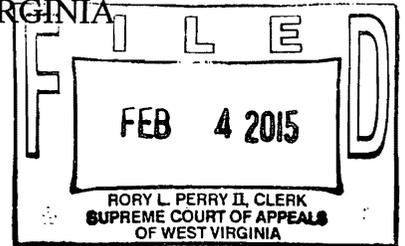


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN TERRY MALONE,
Plaintiff Below, Petitioner,

vs.

No. 14-0849



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

FROM THE CIRCUIT COURT OF MINERAL COUNTY

REPLY 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".

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As noted in his opening brief, 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 *not* appropriate for a memorandum decision; Petitioner, in his opening brief, inadvertently and incorrectly, stated that it *was* 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.

Respondent's Argument (Section "I") is titled "The Circuit Court Did Not Err in Granting the PHAA's Rule 12(b)(6) Motion to Dismiss." Petitioner's contention, however, is broader than that - - Petitioner contends that the Circuit Court erred in granting the Rule 12(b)(6) motion and in denying Petitioner's motion for reconsideration of that denial.

Petitioner contends that his Rule 59(a) motion for reconsideration is inextricably bound to the Circuit Court's granting of the Rule 12(b)(6) motion. The Rule 59(a) motion specifically seeks reconsideration of the Rule 12(b)(6) ruling - - for the reasons set forth in the motion for reconsideration (Joint Appendix [hereafter, "JA"], 26-31) and in Petitioner's opening brief herein. Petitioner's argument, therefore, must perforce include the issues relative to the Circuit Court's Rule 12(b)(6) decision.

Respondent cites *Parkway Fuel Service, Inc., v. Pauley*, 159 W.Va. 216, 220 S.E.2d 439 (1975) in support of its efforts to limit the scope of Petitioner's appeal. *Parkway*, however, is not on point; it merely holds that a losing litigant need not apply for Rule 59 or Rule 60 relief in the circuit court as a condition precedent to the perfection of an appeal of a final judgment.

Respondent contends, in its brief herein, the Petitioner's Rule 59(a) motion "raised no new issues", arguing that the essence of the motion "was rehashing the arguments addressed by the trial court's previous decision." However, the Circuit Court, in granting the Rule 12(b)(6) motion, did not "address" any of Petitioner's arguments. The Circuit Court, in addressing the Rule 12(b)(6)

motion, and after saying that it “would be nice to know . . . more . . . background”, merely commented as follows: “. . . I think the airport authority does have the authority in its discretion to, as far as the management of the airport, to ban individuals that they think would be disruptive to the organization,” (JA, 81).¹ The Circuit Court made that comment without the benefit of any shred of evidence that Petitioner was “disruptive”; Respondent’s counsel argued at the hearing, without evidentiary support, that “there had been complaints by tenants”, “there had been complaints made by other employees of the Board or other employees of the airport to the Board”, concluding that the Respondent “was well within its rights in excluding Mr. Malone from the property. . . .” (JA, 79). Respondent continues to contend, as set forth in its Answer, that it may act arbitrarily - - that it “is entitled to admit or deny access to any person . . . for any reason” and that it “has the power to bar any and all persons” (JA, 9-10).

Respondent has cited, in Section “I” of its Argument that it may arbitrarily bar access to the airport premises, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Loretto*, however, is nowhere near being on point. In *Loretto*, a private property owner (a landlord) claimed to be aggrieved by cable television’s physical occupation of a portion of an apartment building for installation of cable facilities. The Supreme Court found that a “taking” had taken place. The case does not stand for the proposition, as Respondent would imply, that a public corporation, supported by public funds, may exclude the public from its grounds; what it does say is that a public utility (CATV) cannot trample upon the rights of a private entity (including the right to “exclude” the public utility [CATV]) by way of a “taking”, with impunity and without just compensation. The

¹ The Circuit Court’s other on-the-record comments relate specifically to Petitioner’s claim for preliminary injunctive relief and not to the dispositive Rule 12(b)(6) issue (JA, 81).

Loretto language quoted by Respondent is taken wholly out of context; it sounds good, but it has nothing to do with the facts of the instant case.

II.

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

Respondent's Argument (Section II) is titled "The Circuit Court did Not Err in Not Treating the Rule 12(b)(6) Motion as a Motion for Summary Judgment." Petitioner's contention, however, is broader than that - - Petitioner contends that the Circuit Court erred in denying Petitioner's motion for reconsideration based upon Rule 12(b)(6) or Rule 59(a).

Estate of Robinson, ex rel. Robinson v. Randolph County Commission, 209 W.Va. 505, 549 S.E.2d 699 (2001), cited by Respondent, is a case where a Rule 12(b)(6) motion was converted to a Rule 56 proceeding based upon the inclusion of an affidavit. The case does not, however, support the proposition that the "matters outside the pleading" which were considered by the Circuit Court in this case - - a copy of Public Law 108-348 (JA, 19-23) and Petitioner's testimony (JA, 42-71) - - do not amount to matters which would trigger mandatory treatment as a Rule 56 motion, with "reasonable opportunity" for development. Petitioner argues, under the facts of this case, that Respondent's motion should have been treated as one for summary judgment.

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 **REPLY**
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 3rd day of February, 2015.



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