

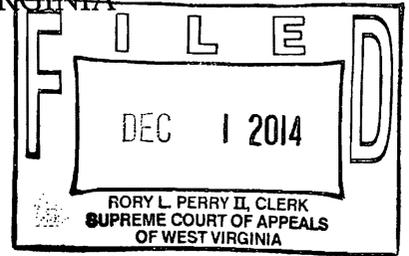
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JOHN TERRY MALONE,**  
**Plaintiff Below, Petitioner,**

vs.

No. 14-0849



**POTOMAC HIGHLANDS AIRPORT**  
**AUTHORITY, a public corporation,**  
**Defendant Below, Respondent.**

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FROM THE CIRCUIT COURT OF MINERAL COUNTY

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**APPEAL BRIEF OF PETITIONER JOHN TERRY MALONE**

JOHN TERRY MALONE  
Petitioner

By Counsel

A handwritten signature in black ink, appearing to read "H. A. Smith, III", written over a horizontal line.

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Table of Authorities .....	ii
Assignments of Error .....	1
Statement of the Case .....	2
Summary of Argument .....	7
Statement Regarding Oral Argument and Decision .....	8
Argument .....	9
I. The Circuit Court Erred in Granting Respondent’s Rule 12(b)(6) Motion and in Denying Petitioner’s Motion for Reconsideration of that Ruling .....	9
II. The Circuit Court Erred in Denying Petitioner’s Motion for Reconsideration Based upon Rule 12(b)(6) or Rule 59(a) .....	13
Conclusion .....	15
Certificate of Service .....	16

**TABLE OF AUTHORITIES**

**CASES**

	<b><u>Page</u></b>
<i>Adams v. Ireland</i> , 204 W.Va. 1, 528 S.E. 2d 197 (1999) .....	11
<i>Anderson &amp; Anderson Contractors, Inc. V. Latimer</i> , 162 W.Va. 803, 257 S.E.2d 878 (1979) .....	11
<i>Forshey v. Jackson</i> , 222 W.Va. 743, 671 S.E. 2d 748 (2008) .....	11
<i>Jones v. West Virginia State Board of Education, et al.</i> , 218 W.Va. 52, 522 S.E.2d 289 (2005) .....	11
<i>Mandolidis v. Elkins Industries, Inc.</i> , 161 W.Va. 695, 246 S.E.2d 907 (1978) .....	11
<i>West Virginia Citizens Action Group, Inc., et al., v. Daley, et al.</i> , 174 W.Va. 299, 324 S.E.2d 173 (1984) .....	12
<i>Woodruff, et al., v. Board of Trustees of Cabell Huntington Hospital, et al.</i> , 173 W.Va. 604, 319 S.E.2d 372 (1984) .....	12

**STATUTES**

**Federal**

Public Law 105-348-Nov. 2, 1998 (Potomac Highlands Airport Authority Compact), 112 Stat. 3212 .....	<i>Passim</i>
--	---------------

**State**

§8-29-8, <i>West Virginia Code</i> .....	12
§8-29-20, <i>West Virginia Code</i> .....	12

**RULES**

Rule 12(b)(6), *West Virginia Rules of Civil Procedure* ..... *Passim*

Rule 59(a), *West Virginia Rules of Civil Procedure* ..... *Passim*

## ASSIGNMENTS OF ERROR

I. Petitioner contends that the Circuit Court of Mineral County erred in granting Respondent's Rule 12(b)(6)<sup>1</sup> motion to dismiss Petitioner's Complaint, and in denying Petitioner's motion for reconsideration of that ruling, in that the Circuit Court accepted Respondent's contention that it, as a public corporation supported by public funds, can arbitrarily bar Petitioner, or any person, from airport premises without providing a reason and without being accountable for its decision.

II. Petitioner contends that the Circuit Court of Mineral County erred in denying Petitioner's motion for reconsideration and rehearing, in that the Circuit Court (1) failed to comply with the mandate of Rule 12(b)(6) which requires, under the facts of this case, that Respondent's motion to dismiss be considered as "one for summary judgment", giving both parties "reasonable opportunity to present all material made pertinent to such motion by Rule 56", and (2) failing to even consider, under Rule 59(a)<sup>2</sup> and the facts of this case, opening the judgment for further proceedings.

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<sup>1</sup> All references to Rule 12(b)(6), *infra*, are to Rule 12(b)(6), *West Virginia Rules of Civil Procedure*

<sup>2</sup> All references to Rule 59(a), *infra*, are to Rule 59(a), *West Virginia Rules of Civil Procedure*

## STATEMENT OF THE CASE

Petitioner filed his Complaint (Joint Appendix [hereafter, “JA”], 2-8) in the Circuit Court of Mineral County), against Potomac Highlands Airport Authority, a public corporation formed pursuant to Public Law 105-348 (112 Stat. 3212),-- “Potomac Highlands Airport Authority Compact” (JA, 19-23); Respondent, supported by public funds, has the authority to operate the Cumberland Municipal Airport (the “Airport”) situate in Mineral County, West Virginia.

Petitioner, a Mineral County resident, is a licensed airplane pilot and a former manager of the Airport and a former board member of Respondent; Petitioner had been informed by correspondence from Respondent’s legal counsel, dated March 28, 2013 (JA, 6), that he was forbidden to enter Airport property, threatening Petitioner with “civil and criminal remedies” if he did so. Respondent’s counsel articulated no viable reason for Petitioner’s banishment, Petitioner being advised only that Respondent “was concerned about complaints . . . from tenants” as well as “interactions” between Respondent’s personnel and Petitioner. Respondent had no legitimate basis in fact for barring Petitioner.

Petitioner’s Complaint alleged that the banishment denied him the ability to earn income as a pilot. Petitioner alleged generally that Respondent’s actions were arbitrary and wrongful as to him as a member of the public. Petitioner sought injunctive relief and damages.

Respondent’s Answer denied that its actions were arbitrary, stating that it had “cause

to bar” Petitioner from the premises (JA, 9-12). Respondent stated only that “(c)omplaints regarding the Plaintiff have been made . . . by employees, tenants and/or other persons.” Importantly, Respondent, in response to Petitioner’s allegation that Respondent cannot arbitrarily bar a person from its premises”, stated that it “is entitled to admit or deny access to any person it determines *for any reason* (emphasis added).” (Paragraph 6 of Respondent’s Answer) (JA, 9). In Paragraph 7 of Respondent’s Answer, Respondent reiterated that it, “as owner of the real property in question, *has the power to bar any and all persons* (emphasis added)” (JA, 10). Respondent’s answer also raised a Rule 12(b)(6) defense, alleging that Petitioner “failed to identify any legal right which he has, or any infringement upon a legal right considered by the Defendant.” Respondent followed with a brief Supplemental Motion to Dismiss for failure to State a Claim (JA, 13-15).

On August 5, 2013, a hearing was held in the Circuit Court of Mineral County. Petitioner presented evidence in support of his request for preliminary injunctive relief. The Court denied a preliminary injunction on the record and by Order entered on September 3, 2013 (JA, 24, 81).

At the August 5, 2013, hearing, the Court also heard arguments of counsel as to Respondent’s Rule 12(b)(6) motion. No testimonial evidence was presented to support Petitioner’s banishment, but Respondent’s counsel summed up Respondents position by stating that “we are empowered like any private corporation that owns property to arbitrarily keep people from the property for any reason the Board feels is appropriate” (JA, 39). The

Circuit Court, based upon Respondent's argument that it had the right to act arbitrarily (and the Court conceding that it "would be nice to know a little bit more of the background here. . . ."), found that Respondent had "the authority in its discretion to . . . ban individuals that they think would be disruptive to their organization . . ." (JA, 81). The Court's decision was memorialized (without any findings) in said Order of September 3, 2013.

Subsequent to the September 3, 2013, Order, Petitioner filed his Motion for Reconsideration and Rehearing (JA, 26-31). Petitioner, in said Motion, did not address the denial of preliminary injunctive relief, concentrating upon the Court's finding that Respondent, as a public corporation, funded by public money, could act arbitrarily in banishing people from its premises. Petitioner argued that Respondent's only contention was that the powers enumerated in Public Law 105-348 could be exercised arbitrarily as to Petitioner. Petitioner noted that the Circuit Court apparently adopted Respondent's theory that Public Law 105-348 permitted Respondent to act in an arbitrary fashion, without accountability or consequence. Petitioner argued that Public Law 105-348 contained nothing which granted, or implied, unbridled or unchecked power to make arbitrary and unreviewable decisions.

Petitioner, in his post-hearing motion, specifically addressed the negative and devastating effects of a lifelong banishment on his flying employment options, as well as upon his ability to participate as a member of the local flying community, and the forfeiture

of his right to even go to dinner at the Airport restaurant, a public accommodation (JA, 28-29).

Petitioner, in his post-hearing motion, urged the Court to reconsider its September 3, 2013, Order. Petitioner noted that the record had not been fully developed, as the Court had conceded, the record as to the Rule 12(b)(6) motion being a perfunctory pleading and an argument that Respondent could, essentially, do as it pleased, without any consequences (JA, 29). Petitioner argued that, pursuant to Rule 59(a), the Court had the right to take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment” (JA, 29). Petitioner argued further that, since the Court considered, at the hearing, matters outside the Rule 12(b)(6) pleadings (i.e., a copy of Public Law 105-348 [introduced and discussed at the hearing], as well as Petitioner’s testimony), Respondent’s Rule 12(b)(6) motion should be “treated as one for summary judgment, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56,” Rule 12(b)(6), *West Virginia Rules of Civil Procedure* (JA, 30).

The Circuit Court, by Order Denying Motion, entered on July 28, 2014, denied Petitioner’s post-hearing motion for reconsideration and rehearing (JA, 36). The Circuit Court, as noted in said Order, did not know of Petitioner’s post-trial motion until July 28, 2014, the date on which the motion was summarily denied, the Court stating only that “Plaintiff has provided no new information and no reason to consider this motion.” The

Circuit Court apparently gave no consideration whatsoever to the post-hearing issues raised by Petitioner.

## **SUMMARY OF ARGUMENT**

I. Respondent, as a statutory public corporation, cannot act in an arbitrary manner in banishing people from its premises and facility. As a statutory public corporation, Respondent cannot, through its rules, regulations or decisions, unreasonably deny public rights. The Circuit Court, in concluding that a public corporation can act arbitrarily, committed error when it granted Respondent's Rule 12(b)(6) motion and when it denied Petitioner's motion for reconsideration.

II. Under the facts of this case, the Circuit Court should have either reconsidered (and reversed) its dismissal order, or it should have reopened the case for further consideration and development pursuant to either the permissive language of Rule 59(a) or the mandatory language of Rule 12(b)(6). The Court erred in having done neither.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner contends that oral argument is necessary and desirable. The parties have not waived oral argument. The appeal is not frivolous. The dispositive issues have not been authoritatively decided. The decisional process, Petitioner believes, would be significantly aided by oral argument, considering the novelty of the issues, the limited amount of controlling law, and the importance of this case to Petitioner.

Petitioner believes that Rule 19 oral argument is appropriate inasmuch as it involves alleged errors in the application of the law and procedural rules, the abuse of discretion by the Circuit Court, and the consideration of a fairly narrow issue of law.

Petitioner believes that this appeal is appropriate for a memorandum decision.

## ARGUMENT

### I.

#### The Circuit Court Erred in Granting Respondent's Rule 12(b)(6) Motion and in Denying Petitioner's Motion for Reconsideration of that Ruling.

Petitioner's motion for rehearing provided, at length, sound reasons for reconsideration of the Court's dismissal for failure to state a claim.

For starters, there is no disagreement between the parties that Respondent is a public corporation, funded by public money. Even though Respondent argues that it can behave as if it were a private corporation, it is not a private corporation (JA, 76).

Petitioner, in his motion for reconsideration and rehearing, made a clear case justifying reversal of the Court's dismissal or, at least, reopening the case for further development.

The motion for reconsideration emphasized the following points: (1) that Respondent's Rule 12(b)(6) motion consisted, essentially, of one sentence, supported by the argument that Respondent could do as it pleased, arbitrarily and without consequence, and by the contention that the powers enumerated in Public Law 105-348 permitted the arbitrary decision to bar Petitioner from Airport premises; (2) that a public corporation cannot act unreasonably and it must be accountable as a matter of public trust; (3) that Respondent's offer to permit Airport access to Petitioner after written notice, "for a specific date or time" is specious and meaningless as a practical matter; (4) that the record below has not been sufficiently developed; (5) that Rule 59(a) permits the Court to reopen the case; and (6) that

Rule 12(b)(6) mandates treating Respondent's motion to dismiss as one for summary judgment inasmuch as matters outside the pleadings (i.e., a copy of Public Law 105-348, as well as Petitioner's testimony) were considered at the hearing of August 5, 2013 (JA, 26-31).

The Circuit Court erred in granting Respondent's Rule 12(b)(6), and denying Petitioner's motion for reconsideration, because Petitioner clearly stated a cause of action (JA, 2):

1. Petitioner alleged that Respondent is a "public corporation formed pursuant to Public Law 105-348 (12 Stat. 3212)"; Respondent admitted the allegation (JA, 2).

2. Petitioner alleged that Respondent, without cause, barred Petitioner from entering the airport grounds or terminal owned and operated by Respondent (JA, 2).

3. Petitioner alleged that Respondent, as a public corporation, does not have the authority to arbitrarily bar any person from Respondent's property (JA, 3).

4. Petitioner alleged that the arbitrary actions of Respondent denied him, a professional airplane pilot, the right to earn a living as a pilot (JA, 3).

Petitioner believes that a cause of action, sufficient to withstand a Rule 12(b)(6) challenge, was alleged. Petitioner contends that a legitimate issue was raised - - whether a federally-chartered public corporation can act in an arbitrary manner, denying access rights to the public (and denying Petitioner the ability to practice his profession) without being answerable to anyone (JA, 3).

The law is clear as to the standards applicable to Rule 12(b)(6) motions. A complaint

must be construed in the light most favorable to the plaintiff and the allegations are to be taken as true. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). A circuit court should grant a Rule 12(b)(6) motion only when it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations; a trial court should not dismiss unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Adams v. Ireland*, 201 W.Va. 1, 528 S.E.2d 197 (1999). The cases are legion to the effect that Rule 12(b)(6) motions should rarely be granted, *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978), the law strongly favoring a liberal approach which would permit development of a case unless the allegations are so meritless that a plaintiff could not possibly prevail.

It is clear that the Circuit Court acted erroneously in summarily granting Respondent's Rule 12(b)(6) motion and in denying reconsideration, and it is also clear that a public corporation cannot act unreasonably or arbitrarily. A public corporation is not permitted to limit a person's rights without just cause. Although there is an apparent dearth of precedent directly on point, West Virginia law clearly imposes restraints on the powers of a public corporation. Citing *Anderson & Anderson Contractors, Inc., v. Latimer*, 162 W.Va. 803, S.E.2d 878 (1979), this Court stated, in *Jones v. West Virginia State Board of Education, et al.*, 218 W.Va. 52, 622 S.E.2d 289 (2005), that "(a)lthough an agency may have power to promulgate rules and regulations, the rules and regulations must be reasonable and conform to the laws enacted by the legislature." In *West Virginia Citizens Action Group, et al., v.*

*Daley*, 174 W.Va. 299, 324 S.E.2d 713 (1984), this Court held, in a case involving municipal restraints on door-to-door canvassing, that a governmental body may not restrict freedom of speech except to the extent essential to serve a substantial governmental interest. In *Woodruff, et al., v. Board of Trustees of Cabell Huntington Hospital, et al.*, 173 W.Va. 604, 319 S.E.2d 372 (1984), this Court held that the employees of a public corporation have rights of free speech and assembly, even in the face of a collective bargaining agreement that would appear to restrict those rights. Applying the above to the instant case, it appears clear that a public corporation (the Respondent) cannot restrict Petitioner's freedom to go where everyone else in Mineral County can go, unless such restriction serves a substantial governmental interest; no such substantial governmental interest has been shown in this case, and, obviously, such a restriction cannot be arbitrarily invoked.

Respondent relies upon the language of the Potomac Highlands Airport Authority Compact (JA, 19-23) to support its banishment of Petitioner. Specifically, Respondent relies upon the general provisions of Section 6 of the Compact ("Powers") (JA, 76-77). Those powers (which include the right to make rules "not inconsistent with law" and to take steps necessary to provide for police protection) cannot be construed as giving Respondent the unbridled authority which it claims, including its claimed right to act in an arbitrary and unreviewable manner, nor can such authority be inferred.

The powers granted to regional airport authorities by §8-29-8, *West Virginia Code*, are no more expansive than those granted by the Compact. Additionally, §8-29-20, *West*

*Virginia Code*, provides that powers granted to regional airport authorities are those which are “reasonably required to give effect to the purposes” of the article governing such authorities.

Clearly, the Circuit Court was wrong, procedurally and substantively, in granting Respondent’s Rule 12(b)(6) motion and in denying Petitioner’s motion for reconsideration of that motion.

## II.

### The Circuit Court Erred in Denying Petitioner’s Motion for Reconsideration Based upon Rule 12(b)(6) or Rule 59(a).

Petitioner’s motion for reconsideration, in addition to arguing that Petitioner did, in fact, state a claim upon which relief can be granted, contended that “the record herein has not been developed sufficiently to permit a comprehensive review of the law and the facts”<sup>3</sup> (JA, 29). Petitioner directed the court’s attention to Rule 59(a) and to Rule 12(b)(6).

Rule 59(a) provides that “the court may open the judgment . . ., take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.” Under the facts of this case, with no development whatsoever, the Court should have opened the record. Petitioner, in addition to noting the arbitrariness of Respondent’s banishment decision, made it clear that the consequences of a life-long banishment were devastating for him and that the option that the

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<sup>3</sup> The Circuit Court considered that the record was undeveloped when it stated that “(i)t would be nice to know a little bit more of the background here” (JA, 81).

Respondent may “consider” allowing Petitioner, upon written request, “to be present on a specific date or time”, afforded Petitioner no tangible relief (JA, 28). Under the applicable rule of liberality, re-opening the case was called for, and the Circuit Court erred in refusing the Rule 59(a) request.

While Rule 59(a) is permissive, Rule 12(b)(6) imposes a mandatory obligation upon a court, requiring additional proceedings when matters outside the Rule 12(b)(6) pleading are considered by the court. In such a case (as in the case at bar), a Rule 12(b)(6) motion should be “treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” In the instant case, matters outside the pleading were considered by the Court (i.e., a copy of Public Law 108-348 [the Compact] and Petitioner’s testimony) (JA, 41-71). Having considered this extraneous material at hearing, the complete summary judgment motion procedure should have become available to the parties, including, *inter alia*, full discovery and briefing as to the motion. Petitioner was denied this opportunity by the Court’s denial of Petitioner’s motion for reconsideration. The Circuit Court, having ignored the mandate of Rule 12(b)(6), has erred.

**CONCLUSION**

For the reasons stated herein, and in the record as a whole, Petitioner prays, that this Court: (1) reverse the July 28, 2014, decision of the Circuit Court of Mineral County, which decision denied Petitioner's Motion for Reconsideration and Rehearing, and (2) remand this action to the Circuit Court of Mineral County for further proceedings and development.

JOHN TERRY MALONE,  
Petitioner

By Counsel



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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served a true copy of the *APPEAL BRIEF OF PETITIONER JOHN TERRY MALONE* upon all other parties to this action

by:

\_\_\_\_\_ Hand delivering a copy hereof to the parties listed below:

or by

  X   Depositing a copy hereof via fax and in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated at Elkins, West Virginia, this 26th day of November, 2014.



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