

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.

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REPLY BRIEF OF APPELLANT

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Timothy Hyland (WV Bar No. 9827)  
HYLAND LAW PLLC  
1818 Library Street, Suite 500  
Reston, VA 20190  
thyland@hylandpllc.com  
(703) 956-3566 (phone)  
(703) 935-0349 (fax)

*Counsel for Appellant  
Alley Cat Allies Incorporated*

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## INTRODUCTION

BCAC's Response Brief ("Response Brief") incorrectly claims that the Circuit Court ruled that Alley Cat Allies' claims in the Verified Complaint are moot.<sup>1, 2</sup> Further, it fails to refute any of Alley Cat Allies' arguments under the five Assignments of Error stated in the Brief of Appellant ("Brief").

## ARGUMENT

### **A. BCAC INCORRECTLY CLAIMS THAT THE CIRCUIT COURT RULED THAT ALLEY CAT ALLIES' CLAIMS ARE MOOT.**

Citing the entirety of the Order, BCAC inaccurately claims that "the [C]ircuit [C]ourt dismissed the Complaint on two justiciability grounds: First, because ACA lacks standing to bring the suit; and *Second, because the claims are moot.*" See Response Brief at p. 6 (emphasis added). According to BCAC, "the [C]ircuit [C]ourt found that because all of the allegations of inadequate veterinary care are from animals no longer in the custody of the Sheriff, the County or any other county agency or officer, there are no treatment decisions at issue in this case and the case is moot." *Id.* at p. 7. BCAC further claims that "ACA does not . . . make any claim on appeal[] that the Court below erred in finding that the case is moot." *Id.* at p. 8. Therefore,

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<sup>1</sup> Terms not defined herein have the meaning ascribed to them in Alley Cat Allies' Brief. One exception is "BCAC"; unlike in the Brief, "BCAC" will be treated as a singular noun in this Reply Brief.

<sup>2</sup> The Response Brief, filed on January 13, 2023, was a day late. Pursuant to the Court's Scheduling Order, "[o]nce the appeal is perfected, the respondent is directed to file a respondent's brief . . . on or before January 13, 2023, or within forty-five days of the date of the appeal is perfected, if the appeal is perfected before November 29, 2022." Alley Cat Allies perfected its appeal on November 28, 2022; BCAC's deadline for responding, forty-five days thereafter, was January 12, 2023.

continues BCAC, “[n]otwithstanding [BCAC’s] responses to each [of the five] assignment[s] of error [in the Brief], the Court should affirm the circuit court’s dismissal because the cause of action is moot.” *Id.*

BCAC is mistaken that the Order includes a ruling on mootness and that Alley Cat Allies has failed to appeal it. To the contrary, with respect to mootness, the Order merely acknowledges, in its Findings of Fact section, the fact that BCAC argued mootness in its Motion to Dismiss:

¶ 8. *Respondents moved to dismiss arguing:*

\* \* \*

B. ACA has no standing to bring this claim as neither it nor its members have any actual or imminent injury which the issuance of the writ could prevent, *and any claims as to past animal control cases are moot.*

Order, § Findings of Fact at ¶ 8 (emphasis added). (A. 2). The Order contains no conclusion of law related to mootness. *See generally* Order. (A. 1-8). In fact, beyond summarizing BCAC’s mootness argument at ¶ 8 quoted above, the Circuit Court does not at all discuss the issue of mootness or of “past animal control cases” anywhere in the Order. *See generally id.*

Because the Circuit Court did not rule on mootness, BCAC’s prolonged argument on Alley Cat Allies’ alleged failure to challenge the Circuit Court’s ruling on mootness is irrelevant to this appeal.

**B. BCAC FAILS TO ADDRESS ALLEY CAT ALLIES' ARGUMENT THAT THE CIRCUIT COURT ERRED IN REQUIRING TRADITIONAL STANDING TO BRING A MANDAMUS ACTION.**

Section I of the Argument in the Response Brief is devoted to BCAC's assertion that the Circuit Court "correctly found *that* ACA lacked traditional standing." *See* Response Brief at p. 13 (emphasis added); *see generally id.* at pp. 13-15. The Response Brief does *not* address Alley Cat Allies' argument, under the first assignment of error in the Brief, that the Circuit Court committed a legal error *in requiring* Alley Cat Allies to demonstrate the elements of traditional standing in order to bring its mandamus action in the Verified Complaint. *See generally* Response Brief. Accordingly, BCAC fails to respond to this assignment of error.<sup>3</sup>

**C. BCAC MERELY REPEATS THE CIRCUIT COURT'S ERRONEOUS STANDARD OF REVIEW AND INAPPROPRIATE FACT FINDING AT THE MOTION TO DISMISS STAGE.**

BCAC argues that "the [C]ircuit [C]ourt correctly found that ACA lacked taxpayer standing because ACA failed to offer *sufficient evidence* that it is taxpayer of the state of West Virginia." *Id.* at p. 15 (emphasis added). According to BCAC,

[i]t is unclear what taxes ACA pays in West Virginia. It is a nonprofit tax-exempt charitable organization. . . . Moreover, if the use of the real property is used exclusively 'for charitable purposes, and not held or leased out for profit,' it is exempt from property taxes.<sup>¶</sup> However, it is unclear if any of the property ACA owns in West Virginia is used for any charitable purpose, let alone exclusively for a charitable purpose.

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<sup>3</sup> W. Va. R. App. P. 10(d) states, in pertinent part, that

the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, . . . the Supreme Court will assume that the respondent agrees with the petitioner's view of the issue.

\* \* \*

While West Virginia courts have not clearly defined what constitutes a taxpayer for standing to enforce a public right, surely it requires more than just buying a piece of property and paying the transfer tax on the same day that the [earlier, November 24, 2021] Petition [to this Court] is filed.

Response Brief at pp. 17-18.

In so arguing, BCAC commits the very same error that Alley Cat Allies argues the Circuit Court has committed at the motion to dismiss stage: failing to “presume all of the plaintiff’s factual allegations are true, and . . . construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff,” in order “merely to assess the legal feasibility of the complaint, [and] not to assay the weight of the evidence which might be offered in support thereof.” *See 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); Brief at pp. 12-15. In other words, BCAC follows the Circuit Court in failing to take Alley Cat Allies’ allegations as true and in failing to construe them and the inferences therefrom in a light most favorable to Alley Cat Allies. *See* Brief at p. 13.

Alley Cat Allies’ Brief already points out the error:

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.

*Id.*

BCAC erroneously maintains that that the Circuit Court was not required—when reviewing BCAC’s Motion to Dismiss—to take Alley Cat Allies’ allegations regarding standing as true and to construe them and inferences therefrom in the light most favorable to Alley Cat Allies:

While trial courts must assume allegations of fact to be true when assessing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, *that is not the case for assessing subject matter jurisdiction under a Rule 12(b)(1) motion.*

Response Brief at p. 17 (emphasis added). The two cases BCAC cites for its position do not in fact support this position: *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992) and *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995). See Response Brief at p. 17 nn.55-56.

First, *Lujan v. Defs. of Wildlife*—a U.S. Supreme Court case that deals *not* with a mandamus action but with a declaratory judgment action and hence focuses on the traditional elements of standing—clearly states that a plaintiff’s standard for demonstrating standing varies depending on the stage of litigation he is in:

The party invoking federal jurisdiction bears the burden of establishing these elements [of standing]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations . . . may suffice*, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’

*Lujan*, 504 U.S. at 561 (internal citations omitted) (emphasis added).

BCAC's second citation is to the Tenth Circuit case *Holt v. United States*: "[w]hen reviewing a *factual attack* on subject matter jurisdiction, a [U.S. federal] district court may not presume the truthfulness of the complaint's factual allegations." See *Holt*, 46 F.3d at 1003; Response Brief at p. 17. This citation, however, is irrelevant here because BCAC's attack on Alley Cat Allies' standing was not a "factual attack," as that term is used in *Holt* and other case law concerning a Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(1) motion to dismiss. Rather, BCAC's attack was a "facial" one that "questions the sufficiency of the complaint" and requires a reviewing court to "accept the allegations in the complaint as true." See *Holt*, 46 F.3d at 1002; see also *Commonwealth of Pa. Fish & Boat Comm'n v. Consol Energy, Inc.*, 233 W. Va. 409, 414, 758 S.E.2d 762, 767 (2014) (stating that 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 and all material allegations of the complaint must be accepted as true).

What BCAC launched in its Motion to Dismiss clearly is a "facial attack" on Alley Cat Allies' standing:

It is unclear what taxes ACA pays in West Virginia . . . While West Virginia courts have not clearly defined what constitutes a taxpayer for standing to enforce a public right, surely it requires more than just buying a piece of property and paying the transfer tax on the same day that the [earlier, November 24, 2021] Petition [to this Court] is filed.

Motion to Dismiss at pp. 11-12 (A. 66-67). "Factual attacks,' on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the

pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (internal quotations omitted) (explaining that “[a]ttacks on subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) come in two forms,” namely as “facial attacks” and “factual attacks”). Because BCAC’s attack on Alley Cat Allies’ standing in its Motion to Dismiss cannot be characterized as a “factual attack,” BCAC’s citation to the standard of review for a Fed. R. Civ. P. 12(b)(1) factual attack is irrelevant here.<sup>4</sup>

**D. BCAC MISCONTRUES “PUBLIC RIGHT” AS USED IN THE CONTEXT OF A MANDAMUS ACTION.**

“Public right” is a technical term in West Virginia case law, with a specific meaning in the context of a mandamus action: “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

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<sup>4</sup> BCAC also cites *Robb v. W. Virginia Consol. Pub. Ret. Bd.*, No. 11-1650, 2013 WL 1301294 (W. Va. Mar. 29, 2013), where the appellant in that case—an individual taxpayer, citizen, and voter of West Virginia—was found to still lack standing to bring a mandamus action because, according to BCAC, he failed to establish “any negative financial impact upon him or upon the taxpayers of this state” and failed to “articulate any other legal basis upon which he might have standing.” *See* Response Brief at p. 16. However, this case is inapposite because the appellant’s action, as BCAC explains, was “against the West Virginia Consolidated Public Retirement Board to stop paying judicial officers that were receiving both a retirement payment from their state pension as well as their salary” *See id.* That is, in *Robb*, there were no allegations that the right sought to be enforced through a mandamus was “based upon a general statute” that applies to everyone in West Virginia, unlike in the Verified Complaint. *See Smith v. W. Va. State Bd. of Educ.*, 170 W. Va. 593, 596, 295 S.E.2d 680, 683 (1982); *Gallant v. Cnty. Comm’n of Jefferson Cnty.*, 212 W. Va. 612, 620, 575 S.E.2d 222, 230 (2002). Rather, it was based on a specialized statute that applies only to a discrete subset of persons.

(1982) (emphasis added); Brief at p. 16 (quoting same); Response Brief at p. 15 (quoting same). BCAC seemingly acknowledges as much. *See* Response Brief at p. 15.

Yet, rather than challenge Alley Cat Allies’ analysis of why and how the right to be enforced in the Verified Complaint meets the above definition of “public right,” BCAC—without citing a single authority—appeals to some intuitive, non-technical notion of “public right” to argue that:

the rights alleged to have been violated [in the Verified Complaint] are personal property rights rather than public rights. Whether and when an animal recovered by an animal control officer gets any level of medical treatment is hardly a public right. 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.

Response Brief at p. 18; *see generally* Response Brief. Such bald and unsupported argument has no force.

**E. MANDAMUS IS AN APPROPRIATE REMEDY TO BE SOUGHT IN THE VERIFIED COMPLAINT.**

BCAC repeats a series of misdirected arguments in defense of the Circuit Court’s erroneous finding that mandamus is not an appropriate remedy to be sought in the Verified Complaint.

First, BCAC argues that

because the only issues raised were abstract questions of future medical care for animals and all parties agree that all animal control officers must not violate the animal abuse statute. . . . [.] . . . the court could do nothing more than simply order the respondents to obey the law and not commit criminal animal abuse.

Response Brief at p. 20. In so doing, BCAC mischaracterizes the remedy that Alley Cat Allies seeks in the Verified Complaint as an empty “obey the law” command that lacks any meaningful guidance or substance. *See id.*

However, contrary to BCAC’s characterization, Alley Cat Allies has (1) alleged a persistent and routine pattern of a *specific* kind of animal abuse by BCAC—namely, not providing any medical care in black-and-white medically emergent cases—and has (2) sought a mandamus with corresponding specificity—namely, an order for 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 p. 10 (A. 18).

Second, BCAC argues that “necessary medical care” is a “vague, abstract notion that necessarily requires some discretion under the circumstances guided by community standards of morality.” *Response Brief* at p. 21. In fact, Alley Cat Allies addressed this argument in the Brief as follows:

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’).

Brief at pp. 20-21.

Third, BCAC raises the issue of mootness again (on which the Circuit Court did not rule), arguing that “[a]ny questions as to *past* care decisions are not suited for mandamus action[.]” Response Brief at pp. 21-22 (emphasis added). However, what BCAC fails repeatedly to understand is that Alley Cat Allies has alleged an *ongoing* persistent and routine *pattern* of failures and refusals by BCAC “to perform its nondiscretionary legal duty to prevent animal cruelty by providing necessary medical treatment to all animals in its care.” *See, e.g.*, Verified Complaint at ¶¶ 10-17, 24 (A. 11-15, 17). The specific examples of failures and refusals that Alley Cat Allies offered in its Verified Complaint were “[b]y way of illustration *only*[.]” *See id.* at ¶ 11 (emphasis added) (A. 12).

**F. THE CIRCUIT COURT IMPROPERLY READS AN ADJUDICATION OF THE MERITS INTO THIS COURT’S SIMPLE REFUSAL TO EXERCISE ITS ORIGINAL JURISDICTION.**

BCAC argues that W. Va. R. App. P. 16(j)

does not state that a circuit court must ignore the findings made by this Court in the refusal order, or ignore the fact that this Court already *fully considered the arguments of the parties*. A dismissal without prejudice simply means that petitioner may refile the same claims in circuit court, not that the circuit court must ignore the fact that the Supreme Court reviewed the petition and found that a rule to show cause should not be awarded.

Response Brief at p. 23 (emphasis added).

BCAC is incorrect that the Circuit Court, in its Order, did nothing more than to acknowledge “the fact that the Supreme Court reviewed [Alley Cat Allies’ original]

petition and found that a rule to show cause should not be awarded.” *See id.* The Circuit Court remarked that it found this fact to be “persuasive, though not controlling.” *See* Order, § Conclusions of Law at ¶ 23. (A. 7). However, unless taken to be a reflection on the merits of the petitioner’s arguments, this Court’s simple refusal to exercise its original jurisdiction would not, and indeed could not, have any “persuasive” quality.

### **CONCLUSION**

WHEREFORE, Alley Cat Allies requests that this Honorable Court grant the relief requested in the Brief of Appellant.

Respectfully submitted,

By: */s/ Timothy B. Hyland*  
Timothy Hyland (WV Bar No. 9827)  
HYLAND LAW PLLC  
1818 Library Street, Suite 500  
Reston, VA 20190  
thyland@hylandpllc.com  
(703) 956-3566 (phone)  
(703) 935-0349 (fax)

*Counsel for Appellant  
Alley Cat Allies Incorporated*

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BERKELEY COUNTY ANIMAL CONTROL and  
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Appellees.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of February, 2023, a copy of the foregoing was served through the electronic filing system and was mailed, first class, postage paid, to:

Anthony J. Delligatti, Esquire  
Jeffrey T. Mauzy, Esquire  
400 W. Stephen Street, Suite 201  
Martinsburg, WV 25401

*/s/ Timothy B. Hyland*  
Timothy Hyland (WV Bar No. 9827)

*Counsel for Petitioner  
Alley Cat Allies Incorporated*