”

In the event that this Honorable Court conclude that the Town of Beverly’s 2007 ordinance did legally replace the 1988 ordinance, it would still be ineffective to deny Petitioner the lawful rights he acquired by virtue of the 1988 ordinance pursuant to *McFillan v. Berkeley County Planning Comm’n*, 190 W. Va. 458, 438 S.E.2d 801 (1993). Petitioner was, and is, lawfully permitted to continue using his property consistent with the provisions of the 1988 ordinance. For the aforesaid reasons, Petitioner maintains that he was entitled to the benefit of the “grandfather clause” provided in the Town of Beverly’s 2017 ordinance and that the trial court erred in concluding that Petitioner was not entitled to the benefit of the “grandfather clause.”

This conclusion is entirely consistent with *McFillan v. Berkeley County Planning Comm’n*, 190 W. Va. 458, 438 S.E.2d 801 (1993). In *McFillan*, the West Virginia Supreme Court of Appeals addressed non-conforming uses and “grandfather” exceptions. The *McFillan* Court acknowledged that “[w]e have 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. Such a nonconforming use generally may be continued until it is abandoned.” *McFillan, supra*, 190 W. Va. 458, 463. The Court acknowledged that non-conforming use is most common in the context of zoning ordinances, but provided “we believe the broad scope of land-use

regulations . . . allows a non-conforming use exemption . . . to apply to any regulation that restricts the use of land.” *Id.*

As such, even had the Town of Beverly’s 2017 ordinance not provided a “grandfather clause”, Petitioner maintains that he was already grandfathered into the lawful uses he was making of his property when he acquired the same in 2003, namely, the lawful right to keep and maintain “junked”, “inoperable” and “unlicensed” vehicles on his business property that were integral to the operation of his business based on the Town of Beverly’s 1988 *Litter Ordinance*. Accordingly, pursuant to *McFillan*, Petitioner was “grandfathered” into the Town of Beverly’s 1988 land use ordinance which permits him the lawful right to keep and maintain “junked”, “inoperable” and “unlicensed” vehicles on his on his business property that are integral to the operation of his business.

For all of the aforesaid reasons, the trial court erred in finding that Petitioner was not entitled to the benefit of either the “grandfather clause” set forth in the 2017 ordinance adopting the IPMC or at common law pursuant to *McFillan*. Accordingly, the decision of the trial court must be reversed and case remanded to the trial court with instructions to enter an order finding Petitioner was “grandfathered” into those lawful uses he made of his property based on the Town of Beverly’s 1988 *Litter Ordinance* and directing the trial court to engage in further proceedings consistent with the ruling of this Honorable Court.

II. The trial court committed reversible error in granting summary judgment in favor of Respondent.

The trial court erred when it concluded that Petitioner was not entitled to the benefit of the “grandfather clause” as discussed and described above in granting summary judgment in favor of Respondent. Specifically, the trial court erred in concluding that the “grandfather clause” provided in the Town of Beverly’s 2017 ordinance was not a valid legal defense to the

Town of Beverly's April 12, 2018, *Notice of Violation* and, therefore, Respondent had no duty to raise the defense in opposition to Town of Beverly's *Motion for Partial Summary Judgment*. *See, Appendix 0259 (Conclusion No. 12)*. The trial court's erroneous conclusion that Petitioner was not entitled to the benefit of a "grandfather clause" demands that this matter be reversed and remanded with instruction provided to the trial court to grant Petitioner's cross-motion for summary judgment or for further proceedings consistent with the ruling that the Petitioner is entitled to the benefit of the "grandfather clause."

In addition to the reversible error discussed and described herein above, the trial court also committed reversible error in concluding that there were no genuine and material factual issues in dispute and that Respondent was entitled to judgment as a matter of law. *See, Appendix 0259 (Conclusion No. 13)*. Among the material factual issues that remain in dispute are the following: 1) that Petitioner was found to be in violation of the Town of Beverly's 2007 ordinance; 2) whether the Town of Beverly issued Petitioner a business license in 2011; 3) whether Petitioner was ever denied a business license by the Town of Beverly; 4) whether Petitioner was ever found to be in violation of the Town of Beverly's 2007 ordinance or its 1988 ordinance.

There was no evidence presented that established that Petitioner ever violated either the 2007 ordinance or the 1988 ordinance. The only evidence that the trial court utilized in making this finding was a 2011 letter delaying Petitioner's business license two letters from the Town of Beverly's counsel in late 2007 and early 2008, each of which alleged violations of the 2007 ordinance. *See, Appendix 0101-0102, 0112-0115*. No evidence was produced to establish that Petitioner in fact violated the 2007 ordinance as alleged. The trial court basically reasoned that Petitioner was guilty of the violation based on the allegation alone. *See, Appendix 0311-0312*.

Regarding the business license discussed above, there is also genuine and material factual issue over whether Petitioner was ever denied a business license, let alone based on an alleged violation of the Town of Beverly's 2007 ordinance or its 1988 ordinance. Petitioner maintains that there was never an occasion in which he operated without a business license after his purchase of the property in 2003.

There is also a genuine and material factual issue as to whether he was ever found to have violated the Town of Beverly's 2007 or 1988 ordinances. Relevant to this inquiry, Respondent has testified that to his knowledge Petitioner was never found to have violated any ordinance enacted by the Town of Beverly. *See, Appendix 0175*. Finally, Petitioner was cited by the Town of Beverly for the same violation in 2022, went to Magistrate Court, took the position that he was "grandfathered" in; the case was dismissed; and the Town of Beverly never appealed the dismissal. *See, Appendix 0280-0281*.

While Petitioner has acknowledged and addressed the aforesaid factual issues, it is his contention that the 2007 ordinance is not relevant to the "grandfather" inquiry for the reasons previously stated. However, these genuine and material factual issues are being addressed as it was improper for the trial court put itself in the position of the jury as trier of fact. *See, Hatten, supra*.

CONCLUSION

Based on the foregoing, Petitioner prays that this Honorable Court issue an opinion reversing the order of the trial court granting summary judgment against Petitioner as to whether he was entitled to the benefit of a "grandfather" clause and, further, granting summary judgment in favor of Respondent as to the legal malpractice claim based on the trial court's conclusion regarding the "grandfather" clause and because there were genuine

issues of material fact presented that were for the jury, and not the trial court, to determine. Petitioner further requests that this matter be remanded to the trial court with instructions to proceed consistent with this Honorable Court's ruling.

Respectfully submitted this 21st day of January, 2025.

/s/ Michael D. Crim

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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of January, 2025, the undersigned counsel filed and served the foregoing ***Brief in Support of Petition for Appeal*** upon the following via File & Serve Express, to the following:

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