

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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ALLEY CAT ALLIES INCORPORATED,

Appellant,

v.

No. 22-744

BERKELEY COUNTY ANIMAL CONTROL and
COUNTY COUNCIL OF BERKELEY COUNTY,

Appellees.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE..... 2

 A. Introduction..... 2

 B. Procedural History 3

 C. Pertinent Facts 4

SUMMARY OF THE ARGUMENT 6

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 8

ARGUMENT 9

 A. Standard of Review 9

 B. The Circuit Court erred in its analysis of the standing Alley Cat Allies invoked for its mandamus action. 9

 C. The Circuit Court erred in making findings of fact that are unsupported in the record and are based on its own perceptions of credibility. 12

 D. The Circuit Court erred in holding that Alley Cat Allies did not seek enforcement of a public right in its mandamus action..... 16

 E. The Circuit Court erred in holding that mandamus was not an appropriate remedy to require BCAC to perform their lawful duties..... 18

 F. The Circuit Court erred by giving any consideration to this Court’s previously declining to issue a rule to show cause on Alley Cat Allies’ petition for a writ of mandamus 21

CONCLUSION..... 23

CERTIFICATE OF SERVICE..... 25

TABLE OF AUTHORITIES

Cases

<i>Bayles v. Evans</i> , 243 W. Va. 31, 842 S.E.2d 235 (2020).....	9
<i>City of Bridgeport v. Matheny</i> , 223 W. Va. 445, 675 S.E.2d 921 (2009).....	17, 18
<i>Coleman v. Sopher</i> , 194 W.Va. 90, 459 S.E.2d 367 (1995).....	9, 10
<i>Commonwealth of Pa. Fish & Boat Comm’n v. Consol Energy, Inc.</i> , 233 W. Va. 409, 758 S.E.2d 762 (2014).....	12-13
<i>Courtney v. Smith</i> , 297 F.3d 455 (6th Cir. 2002).....	12, 13
<i>Excavation Const., Inc. v. Ritchie</i> , 159 W. Va. 888, 230 S.E.2d 822 (1976).....	12
<i>Frantz v. Wyoming Cnty. Ct.</i> , 69 W. Va. 734, 73 S.E. 328 (1911).....	7, 10, 11
<i>Findley v. State Farm Mutual Automobile Insurance Company</i> , 213 W. Va. 80, 576 S.E.2d 807 (2002).....	4, 5
<i>Gallant v. Cnty. Comm’n of Jefferson Cnty.</i> , 212 W. Va. 612, 575 S.E.2d 222 (2002)	17
<i>Harrison Cnty. Comm’n v. Harrison Cnty. Assessor</i> , 222 W. Va. 25, 658 S.E. 555 (2008).....	9
<i>Hickman v. Epstein</i> , 192 W. Va. 42, 450 S.E.2d 406 (1994).....	17
<i>Knotts v. Moore</i> , 177 W. Va. 9, 350 S.E.2d 9 (1986).....	22
<i>Mountaineer Fire & Rescue Equip., LLC v. City Nat’l Bank of W. Va.</i> , 244 W. Va. 508, 854 S.E.2d 870 (2020).....	12
<i>Myers v. Barte</i> , 167 W.Va. 194, 279 S.E.2d 406 (1981).....	5
<i>Nobles v. Duncil</i> , 202 W. Va. 523, 505 S.E.2d 442 (1998).....	20, 21
<i>Payne v. Staunton</i> , 55 W. Va. 202, 46 S.E. 927 (1904).....	16
<i>Prichard v. De Van</i> , 114 W. Va. 509, 172 S.E. 711 (1934).....	16
<i>Rogers v. Hechler</i> , 176 W. Va. 713, 348 S.E.2d 299 (1986).....	10, 11

<i>Savarese v. Allstate Ins. Co.</i> , 223 W. Va. 119, 672 S.E.2d 255 (2008).....	9
<i>Smith v. W. Va. State Bd. of Educ.</i> , 170 W. Va. 593, 295 S.E.2d 680 (1982).....	16, 17
<i>State ex rel. Barker v. Manchin</i> , 167 W. Va. 155, 279 S.E.2d 622 (1981).....	7, 11, 12
<i>State ex rel. Blankenship v. McHugh</i> , 158 W. Va. 986, 217 S.E.2d 49 (1975).....	22
<i>State ex rel. Brotherton v. Moore</i> , 159 W. Va. 934, 230 S.E.2d 638 (1976).....	11
<i>State ex rel. Greenbrier Cnty. Airport Auth. v. Hanna</i> , 151 W.Va. 479, 153 S.E.2d 284 (1967).....	19
<i>State ex rel. Healthport Techs., LLC v. Stucky</i> , 239 W. Va. 239, 800 S.E.2d 506 (2017)	9
<i>State ex rel. Noyes v. Lane</i> , 89 W. Va. 744, 110 S.E. 180 (1921).....	19

Statutes and Rules

W. Va. Code § 7-10-2(a).....	17
W. Va. Code § 7-10-1.....	17
W. Va. Code § 61-8-19.....	17
W. Va. Code § 61-8-19(a)(1)(C)(iii).....	2, 19
W. Va. R. App. P. 16(j).....	3, 8, 21, 22
W. Va. R. App. P. 19.....	8
W. Va. R. Civ. P. 12(b).....	9

Other Authority

Berkeley Cnty., W. Va. Ordinance In Re: Mgmt. & Control of Dogs and Certain Other Animals (February 25, 2010).....	17
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ASSIGNMENTS OF ERROR

1. Whether the Circuit Court of Berkeley County (the “Circuit Court”) erred in holding that to obtain standing, Alley Cat Allies Incorporated (“Alley Cat Allies”)—a taxpayer of Berkeley County and the State of West Virginia—was required to demonstrate a particularized injury, when seeking a Writ of Mandamus to compel Berkeley County Animal Control and the County Council of Berkeley County (together, “BCAC”) to perform a ministerial duty, imposed upon them by law in favor of the public;

2. Whether the Circuit Court erred in holding that Alley Cat Allies was not sufficiently a taxpayer to invoke taxpayer standing in bringing its Verified Complaint for Writ of Mandamus (the “Verified Complaint”), improperly relying on facts unsupported in the record and its own perceptions of credibility—in other words, applying an incorrect standard of review to its consideration of the Motion to Dismiss;

3. Whether the Circuit Court erred in holding that Alley Cat Allies did not seek enforcement of a public right in the Verified Complaint;

4. Whether the Circuit Court erred in holding that mandamus was not an appropriate remedy to require BCAC to perform their lawful duties; and

5. Whether the Circuit Court erred by giving any consideration to this Court’s previous refusal to issue a rule to show cause, without prejudice, on Alley Cat Allies’ original jurisdiction Petition for Writ of Mandamus.

STATEMENT OF THE CASE

A. INTRODUCTION

This is a case in which a Berkeley County taxpayer, Alley Cat Allies, filed the Verified Complaint in the Circuit Court against BCAC. Alley Cat Allies sought the Writ of Mandamus as a result of BCAC's persistent and routine endangerment and abuse of animals, and their repeated and habitual failure to provide medical treatment to animals in their care. Alley Cat Allies sought from the Circuit Court a Writ of Mandamus ordering BCAC to comply with their nondiscretionary obligations to prevent animal cruelty and enforce animal cruelty laws, including W. Va. Code § 61-8-19(a)(1)(C)(iii).

In response to the Verified Complaint, BCAC filed an unverified Motion to Dismiss, asserting, *inter alia*, that Alley Cat Allies lacked standing to seek a Writ of Mandamus and that the Circuit Court therefore lacked jurisdiction. The parties each briefed the issues, and oral argument was held before the Circuit Court. The Circuit Court granted BCAC's Motion to Dismiss on the bench on the grounds that Alley Cat Allies lacked standing and subsequently issued a written Order Denying Motion to Strike and Granting Motion to Dismiss (the "Order").

This appeal ensued.

B. PROCEDURAL HISTORY

1. On November 24, 2021, Alley Cat Allies presented to this Court a Verified Petition for Writ of Mandamus against Berkeley County Animal Control (Case No. 21-0962), invoking this Court’s concurrent original jurisdiction with the Circuit Court over such action. (A. 78).¹

2. On February 23, 2022, after considering Berkeley County Animal Control’s Response to Petition for Writ of Mandamus and Motion to Dismiss, and Alley Cat Allies’ Opposition to Motion to Dismiss,² this Court entered an Order declining to issue a rule to show cause *without prejudice* to the right of Alley Cat Allies to present its case to the appropriate circuit court. *See* W. Va. R. App. P. 16(j). (A. 261).

3. On March 3, 2022, Alley Cat Allies submitted a Verified Complaint for Writ of Mandamus in the Circuit Court against BCAC. (A. 9).

4. BCAC filed their Motion to Dismiss on March 30, 2022. (A. 55).

¹ Citations to the Appendix will be made as follows: “(A. __).”

² Simultaneously with its Opposition to Motion to Dismiss, Alley Cat Allies filed in this Court a Motion for Leave to Amend and Supplement Petition for Writ of Mandamus, and a proposed Verified Amended and Supplemented Petition for Writ of Mandamus. (A. 246).

5. Alley Cat Allies filed its Opposition to Motion to Dismiss on April 4, 2022.³ (A. 263).

6. BCAC filed their Reply in Support of Motion to Dismiss on April 19, 2022. (A. 282).

7. The Circuit Court held an oral argument on the Motion to Dismiss⁴ on July 18, 2022.

8. The Circuit Court ruled from the bench, granting BCAC's Motion to Dismiss.⁵ (A. 335-38).

9. On July 29, 2022, the Circuit Court issued its written Order. (A. 1-7).

C. PERTINENT FACTS

10. In the Conclusions of Law section of the Order (A. 3-7), the Circuit Court stated, in pertinent parts, as follows:

¶ 10. Standing requires three elements:

. . . First, the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the

³ Simultaneously with its Opposition to Motion to Dismiss, Alley Cat Allies filed in the Circuit Court a Motion to Strike Portions of Motion to Dismiss, alleging that BCAC improperly used the platform of their Motion to Dismiss to level unsupported scurrilous, immaterial, impertinent, and scandalous attacks on Alley Cat Allies and one of its officers, and to suggest the existence of defenses that are contrary to clearly established law. The Circuit Court's denial of Alley Cat Allies' Motion to Strike is not the subject of an assignment of error.

⁴ The July 18, 2022 oral argument also addressed the Motion to Strike.

⁵ Ruling from the bench, the Circuit Court also denied Alley Cat Allies' Motion to Strike. (A. 305).

lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. Pt. 5, *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

¶ 11. Here, ACA has no concrete and particularized injury, and the purported injury to be abated by issuing the writ is not to the organization, its members, or their property, but to some future animal and its owner.

¶ 12. Any potential future injury is not actual or imminent; it is conjectural and hypothetical.

¶ 13. *Because ACA has no injury-in-fact, it lacks standing and this Court lacks subject matter jurisdiction.*

¶ 14. In addition, any possible remedy the Court could impose cannot redress the ‘injury’ alleged. *The Court could merely order BCAC and the Sheriff [of the Berkeley County] to follow the law, which they already know they must do.*

¶ 15. *Rather than allege an injury-in-fact, ACA argues that it has standing to bring this suit as a taxpayer to enforce a public right. The West Virginia Supreme Court has held that ‘[w]here the right sought to be enforced is a public one, mandamus can be sought by any citizen, taxpayer or voter.’ Syl. Pt. 3, Myers v. Barte, 167 W.Va. 194, 279 S.E.2d 406 (1981).*

¶ 16. *While ACA may have paid some property transfer taxes or even property taxes, taxpayer standing for public rights requires more than just buying a piece of property and paying the transfer tax on the same day that the Petition is filed.*

¶ 17. While an individual owner of an animal may have a property right as to the treatment of that animal while in the care of an animal control officer, *there is no public right to be enforced here.*

¶ 18. Therefore, *based on the facts presented by ACA, ACA has not demonstrated that it is a taxpayer in West Virginia seeking to enforce a public right sufficient to give rise to taxpayer standing.*

* * *

¶ 20. . . . [T]he Court cannot find that there is an injury suffered by the Petitioner to its organization, members, or their property.

¶ 21. Finally, the Court cannot conclude that the alleged injury to animals would be redressed through a favorable decision of the Court because the Court could do nothing more than simply order that the Respondents obey the law; and the Respondents have here today acknowledged that they are already required to obey the law.

¶ 22. Because ACA does not have standing to bring this suit, the Court is without jurisdiction to hear the case, and the Court need not address the issue of whether the Petitioner has made a prima facie case to prevail against the Motion to Dismiss.

¶ 23. The Court finds at least *persuasive*, though not controlling, that the petition to the West Virginia Supreme Court of Appeals was summarily dismissed. The Court has read all of the pleadings in that case and finds the arguments nearly identical.

Order, § Conclusions of Law at ¶¶ 10-23 (*italics added*). (A. 4-7).

11. The Circuit Court concluded, in pertinent part, that “[i]t is further ADJUDGED and ORDERED that the Respondents’ Motion to Dismiss is GRANTED and the Complaint is DISMISSED, with prejudice. *Id.*, § Conclusion. (A. 7).

SUMMARY OF THE ARGUMENT

The Court should reverse the Circuit Court’s Order granting BCAC’s Motion to Dismiss Alley Cat Allies’ Verified Complaint for a Writ of Mandamus and remand the case for proceedings consistent with the Court’s opinion.

The Circuit Court erred in holding that to obtain standing, Alley Cat Allies—a taxpayer—was required to demonstrate a particularized injury to itself or its members or their property, when seeking a Writ of Mandamus to compel BCAC to perform a ministerial duty, imposed upon BCAC by law in favor of the public. The Circuit Court’s holding in this regard is contrary to long-established West Virginia

law that a taxpayer of this State has a right to a mandamus proceeding in order to compel a public official to perform a nondiscretionary constitutional duty, without showing “any special or pecuniary interest in the performance thereof,” *Frantz v. Wyoming Cnty. Ct.*, 69 W. Va. 734, 73 S.E. 328, 328 (1911), in other words, “‘direct injury’ such as was traditionally required,” *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 165, 279 S.E.2d 622, 629 (1981) (emphasis added).

The Circuit Court erred in holding that Alley Cat Allies was not sufficiently a taxpayer to invoke taxpayer standing in bringing its Verified Complaint, improperly relying on facts unsupported in the record, improperly applying its own perceptions of credibility, and improperly refusing to accept the allegations in the Verified Complaint as true and to construe all reasonable inferences therefrom in Alley Cat Allies’ favor.

The Circuit Court erred in holding that Alley Cat Allies did not seek enforcement of a public right. This holding is contrary to West Virginia law which provides that general statutes or those affecting the public at large (such as the animal cruelty laws) are subject to mandamus proceedings brought by any citizen, taxpayer, or voter.

The Circuit Court erred in holding that mandamus was not an appropriate remedy to require BCAC to perform their lawful duties and “follow the law.” This holding is contrary to West Virginia law which provides that mandamus is precisely the proper means to compel any public officer to perform a nondiscretionary legal duty.

The Circuit Court also erred by considering this Court's previous refusal to issue a rule to show cause on Alley Cat Allies' original jurisdiction Petition for Writ of Mandamus. This holding is in plain contravention of W. Va. R. App. P. 16(j) and West Virginia case law stating that a refusal by the Court to exercise its original jurisdiction, without prejudice, is not a decision on the merits.

The Circuit Court's Order must be reversed, and the case remanded for further proceedings consistent with this Court's opinion.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Alley Cat Allies respectfully asks for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law; the parties have not waived oral argument; the appeal is non-frivolous; some of the issues here have not been authoritatively decided; and the decisional process will significantly be aided by oral argument. This case is not appropriate for a memorandum decision. Alley Cat Allies respectfully submits that because of the number of substantial issues presented, oral argument of 10 minutes per side would be insufficient, and requests that oral argument be set for 20 minutes per side.

ARGUMENT

A. STANDARD OF REVIEW

Where, as here, the Court is presented with an appeal of a motion to dismiss based upon Rule 12(b)(1) and Rule 12(b)(6), “this Court will apply a *de novo* standard of review to a circuit court’s order granting a motion to dismiss.” *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 123, 672 S.E.2d 255, 259 (2008); *see also Bayles v. Evans*, 243 W. Va. 31, 38, 842 S.E.2d 235, 242 (2020) (“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.”). In particular, the standard of review in considering whether a circuit court properly denied a writ of mandamus is *de novo*. *See Harrison Cnty. Comm’n v. Harrison Cnty. Assessor*, 222 W. Va. 25, 28, 658 S.E. 555, 558 (2008).

B. THE CIRCUIT COURT ERRED IN ITS ANALYSIS OF THE STANDING ALLEY CAT ALLIES INVOKED FOR ITS MANDAMUS ACTION.

“This Court has defined ‘standing’ as ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017). “The focus of a standing analysis is not on the validity of the claim but instead is ‘on the appropriateness of a party bringing the questioned controversy to the court.’” *Id.* at 243, 800 S.E.2d at 510. As the Circuit Court recognized, traditionally,

[s]tanding . . . is comprised of three elements: First, the party . . . [attempting to establish standing] must have suffered an *‘injury-in-fact’*—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, it must

be likely that the injury will be redressed through a favorable decision of the court.

Coleman v. Sopher, 194 W.Va. 90, 95 n.6, 459 S.E.2d 367, 373 n.6 (1995) (emphasis added); *cf.* Order, § Conclusions of Law at ¶ 10 (A. 4).

Employing this traditional framework, the Circuit Court concluded that Alley Cat Allies lacked standing to bring its mandamus action *because* “the Court cannot find that there is an injury suffered by the Petitioner to its organization, members, or their property.” *See* Order, § Conclusions of Law at ¶ 20 (A. 6); *see also id.* at ¶ 13 (A. 5) (“Because ACA has no injury-in-fact, it lacks standing and this Court lacks subject matter jurisdiction.”); Transcript of July 18, 2022 Hearing (“Tr.”) at 43:21-23 (A. 335) (“[E]ven assuming *arguendo* that the petitioner is a taxpayer the Court finds that this alone is insufficient to establish proper standing [in this action.]”).

The Circuit Court’s reliance on this traditional basis of standing—despite acknowledging that Alley Cat Allies invoked the taxpayer standing permitted specifically for requesting a mandamus “to compel a public tribunal to perform a ministerial duty, imposed upon it by law in favor of the public”—constitutes a legal error. *See Frantz*, 69 W. Va. at 734, 73 S.E. at 328; Order, § Conclusions of Law at ¶ 15 (A. 5) (“Rather than allege an injury-in-fact, ACA argues that it has standing to bring this suit as a taxpayer to enforce a public right.”). Contrary to the Circuit Court’s view and as repeatedly argued in Alley Cat Allies’ Opposition to Motion to Dismiss and at the July 18, 2022 hearing, to assert the taxpayer standing in such mandamus action, an injury or special interest need not be alleged—being a citizen, taxpayer, or voter is sufficient. *See Rogers v. Hechler*, 176 W. Va. 713, 716, 348 S.E.2d

299, 302 (1986) (“Where the right sought to be enforced is a public one, mandamus can be sought by any citizen, taxpayer or voter.”); Opposition to Motion to Dismiss at 7-8 (A. 269-70); Tr. at 27:4-7, 37:8-14 (A. 319, 329).

As this Court has explained,

Any [additional] standing which could be demonstrated in this regard, . . . is superfluous. Both of these relators have standing to maintain the proceeding as citizens and taxpayers of this State.

We have faithfully adhered to the principle that a citizen and taxpayer may maintain a mandamus proceeding to compel any public officer to perform a nondiscretionary legal duty. *No special or pecuniary interest must be shown by individuals who sue in this capacity.*

State ex rel. Brotherton v. Moore, 159 W. Va. 934, 938, 230 S.E.2d 638, 640-41 (1976) (internal citations omitted) (emphasis added); *see also Frantz*, 69 W. Va. at 734, 73 S.E. at 328 (“A citizen, taxpayer, or voter in any proper case may maintain mandamus to compel a public tribunal to perform a ministerial duty, imposed upon it by law in favor of the public without showing any special or pecuniary interest in the performance thereof.”).

In fact, this Court has explicitly refuted the Circuit Court’s position in this case:

The respondent has also questioned the standing of Mr. Barker to seek relief in this case. *The crux of this argument is that the relator has shown no ‘direct injury’ such as was traditionally required This point is not well taken.* This Court rejected this strict standard in the case of *State ex rel. Brotherton v. Moore*, W.Va., 230 S.E.2d 638 (1976), where it was stated in syllabus point 1 that:

‘A citizen and taxpayer of this State has a right to a mandamus proceeding in order to compel a public official to perform a non-discretionary constitutional duty.’

We specifically stated that no ‘special or pecuniary interest must be shown by individuals who sue in this capacity.’ 230 S.E.2d 638, 640-641.

Manchin, 167 W. Va. at 165, 279 S.E.2d at 629 (emphasis added); *see also Excavation Const., Inc. v. Ritchie*, 159 W. Va. 888, 889, 230 S.E.2d 822, 823 (1976) (“Shenandoah Quarry, Inc., a West Virginia corporation, participated in this [mandamus] proceeding as a *West Virginia taxpayer*, has the necessary standing to present the issues which are fundamental to a proper disposition of this case and hereinafter will be treated as the sole appellant.” (emphasis added)).

The Circuit Court erred in requiring Alley Cat Allies to show a special interest or injury beyond being a taxpayer to have standing to bring its mandamus action in the Verified Complaint.

C. THE CIRCUIT COURT ERRED IN MAKING FINDINGS OF FACT THAT ARE UNSUPPORTED IN THE RECORD AND ARE BASED ON ITS OWN PERCEPTIONS OF CREDIBILITY.

At the motion to dismiss stage, courts “should presume all of the plaintiff’s factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff.” *Mountaineer Fire & Rescue Equip., LLC v. City Nat’l Bank of W. Va.*, 244 W. Va. 508, 520, 854 S.E.2d 870, 882 (2020). At this stage, the task of a court “is merely to assess the legal feasibility of the complaint, *not to assay the weight of the evidence* which might be offered in support thereof.” *Id.* (emphasis added). Determining the issue of *standing* at this stage also requires “[v]iewing the complaint in the light most favorable to [the plaintiff].” *See Commonwealth of Pa. Fish & Boat Comm’n v. Consol Energy, Inc.*, 233 W. Va. 409, 414, 758 S.E.2d 762, 767 (2014) (citing *Courtney v. Smith*, 297 F.3d 455,

459 (6th Cir. 2002) (stating for purposes of ruling on a motion to dismiss for lack of standing, a complaint must be viewed in the light most favorable to the plaintiff; all material allegations of the complaint must be accepted as true)); *see also* Opposition to Motion to Dismiss at 5-6 (A. 267-68).

Alley Cat Allies alleged in its Verified Complaint that it “pays taxes on real property it owns in Berkeley and Jefferson counties, West Virginia, and is required to pay unemployment assessments and other applicable taxes in West Virginia.” Verified Complaint at ¶ 1 (A. 10). Taking this in the light most favorable to Alley Cat Allies and accepting it as true, Alley Cat Allies established that it is a taxpayer—it pays property taxes on the multiple properties it owns in West Virginia (at least one in Berkeley County and at least one in Jefferson County), in addition to unemployment assessments and other applicable taxes in West Virginia as an employer in West Virginia.

However, the Circuit Court declined to take Alley Cat Allies’ allegations as true and construed them and reasonable inferences therefrom in the light most *unfavorable* to Alley Cat Allies. The Circuit Court found that Alley Cat Allies recently paid at most a transfer tax on a single property, and then proceeded to improperly and irrelevantly question the motives and timing of Alley Cat Allies’ acquisition of real estate in West Virginia:

[R]emember that credibility meter’s running—you’re going to argue that payment of a transfer tax entitled your client an out-of-state organization to come into West Virginia and begin filing cases against government agencies here . . .

Tr. at 27:9-12 (A. 319); *see also id.* at 13:10-12 (“[C]redibility of sworn testimony is always something that the Court must weigh[.]”) (A. 305).

Both parties agree that the petitioner paid a transfer tax. No other evidence has been provided to the Court to demonstrate to the Court that the petitioner paid any other taxes other than statements of counsel.

Id. at 43:17-21. (A. 335).

¶ 16. While ACA may have paid some property transfer taxes or *even property taxes*, taxpayer standing for public rights requires more than just buying a piece of property and paying *the transfer tax* on the same day that the Petition⁶ is filed. (A. 5).

* * *

¶ 18. Therefore, *based on the facts presented by ACA, ACA has not demonstrated that it is a taxpayer in West Virginia* seeking to enforce a public right sufficient to give rise to taxpayer standing.

Order, § Conclusions of Law at ¶¶ 16, 18 (emphasis added). (A. 5).

⁶ It is not clear whether the Circuit Court was referring, by “the Petition,” to the Verified Complaint filed with the Circuit Court on March 3, 2022, or the earlier Petition for a Writ of Mandamus to this Court filed on November 24, 2021. The Circuit Court refers to Alley Cat Allies in the Circuit Court case at times as the “Plaintiff,” but also as the “Petitioner.” *See* Order, § Findings of Fact at ¶ 9 (A. 3) (“Petitioner filed a response in opposition to the Motion to Dismiss, as well as a Motion to Strike Portions of the Motion to Dismiss.”). When the Verified Complaint was filed, Alley Cat Allies had owned its non-tax-exempt property in Berkeley County for several months, and its non-tax-exempt property in Jefferson County for several years. *See, e.g.,* Tr. at 37:10-38:5. (A. 329-30). As an employer in West Virginia, it has also been paying unemployment assessments and other applicable taxes in West Virginia for several years. *See, e.g., id.; see also* Verified Complaint at ¶ 1. (A. 10). Taking its allegations as true and all reasonable inferences therefrom in the light most favorable to Alley Cat Allies, Alley Cat Allies has been and is a taxpayer of Berkeley County, Jefferson County, and the State of West Virginia in multiple ways, and for an extended period of time.

Counsel for Alley Cat Allies attempted multiple times—to no avail—to point out the Circuit Court’s improper standard of review and credibility determinations at the motion to dismiss stage:

Alley Cat Allies paid real estate taxes just the same as any other citizen of this county and has in West Virginia for some years.

Tr. at 27:19-22; *see also id.* at 32:1-3. (A. 319, 324).

[I]f you believe nothing else the complaint alleges that Alley Cat Allies is a taxpayer. . . . There’s no real claim here that . . . they’re not taxpayers. I’m a little puzzled by the discussions well they did it one day before or two days before. How many days is enough? How many days of being a taxpayer does it take? Is there a one-month rule? A one-year rule? The answer to that, of course, is there’s no such rule at all. You’re either a taxpayer or you’re not.

Alley Cat Allies for what it’s worth has been a taxpayer in the state of West Virginia for some years both on its real estate which is not—I can tell you the real estate in Jefferson County it’s not tax exempt. . . . [T]he county assessor certainly hasn’t treated its property here in Berkeley County as tax exempt. It also pays other incidental taxes in Berkeley County and throughout West Virginia. So . . . there’s no real argument here that Alley Cat Allies is not a taxpayer[.]

Id. at 37:10-38:5. (A. 329-30).

The Circuit Court committed reversible errors in refusing or failing to take Alley Cat Allies’ allegations as true and to view them and reasonable inferences therefrom in the light most favorable to it, and in making findings of fact at the motion to dismiss stage with no basis in the record and applying its own perceptions of credibility.

D. THE CIRCUIT COURT ERRED IN HOLDING THAT ALLEY CAT ALLIES DID NOT SEEK ENFORCEMENT OF A PUBLIC RIGHT IN ITS MANDAMUS ACTION.

The Circuit Court also erred in finding that Alley Cat Allies' Verified Complaint does not concern a "public right," understood in the context of a mandamus.

¶ 17. While an individual owner of an animal may have a property right as to the treatment of that animal while in the care of an animal control officer, *there is no public right to be enforced here.*

See Order, § Conclusions of Law at ¶ 17 (emphasis added). (A. 5).

However, as Alley Cat Allies pointed out in its Opposition to Motion to Dismiss and again at the hearing, the law is clear that "where the right sought to be enforced is a *public one* in the sense that it is *based upon a general statute or affects the public at large* the mandamus proceeding can be brought by any citizen, taxpayer, or voter." See *Smith v. W. Va. State Bd. of Educ.*, 170 W. Va. 593, 596, 295 S.E.2d 680, 683 (1982) (emphasis added); Opposition to Motion to Dismiss at 7-8 (A. 269-70); Tr. at 37:12-14 (A. 329) ("This is a statute that we're dealing with the Animal Cruelty Statute that is one of general application in which case a taxpayer standing does apply."); see also *Prichard v. De Van*, 114 W. Va. 509, 172 S.E. 711, 713 (1934) ("An individual may maintain mandamus to compel performance of official act in which individual has common interest with public at large."); *Payne v. Staunton*, 55 W. Va. 202, 46 S.E. 927 (1904) ("One or more individuals may maintain mandamus to compel the doing of an act in which the public at large, including them, have a common interest.").

First, West Virginia’s animal cruelty statute, W. Va. Code § 61-8-19, is a general statute that applies to everyone in West Virginia. *See Gallant v. Cnty. Comm’n of Jefferson Cnty.*, 212 W. Va. 612, 620, 575 S.E.2d 222, 230 (2002) (“A statute is general when it operates uniformly on all persons and things of a class and such classification is natural, reasonable and appropriate to the purpose sought to be accomplished.”).

Further, Berkeley County Animal Control and its officers serve as Berkeley County’s “humane officers,” whose duties include “prevent[ing] the perpetration nor continuance of any act of cruelty upon any animal,” or, in other words, “personally see[ing] that the law relating to the prevention of cruelty to animals is enforced.” *See* W. Va. Code §§ 7-10-2(a), 7-10-1. As a public office created and empowered by law to perform prescribed public duties, Berkeley County Animal Control and its officers’ duties “affect[] the public at large” and are a proper subject of a mandamus. *See Smith*, 170 W. Va. at 596, 295 S.E.2d at 683; W. Va. Code § 7-10-1 to 5; *Hickman v. Epstein*, 192 W. Va. 42, 44, 450 S.E.2d 406, 408 (1994) (defining a “public officer” as “a person acting . . . in the performance of a public or quasi-public duty”); Berkeley Cnty., W. Va. Ordinance In Re: Mgmt. & Control of Dogs and Certain Other Animals (February 25, 2010) (“The Sheriff’s designees are hereby appointed as Dog Wardens and County Humane Officers, as those terms are defined in the *West Virginia Code*, 1931, as amended, and are collectively designated Berkeley County Animal Control Officers.”); *City of Bridgeport v. Matheny*, 223 W. Va. 445, 448, 675 S.E.2d 921, 922 (2009) (“Among the criteria to be considered in determining whether a position is an

office or a mere employment are whether the position was created by law; whether the position was designated [as] an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required” (emphasis added)).

The Circuit Court erred in holding that Alley Cat Allies did not seek enforcement of a public right in its mandamus action and that BCAC could not possibly be compelled through a mandamus action to perform their nondiscretionary duties arising from the discharge of their public function imposed by statute.⁷

E. THE CIRCUIT COURT ERRED IN HOLDING THAT MANDAMUS WAS NOT AN APPROPRIATE REMEDY TO REQUIRE BCAC TO PERFORM THEIR LAWFUL DUTIES.

The Circuit Court found that a writ of mandamus was not an appropriate remedy in this case “because the Court could do nothing more than simply order that the [BCAC] obey the law; and the [BCAC] have here today acknowledged that they are already required to obey the law.” *See* Order, § Conclusions of Law at ¶ 21. (A. 6).

At the hearing, the Circuit Court repeatedly questioned Alley Cat Allies as follows:

. . . I’m asking you to explain to the Court how this Court has the authority to tell another governmental agency to obey the law.

Tr. at 28:16-18. (A. 320).

[H]ow would this Court possibly fashion an adequate remedy other than to say obey the law? They [BCAC] already know they have to obey the law.

⁷ Alley Cat Allies also alleged and argued that preventing animal cruelty and enforcing animal cruelty laws is Berkeley County Animal Control’s mandatory, nondiscretionary legal duty. *See* Verified Complaint at ¶¶ 21-23 (A. 16); Opposition to Motion to Dismiss at 9-10 (A. 271-72); Tr. at 29:1-21, 33:13-24 (A. 321, 325).

Id. at 30:12-14. (A. 322).

Contrary to the Circuit Court’s view, there is nothing unusual or absurd about the applicability of a writ of mandamus in this case. Mandamus is an appropriate remedy to compel BCAC to comply with W. Va. Code 61-8-19(a)(1)(C)(iii) by providing “[m]edical treatment, necessary to sustain normal health and fitness or to end the suffering of any animal to all animals in its custody at the time of intake or within a reasonable time after the intake, and subsequently as necessary.” *See* Verified Complaint at 10 (A. 18); *State ex rel. Greenbrier Cnty. Airport Auth. v. Hanna*, 151 W.Va. 479, 494, 153 S.E.2d 284, 292 (1967) (“Mandamus lies to require the discharge by a public officer of a nondiscretionary duty.”). That is, the very purpose of a writ of mandamus is to compel a public office or officer such as BCAC to properly perform their lawful, statutory duties. *See id.*; *State ex rel. Noyes v. Lane*, 89 W. Va. 744, 110 S.E. 180, 182 (1921).

As Alley Cat Allies argued repeatedly at the hearing:

What has been alleged here is not necessarily that [BCAC] have exercised discretion improperly. It’s that they haven’t exercised discretion at all. They don’t do anything. It’s easy—I’ll make a scenario—it’s easy from their perspective.

If there’s a dog in there and the dog has a cough—I’m using an easy example. Dog has a cough[,] everything like that[,] an emergent situation[,] maybe, maybe not, probably not[,] and could this Court order [BCAC] to send all dogs with coughs off to a veterinarian[,] probably not, that’s . . . plainly within the realm of discretion but what we have here is a pattern and practice.

This is what’s alleged in the [Verified Complaint]. A pattern and practice of animals with manifested medical emergencies[,] dire ones, broken bones, bleeding out, and what do [BCAC] do? They do nothing. Put them in a kennel and let them suffer[,] . . . that’s what we’ve alleged. You don’t

have to believe it. We'll put on our evidence but that's what goes on and we've alleged that and that is not . . . a[n] issue of discretion[,] that is a refusal to exercise discretion and *the West Virginia Supreme Court of Appeals in the Dillon v. Bare case said when you do that[,] it's the subject of mandamus.*

Tr. at 29:1-21 (emphasis added). (A. 321).

[T]he decision to or not to provide necessary medical treatment is not discretionary. Under 68-1-19 of the code [BCAC] are required to provide objectively necessary medical treatment and the complaint at paragraphs 10, 11, and 17 alleges that [BCAC] persistently and routinely failed and refused to provide any medical treatment. . . .

[D]iscretion would be inadequate medical treatment. The allegation here is *any* medical treatment and that's where we get back to the *Dillon v. Bare case. Mandamus is proper when a public officer is clearly disregarding his duty and that's what we have here. They're not doing their duty.*

Id. at 33:13-24 (emphasis added) (A. 325).

Alley Cat Allies here alleged that BCAC did not merely exercise discretion poorly. Rather, it alleged that BCAC persistently and routinely failed and refused “to perform its nondiscretionary legal duty to prevent animal cruelty by providing necessary medical treatment to all animals in its care”. Verified Complaint at ¶ 24 (A. 17); *see also id.* at ¶¶ 21-23 (A. 16). “Mandamus is a proper remedy to compel . . . officers exercising discretionary . . . powers to act, when they refuse to do so, in violation of their duty.” *Nobles v. Duncil*, 202 W. Va. 523, 534-35, 505 S.E.2d 442, 453-54 (1998). Because Alley Cat Allies alleged that BCAC were refusing to perform—at all—their duty to prevent animal cruelty by obtaining medical treatment for animals suffering emergent medical conditions, mandamus is proper. *See id.* at

535, 505 S.E.2d at 454 (holding that mandamus is a proper remedy to require “prison officials . . . to provide a constitutionally acceptable level of medical care”).

The Circuit Court erred in holding that mandamus is categorically not an appropriate remedy to require BCAC to perform their lawful, nondiscretionary duties.

F. THE CIRCUIT COURT ERRED BY GIVING ANY CONSIDERATION TO THIS COURT’S PREVIOUSLY DECLINING TO ISSUE A RULE TO SHOW CAUSE ON ALLEY CAT ALLIES’ PETITION FOR A WRIT OF MANDAMUS.

On February 23, 2022, before the filing of the Verified Complaint for a Writ of Mandamus in the Circuit Court, this Court entered an Order declining to issue a rule to show cause *without prejudice* to the right of Alley Cat Allies to present its complaint to Circuit Court. (A. 261).

The Circuit Court erred as a matter of law in giving *any* consideration to this Court’s previously declining to issue a rule to show cause on Alley Cat Allies’ original jurisdiction petition for writ of mandamus:

¶ 23. The [Circuit] Court finds *at least persuasive*, though not controlling, that the petition to the West Virginia Supreme Court of Appeals was summarily dismissed.

Order, § Conclusions of Law at ¶ 23 (emphasis added). (A. 7).

[The Circuit Court:] . . . I do . . . believe that although it’s not controlling to the [Circuit] Court it *certainly* is something the [Circuit] Court should consider[.]

Tr. at 14:12-14 (emphasis added). (A. 306).

West Virginia law clearly states otherwise. W. Va. R. App. R. 16(j) provides that

[i]f the Supreme Court declines to issue a rule to show cause, such determination shall be *without prejudice to the right of the petitioner* to present a petition to a lower court having proper jurisdiction, unless the Supreme Court specifically notes in the order denying a rule to show cause that the denial is with prejudice. An order declining to issue a rule to show cause does not prevent the petitioner from pursuing the same issues on appeal following a final order in the lower court.

Id. (emphasis added). As this Court has explained,

Appellate courts, exercising original jurisdiction concurrently with trial courts, frequently deny summarily a petition for extraordinary relief *without considering the merits of the petition*. In such cases a trial court has authority to consider anew the same petition. This jurisdictional concept has been accepted without dispute.

. . . [T]he fact that inferior courts also have original jurisdiction concurrent with appellate courts with respect to the writ has been considered as ample ground for appellate courts in their discretion to refuse to assume original jurisdiction, since the remedy in the lower court is in the nature of another adequate remedy.

* * *

The denial shown by our minute order . . . *must be construed to constitute simply a refusal by this court to exercise its original jurisdiction*. . . . The minute order, under such circumstances, was not intended to be and is not an adjudication upon the merits of the facts presented in the application.

State ex rel. Blankenship v. McHugh, 158 W. Va. 986, 992-93, 217 S.E.2d 49, 53-54 (1975) (emphasis added) (internal citations and quotations omitted); *see also Knotts v. Moore*, 177 W. Va. 9, 11, 350 S.E.2d 9, 11 (1986) (“[A] denial of a petition by an appellate court is not a decision on the merits.”).

The Circuit Court erred in giving any consideration—in ruling on the Motion to Dismiss—to this Court’s “simpl[e] [] refusal . . . to exercise its original jurisdiction,” which is “not an adjudication upon the merits of the facts presented in the

application.” See *McHugh*, 158 W. Va. at 993, 217 S.E.2d at 54 (1975) (internal citations and quotations omitted).

CONCLUSION

WHEREFORE, Alley Cat Allies requests that this Honorable Court:

a. Hold that the Circuit Court erred in ruling on the issue of standing by acknowledging that Alley Cat Allies invoked taxpayer standing, but then applying a traditional standing analysis not applicable to taxpayer standing;

b. Hold that the Circuit Court erred in making findings of fact unsupported in the record and in applying an incorrect standard of review to its consideration of the Motion to Dismiss;

c. Hold that the Circuit Court erred in holding that Alley Cat Allies did not seek enforcement of a public right;

d. Hold that the Circuit Court erred in holding that mandamus was not an appropriate remedy to require BCAC to perform their lawful duties and “follow the law”;

e. Hold that the Circuit Court erred by giving any consideration to this Court’s previous refusal to issue a rule to show cause on Alley Cat Allies’ original jurisdiction Petition for Writ of Mandamus;

f. Reverse the Circuit Court’s Order dismissing Alley Cat Allies’ Verified Complaint for a Writ of Mandamus; and

g. Remand this case to the Circuit Court for further proceedings consistent with the holdings of this Court.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ALLEY CAT ALLIES INCORPORATED,

Appellant,

v.

No. 22-744

**BERKELEY COUNTY ANIMAL CONTROL and
COUNTY COUNCIL OF BERKELEY COUNTY,**

Appellees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November, 2022, a copy of the foregoing was served through the electronic filing system and was mailed, first class, postage paid, to:

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/s/ Timothy B. Hyland
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