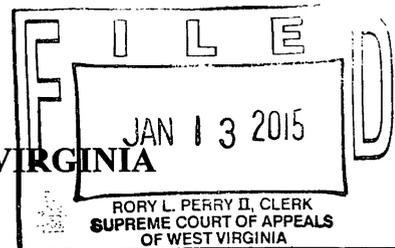


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 14-0849

JOHN TERRY MALONE

Petitioner

Vs.

POTOMAC HIGHLANDS AIRPORT AUTHORITY

Respondent

RESPONDENT'S BRIEF

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SUMMARY OF ARGUMENT

Petitioner Malone has waived his right to directly appeal from the circuit court's granting of Respondent's Motion to Dismiss for Failure to State A Claim under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.¹ Petitioner Malone has appealed only from the denial of his Motion to Reconsider under Rule 59, and as such a deferential "abuse of discretion" standard of review applies.

Under that standard, the circuit court's rejection of Petitioner's reconsideration request was correct. The Petitioner has failed to plead a claim based on any statute, regulation or common law duty. Petitioner failed to raise any issues in his Reconsideration Motion that had not previously been presented. Petitioner was not entitled to reconsideration by the Circuit Court.

Petitioner was also not entitled to have the Rule 12(b)(6) Motion treated as a Rule 56 Motion for Summary Judgment. The trial court did not consider any factual matters outside of the record, and was correct to rule on the motion based on the pleadings and arguments of counsel.

¹ All rule references hereafter are to the W.Va. Rules of Civil Procedure.

**STATEMENT REGARDING ORAL ARGUMENT
AND DECISION**

Respondent believes oral argument under Rule 19 would be productive and desirable in addressing the issues raised on appeal.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING THE PHAA'S RULE 12(b)(6) MOTION TO DISMISS

Petitioner Malone, in his first assignment of error, argues that the Circuit Court erred in granting the Rule 12(b)(6) Motion to Dismiss of the Respondent Potomac Highlands Airport Authority (PHAA). There are a number of problems with Malone's position. Procedurally, Malone is barred from seeking direct appellate review of the initial dismissal of his claim, and has only sought timely review of the denial of reconsideration – a review subject to the deferential “abuse of discretion” standard. As to the underlying claim, Malone can point to no prior precedent to support his bald assertion that the PHAA cannot restrict his access to property it owns and manahes.

A. Petitioner is Barred from Attacking the September 3, 2013 Order Granting Dismissal.

Malone did *not* appeal from the trial court's September 3, 2013 Order granting, *inter alia*, PHAA's Motion to Dismiss. Malone appealed from the trial court's July 28, 2014 denial of his Motion to Reconsider under Rule 59. As this Court's own Scheduling Order provides: “[a]ny issues raised on appeal from the September 3, 2013 order are untimely.”¹

Malone cites several cases involving the standards to be applied in deciding Rule 12(b)(6) motions. However, he has waived such argument. As this Court has made

¹ Scheduling Order of the Supreme Court of Appeals, entered September 3, 2014, at 1 (emphasis added).

clear, the remedies of appellate review and of Rule 59 reconsideration are independent, and can proceed concurrently. See Parkway Fuel Service, Inc., v. Pauley, 159 W.Va. 216, 220 S.E.2d 439 (1975). Malone chose to seek reconsideration on the September 3, 2013 dismissal, rather than file an appeal at that time. He is therefore barred from seeking review of the September 3, 2013 Order and instead can only seek review of the July 28, 2014 denial of reconsideration.

B. The Standard of Review to Be Applied By This Court is “Abuse of Discretion.”

When a decision on a Rule 59(a) Motion to Reconsider is challenged on appeal, the standard to be applied is “abuse of discretion.” In Re State Pub. Bldg. Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994); Morrison v. Sharma, 200 W.Va. 1932, 488 S.E.2d 467 (1997). Moreover, reconsideration should “rarely” be granted. In Re State Pub. Bldg Asbestos Litigation, 454 S.E.2d at 418. The decision of the trial court denying a Rule 59 motion is “entitled to great respect and weight...” Sanders v. Georgia Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976).

C. The Circuit Court Was Correct To Deny Reconsideration.

The Motion for Reconsideration filed by Malone raised no new issues. He suggests that he raised several new points which were never addressed by the Court, but

the essence of his Motion was rehashing the arguments addressed by the trial court's previous decision.

Malone argued again that the PHAA could not "arbitrarily" bar him, but the trial court had specifically found that "the airport authority does have the authority in its discretion to...to ban individuals that they think would be disruptive."² Malone argued again that the PHAA was harming his business, but the Circuit Court had found that "Mr. Malone had not used the airport in the months before the letter [barring him] came..."³

Malone raised no new issues in his Motion for Reconsideration which had not already been addressed at the hearing and the September 3 Order, and the circuit court was correct to reject his request.

D. The PHAA has the Power and Authority to Control Access to its Property.

Malone claims that the PHAA cannot exclude him from its property; however, he cites to no cases involving public corporations excluding certain persons from their premises. Instead, he cites inapplicable cases involving government agencies which acted against fundamental constitutional rights.

Malone first cites Jones v. West Virginia State Board of Education, et al., 218 W.Va. 52, 622 S.E.2d 289 (2005), for the proposition that agency rules must be "reasonable and conform to the laws enacted by the legislature." However, Jones was a challenge to government agency regulations regarding the sports activities of home-

² Joint Appendix at 81.

³ Id.

schooled children. This Court upheld the regulations of the Board of Education, and found that they conformed to applicable statutes and did not violate the Equal Protection rights of the home-schooled children under the rational basis standard. The Court also concluded the regulations were not “arbitrary or capricious” as they fell within the powers of the issuing agency. Malone did not raise an Equal Protection Challenge in the trial court; nor did he raise *any* constitutional issue below. As such, his reliance on Jones is misplaced.

Malone also cites West Virginia Citizen Action Group, et al., v. Daley, 174 W.Va. 299, 324 S.E.2d 713 (1984) and Woodruff, et al., v. Board of Trustees of Cabell Huntington Hospital, et al., 173 W.Va. 604, 319 S.E.2d 372 (1984). These are free speech cases where municipalities or public corporations sought to limit the free speech rights of citizens. This Court held, in both cases, that “substantial governmental interests” must support any restrictions on fundamental constitutional rights.

Again, Malone did not raise any claimed restriction on any constitutional rights. Here, for the first time, he attempts to make a claim of “freedom to go where everyone else in Mineral County can go,” but does not elucidate his claim, point to where he raised it before the trial court, or indicate where in the Constitution of West Virginia of the United States it flows from.⁴ As the PHAA has said from the beginning,

“[Malone] points to no statutory enactment requiring that the Airport be open to any and all persons. [Malone] cites no

⁴ Malone makes a passing reference to W.Va. Ann. Code, sec. 8-29-8, which governs regional airports in West Virginia. The PHAA, however, is a bi-state compact airport under federal creation and as such is not governed by said statute. See, e.g., HIP, Inc., v. The Port Authority of New York and New Jersey, 693 F.3rd 345 (3rd Cir.2012)(NJ state disability accommodations laws did not apply to Port Authority as bi-state compact entities are ‘not subject to the unilateral control of any one of the States’).

legal duty for the [PHAA] to admit any persons at all.”⁵

The PHAA owns the Greater Cumberland Regional Airport, and “[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.” Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982). So long as it is exercised in conformity with existing applicable law, the PHAA can exercise this power.

There are, of course, limitations on the PHAA’s power to exclude persons. For example, the PHAA could not exclude Malone because of his national origin. The PHAA could not exclude Malone due to his race or religion. The PHAA could not exclude Malone because he was a registered Republican or Democrat, nor because he was disabled. The PHAA could not exclude Malone because he had taken part in Nazi demonstrations, nor because of his gender.⁶ *But Malone has not claimed any of these reasons.* Absent invidious discrimination, Malone has not demonstrated any limits on the PHAA’s ownership rights.⁷

⁵ Answer of PHAA to Malone’s Complaint, Joint Appendix at 10.

⁶ Less theoretically, *if* the Airport hosted regulated commercial passenger flights, there are federal common carrier regulations which might limit the PHAA’s authority to exclude persons. That is not the case here.

⁷ Malone uses the colorful term “banishment,” Petitioner’s Brief at 12, but of course he has been offered the opportunity to enter the Airport with prior written approval. He has never done so.

II. THE CIRCUIT COURT DID NOT ERR IN NOT TREATING THE RULE 12(b)(6) MOTION AS A MOTION FOR SUMMARY JUDGMENT

Malone's second assignment of error is that, because matters outside the pleadings were considered by the trial court, the Rule 12(b)(6) motion to dismiss should have been treated as a Motion for Summary Judgment, and discovery should have been allowed.⁸

While the PHAA suggests Malone is barred from seeking review of the merits of September 3, 2013 Order, see *infra*, it must address his contention. What are the matters outside the pleadings that Malone claims were considered at the 12(b)(6) hearing? The Bi-State Compact and Malone's own testimony.⁹ However, neither of those converted the proceeding to a Motion for Summary Judgment under Rule 56.

The Bi-State Compact, contained at Public Law 108-348, is a federal statute. As such, it is available for any party or court to read, review and rely on. The "matter[s] outside the pleadings" referred to by Rule 12(b)(6) are factual matters such as affidavits. See, e.g., Estate of Robinson, ex rel. Robinson v. Randolph Co. Comm'n, 209 W.Va. 505, 549 S.E.2d 699 (2001)(trial court considered an affidavit, which converted 12(b)(6) proceeding to Rule 56 proceeding).

While testimony was presented – by Malone – at the hearing, it was in support of Malone's own preliminary injunction. The testimony was in regards to the four factors the trial court was to consider in deciding on a preliminary injunction under Rule 65(a). None of the testimony presented was directed at the question of whether a claim had been

⁸ Brief of Petitioner Malone at 14.

⁹ *Id.*

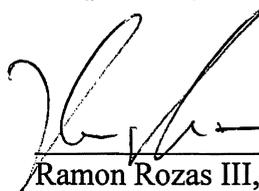
properly pled by Malone, because that question (in the posture the case occupied on August 5, 2013) was a purely legal one. The testimony did not concern the 12(b)(6) Motion, and the trial court did not rely on the testimony in granting the motion and dismissing Malone's claim.

Malone claims he should have been availed the opportunity for discovery, but he completely fails to illuminate what factual matters might have been disclosed in discovery that would affect the purely legal question of whether he had made a claim. Malone has not claimed discrimination, nor limiting of his constitutional rights. He simply baldly claimed "they can't do that," and the trial court, in essence, concluded Malone had failed to even outline an argument as to why the PHAA couldn't exclude him. The trial court did not err in granting the 12(b)(6) Motion without discovery.

CONCLUSION

The Respondent PHAA respectfully requests this Honorable Court to affirm the dismissal by the Circuit Court.

Respectfully Submitted,



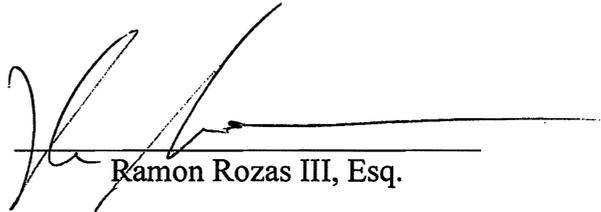
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CERTIFICATE OF SERVICE

I hereby certify, this 12th day of January, 2014, that I mailed, first class postage prepaid, a copy of the foregoing Brief, to:

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