

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
ALLEY CAT ALLIES INCORPORATED,

SCA EFiled: Jan 13 2023
12:39PM EST
Transaction ID 68886244

Petitioner,

v.

No. 22-744

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

Respondents.

RESPONSE BRIEF

**Counsel for “Berkeley County Animal Control”
and Berkeley County Council,
Respondents,**

Anthony J. Delligatti, (WV State Bar No. 12345)
Jeffery T. Mauzy, (WV State Bar No. 11178)
400 W. Stephen Street, Suite 201
Martinsburg, West Virginia 25401
Phone: (304) 264-1923 Ext. 8
adelligatti@berkeleywv.org
jmauzy@berkeleywv.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF THE CASE..... 4

SUMMARY OF ARGUMENT..... 8

STATEMENT REGARDING ORAL ARGUMENT 11

STANDARD OF REVIEW 11

ARGUMENT..... 13

I. The circuit court correctly found that ACA lacked traditional standing because it had no concrete actual or imminent injury that could be redressed by a mandamus action......13

II. The circuit court correctly found that ACA lacked taxpayer standing because ACA failed to offer sufficient evidence that it is a taxpayer of the state of West Virginia.15

III. The circuit court correctly found there is no public right to various treatment decisions of rescued animals in the care of Berkeley County Animal Control, and because of that no taxpayer standing suit could be brought to enforce any such rights......18

IV. The circuit court correctly found that a favorable decision by the circuit court would not redress any of the alleged wrongdoing or injuries, because such order could only require all public officers to not abuse rescued animals by giving an in adequate level of veterinary care without specifying what is an adequate level in all situations.20

V. The circuit court’s consideration of this court’s finding that no rule to show cause should issue in this writ was not error as it was not the basis for the circuit court’s dismissal, but even if such consideration was error it is not reversible error because ACA lacks standing, and the case is moot......22

VI. Although ACA does not contest the lower court’s finding that the case is moot, the case is moot and this appeal should be dismissed for being moot.24

CONCLUSION 25

Cases

<i>Am. Soc. for Prevention of Cruelty to Animals v. Feld Ent., Inc.</i> , 659 F.3d 13 (D.C. Cir. 2011).	14
<i>City of Martinsburg v. Cnty. Council of Berkeley Cnty.</i> , 880 S.E.2d 42 (W. Va. 2022)	24
<i>Cooper v. Gwinn</i> , 171 W.Va. 245, 298 S.E.2d 781 (1981).	12
<i>Doering v. City of Ronceverte</i> , 228 W. Va. 147, 718 S.E.2d 497 (2011).....	11
<i>Findley v. State Farm Mutual Automobile Insurance Company</i> , 213 W.Va. 80, 576 S.E.2d 807 (2002)	passim
<i>Flast v. Cohen</i> , 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968)	16
<i>Glover v. Sims</i> , 121 W. Va. 407, 3 S.E.2d 612, (1939).	11
<i>Hein v. Freedom From Religion Found., Inc.</i> , 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007)	16
<i>Holt v. United States</i> , 46 F.3d 1000 (10th Cir. 1995)	17
<i>Huffman v. Goals Coal Co.</i> , 223 W. Va. 724, 679 S.E.2d 323, (2009).....	12
<i>Kendall v. U.S. ex rel. Stokes</i> , 37 U.S. 524, 9 L. Ed. 1181 (1838).	12
<i>Lucas v. Bd. of Canvassers of Lincoln Cty.</i> , 116 W. Va. 427, 181 S.E. 77 (1935)	12
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).....	14, 17
<i>Marcum v. Ballot Commissioners</i> , 42 W. Va. 263, 26 S.E. 281 (1896).....	20
<i>McComas v. Bd. of Educ. of Fayette Cty.</i> , 197 W. Va. 188, 475 S.E.2d 280 (1996)	11
<i>Myers v. Barte</i> , 167 W.Va. 194, 279 S.E.2d 406 (1981)	15
<i>People v. Arroyo</i> , 3 Misc. 3d 668, 777 N.Y.S.2d 836 (Crim. Ct. 2004).....	22
<i>People v. Curcio</i> , 22 Misc. 3d 907, 908, 874 N.Y.S.2d 723, 726 (Crim. Ct. 2008).....	22
<i>Robb v. W. Virginia Consol. Pub. Ret. Bd.</i> , No. 11-1650, 2013 WL 1301294, (W. Va. Mar. 29, 2013).....	16
<i>Rogers v. Hechler</i> , 176 W. Va. 713, 348 S.E.2d 299 (1986).....	16
<i>Smith v. W. Virginia State Bd. of Educ.</i> , 170 W. Va. 593, 295 S.E.2d 680 (1982).	15
<i>Spilman v. City of Parkersburg</i> , 35 W. Va. 605, 14 S.E. 279.....	15
<i>State ex rel. Alsop v. McCartney</i> , 159 W.Va. 829, 228 S.E.2d 278, (1976).....	16
<i>State ex rel. Baker v. Bailey</i> , 152 W.Va. 400, 163 S.E.2d 873 (1968)	16
<i>State ex rel. Booth v. Board of Ballot Commissioners</i> , 156 W.Va. 657, 196 S.E.2d 299 (1972). 16	
<i>State ex rel. Brotherton v. Moore</i> , 159 W. Va. 934, 230 S.E.2d 638	15
<i>State ex rel. Buxton v. O'Brien</i> , 97 W. Va. 343, 125 S.E. 154 (1924).....	11
<i>State ex rel. Heironimus v. Town of Davis</i> , 76 W.Va. 587, 85 S.E. 779 (1915).....	16
<i>State ex rel. Lilly v. Carter</i> , 63 W.Va. 684, 60 S.E. 873 (1908).	24
<i>State ex rel. Pack v. Karnes</i> , 83 W.Va. 14, 97 S.E. 302 (1918)	16
<i>State ex rel. Sandy v. Johnson</i> , 212 W. Va. 343, 571 S.E.2d 333 (2002).	16
<i>State ex rel. Wiley v. State Rd. Comm'n</i> , 148 W. Va. 76, 133 S.E.2d 113 (1963).	13
<i>Walter v. Ritchie</i> , 156 W.Va. 98, 191 S.E.2d 275 (1972).....	12
<i>White v. Manchin</i> , 173 W.Va. 526, 318 S.E.2d 470 (1984)	16

Statutes

W. Va. Code § 11-3-9(a)(12).....	17
----------------------------------	----

W. Va. Code § 53-1-5.....	12
W. Va. Code § 61-8-19(a).....	5, 9, 20, 25
W. Va. Code 7-10-2(a).....	5

Other Authorities

MOOTNESS, Black’s Law Dictionary (11th ed. 2019).....	24
---	----

Rules

W. Va. R. App. 16.....	10, 11, 23
------------------------	------------

Treatises

Louis J. Palmer, Robin J. Davis, Litigation Handbook on West Virginia Rules of Civil Procedure § 12(b), 344 (5th ed. 2017).....	14
---	----

STATEMENT OF THE CASE

On November 23, 2021, Petitioner Alley Cat Allies Incorporated “ACA”, a foreign special interest group, filed an unverified petition for writ of mandamus in the state’s highest court against the “Berkeley County Animal Control” seeking an order from this Court directing the Berkeley County Animal Control to broadly follow the law by providing sufficient veterinary care to animals.¹ ACA did so without ever lodging any complaints with anyone at the Berkeley County Sheriff’s Office, with any animal control officer, or any other county employee or agency relating to mistreatment of the animals cited in the petition. That initial action and a subsequent lawsuit in circuit court both allege that animals with no connection to ACA were previously in the custody of “Berkeley County Animal Control” and were provided insufficient veterinary care.²

“Berkeley County Animal Control” (“BCAC”) is a department in the Berkeley County Sheriff’s Office. It is not a public corporation, political subdivision, or any other type of entity that has legal personhood. BCAC did not waive personal jurisdiction or service of process, but because

¹ Original Supreme Court Petition. App. at 78.

² Original Supreme Court Petition. App. at 78; Circuit Court Complaint. App. at 9.

the circuit court dismissed the suit for lack of subject matter jurisdiction,³ the issue of personal jurisdiction over BCAC is not addressed in this brief.

The Complaint alleges that “Berkeley County Animal Control” violated a nondiscretionary duty “of prevent[ing] the perpetuation or continuance of any act of cruelty upon any animal,”⁴ and asked first this Court, and then the circuit court to compel “Berkeley County Animal Control” to not violate a criminal code section (W. Va. Code § 61-8-19(a)) by providing necessary medical treatment in making future medical care decisions. ACA alleges instances of BCAC violating a nondiscretionary duty to provide certain animals more medical care than had been received at various times over the tenures of the current and former Sheriff.⁵ None of the allegations involved animals in the custody of the Respondents, the Sheriff, or any animal control officer at the time the suit was filed.⁶ While ACA acknowledges that determining the degree of medical care / veterinary care often requires some degree of discretion,⁷ ACA claims that “Berkeley County Animal Control” itself has a broad non-discretionary legal duty to prevent animal cruelty and provide veterinary care to animals in its custody and asked the circuit court to prospectively direct “Berkeley County Animal Control” to provide or obtain necessary medical and veterinary care in

³ Circuit Court order. App. at 5. The Respondents also argued for dismissal for failure to state a claim for which relief could be granted below under rule 12(b)(6) of the West Virginia Rules of Civil Procedure because ACA failed to provide verified evidence of 1) a clear right in the to the relief sought; (2) the existence of a legal duty on the part of the respondents; and (3) the absence of another adequate remedy at law. Because the court below only addressed the jurisdictional matters, this brief does not address those reasons for dismissal.

⁴ Circuit Court Complaint. App. at 9. Citing W. Va. Code 7-10-2(a))

⁵ Circuit Court Complaint. App. at 12-13.

⁶ Subsequent to the law suit being filed the Sheriff and Prosecuting Attorney asked that the West Virginia State Police to investigate the allegations of criminal conduct. The State Police drafted a final report noting that none of the allegations were substantiated and that ACA refused to communicate with the investigating trooper.

⁷ Appellant’s Brief at 19. ACA notes that some medical treatment such as treating coughs is “plainly within the realm of discretion.”

accordance with the law in all future cases. ACA does nothing in the way of defining when an animal must see a veterinarian or what type of medical care is necessary in future cases, and the respondents agree that they must comply with laws against animal cruelty. Here however, ACA merely claims that veterinary care should have been provided sooner or been more extensive in some past cases of animals no longer in the custody of the Sheriff or the Respondents.

Knowing that it lacked traditional standing because neither it nor any of its members had a cognizable injury, Alley Cat Allies purchased a piece of vacant land in Berkeley County on the very same day that it placed the first Supreme Court Petition in the mail in an attempt to gain taxpayer standing to enforce public rights. This Court reviewed the original Petition, a Motion to Dismiss, and a response to the Motion to Dismiss, and unanimously found: “Upon consideration and review, the Court is of the opinion that a rule should not be awarded, and the writ prayed for by the petitioner is refused.”⁸ Without alleging any new pertinent facts, allegations, or claims, ACA added the Berkeley County Council as a party and petitioned the Circuit Court to award a writ of mandamus, despite the Supreme Court’s refusal to do so.⁹

Although the underlying facts of each allegation of wrongdoing are in dispute, the circuit court did not address the specific allegations of prior wrongdoing, but reviewed only the jurisdictional grounds for dismissal. The circuit court dismissed the Complaint on two justiciability grounds: First, because ACA lacks standing to bring the suit; and Second, because the claims are moot.¹⁰ The Circuit Court first looked to whether there is an allegation of any injury to ACA and whether this suit would be likely to redress this purported injury. The Circuit Court found that

⁸ Supreme Court Order Refusing Petition for Writ of Mandamus. App. at 261.

⁹ Circuit Court Complaint. App. at 9.

¹⁰ Order Granting Motion to Dismiss. App. at 1-8.

there is no injury alleged by ACA or its members and that any ruling by the Court could not redress any such injury.¹¹

Next, the circuit court looked to whether ACA could have taxpayer standing, to enforce a public right. Petitioner's sole stated basis for standing is that it is a "taxpayer of the state of West Virginia and Berkeley County" and that it pays real property taxes and unemployment taxes.¹² Defendants below conceded that ACA paid a transfer tax on the same day ACA mailed the Supreme Court Petition, but disputed whether any other taxes had been paid prior to the suit. It is unclear whether Alley Cat Allies, a nonprofit IRC 501(c)(3) charitable organization, paid any other taxes in West Virginia as the only evidence is the verified Complaint itself which alleges ACA "pays taxes on real property it owns in Berkeley County and is required to pay unemployment assessment and other applicable taxes."¹³ The circuit court found that ACA failed to demonstrate that it is a taxpayer in West Virginia that may bring suit against a public body or official to enforce a public right.¹⁴ Beyond finding that ACA failed to demonstrate standing as a taxpayer, the circuit court found that treatment decisions for hypothetical future animals in the care of the County, the Sheriff, or an animal control officer is not a public right.¹⁵

Lastly, the circuit court 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.¹⁶

¹¹ Order Granting Motion to Dismiss. App. at 5.

¹² Circuit Court Complaint. App. at 10.

¹³ Circuit Court Complaint. App. at 10.

¹⁴ Order Granting Motion to Dismiss. App. at 5.

¹⁵ Order Granting Motion to Dismiss. App. at 5.

¹⁶ Order Granting Motion to Dismiss. App. at 5.

While the circuit court did not find this Court's previous review of the matter controlling, the circuit court did find it persuasive that this Court concluded that "a rule should not be awarded."¹⁷

On appeal, ACA argues that the court below erred in finding that ACA lacked standing to bring the suit. ACA does not however make any claim on appeal, that the Court below erred in finding that the case is moot.

Summary of Argument

On appeal, ACA argues that the circuit court erred in five ways, and each are addressed in turn. Notwithstanding those responses to each assignment of error, the Court should affirm the circuit court's dismissal because the cause of action is moot.

First, ACA mistakenly alleges that the circuit court held that taxpayer standing requires a demonstration of a particularized injury to compel performance of a ministerial duty. Rather, the Circuit Court reviewed whether ACA had traditional standing, prior to analyzing taxpayer standing to enforce a public right. Traditional standing requires an actual or imminent injury that is concrete and particularized.¹⁸ Further, traditional standing requires that the actual or imminent injury will be redressed through a favorable ruling by the Court.¹⁹ Here, ACA agrees that it does not have any prior or imminent injury, thus the circuit court found that ACA did not have traditional standing. Furthermore, the circuit court found that a favorable ruling would not redress any future injury, because the only relief sought was an order to not criminally abuse animals, and respondents agree that they and their agents must abide by all criminal laws including those against animal cruelty.

¹⁷ Supreme Court Order Refusing Petition for Writ of Mandamus. App. at 261.

¹⁸ Syl. pt. 5, *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

¹⁹ *Id.*

Second, ACA failed to provide sufficient evidence that it has standing to bring a taxpayer standing suit, because it failed to demonstrate that it is a taxpayer of the state of West Virginia. Taxpayer standing to enforce public rights requires more than paying a transfer tax on a vacant piece of property on the eve of a lawsuit or even some property tax in this state. ACA offered no documentary evidence that it had paid taxes or offered any evidence that it conducted any business; rather ACA simply made a statement in the complaint alleging that ACA is now obligated to pay property taxes and unemployment taxes.

Third, the circuit court correctly found that no public right was at issue, thus no taxpayer standing exists. ACA argues that the welfare and treatment of animals that neither it nor its members owned, that were previously in the custody of the Sheriff rose to a public right that could be enforced by any taxpayer. Here, however, no public right was at issue. Rather, any right implicated would be a personal property right of the owner of a pet animal. Otherwise, if the court had expanded all treatment decisions of animals that BCAC rescues, many of which arrive with serious medical issues, then any taxpayer could drag these public officials into costly litigation. Such a broad standing would deter local governments from rescuing endangered, injured, or abused animals as it could result in litigation.

Fourth, the circuit court, contrary to ACA's claims, did not find that mandamus is not an appropriate remedy to require performance of lawful duties in all animal welfare cases, but rather found that hypothetical future treatment decision are discretionary and any broad order by the court could not redress the alleged injuries. The lower court found that the suit lacked redressability, because the only issues raised before it 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.²⁰

²⁰ See W. Va. Code § 61-8-19(a).

Standing requires that injuries be capable of being redressed by a court.²¹ Rather than seeking a redress of injuries, ACA seeks an advisory opinion that some treatment decisions in the past were improper, but offers nothing in the way specific mandatory guidance in future medical care decisions. Because all parties agree that everyone must not violate the criminal laws of the state of West Virginia, and a general order requiring Respondents to do so would not redress the perceived injury of prior incidents of veterinary care failing to meet the appropriate standard of care.

Fifth, the circuit court noted this Court’s initial review and refusal of this mandamus action, but did not dismiss it because this Court found that “(u)pon consideration and review, the Court is of the opinion that a rule should not be awarded, and the writ prayed for by the petitioner is refused.”²² While Rule 16(j) of the West Virginia Rules of Appellate Procedure notes that when this Court refuses an original jurisdiction petition it is without prejudice, the rule does not state that a circuit court must ignore the findings made by this Court in the refusal order. 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. Moreover, the circuit court did not base its finding that it lacked jurisdiction on this Court’s prior decision, but merely noted that it “finds at least persuasive, though not controlling, that the petition to the West Virginia Supreme Court of Appeals was summarily dismissed.”²³

Sixth, although ACA does not contest mootness on appeal, the circuit court found this case to be moot, and this Court should affirm the mootness finding. Because the veterinary care

²¹ Syl. pt. 5, *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

²² Supreme Court Order Refusing Petition for Writ of Mandamus. App. at 261.

²³ Circuit Court Order. App. at 7.

decisions at issue are moot and were even moot at the time the action was filed, as none of the animals cited were in the care or custody of the Sheriff, any animal control officer, the County Council, or any other county government agency or official, the circuit court found there was no justiciable controversy.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not proper in this case because there is no substantial question of law and no prejudicial error. While ACA contests the finding of the lower court that ACA lacked standing, it does not contest the finding the case is moot, and even if the Court ruled in ACA's favor the underlying dismissal with prejudice would stand. For these reasons, oral argument is improper and a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

STANDARD OF REVIEW

The grant of a motion to dismiss, a finding of lack of jurisdiction, and the refusal to issue a show cause in suit for mandamus, are all reviewed on appeal *de novo*.²⁴

Granting a writ of mandamus "is not a matter of right, but of discretion sparingly exercised"²⁵ by courts. Mandamus is a tool of courts to require governmental officials to act when the law requires the official to act but refuses to do so, "but it is never employed to prescribe in what manner they shall act, or to correct errors they have made."²⁶ Mandamus is "a drastic remedy to be invoked only in extraordinary situations,"²⁷ and mandamus will only issue "to require the discharge by a public official of a nondiscretionary duty."²⁸ A non-discretionary or ministerial

²⁴ *Doering v. City of Ronceverte*, 228 W. Va. 147, 151, 718 S.E.2d 497, 501 (2011).

²⁵ W.Va. R. App. 16(a).

²⁶ Syllabus, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924).

²⁷ *McComas v. Bd. of Educ. of Fayette Cty.*, 197 W. Va. 188, 475 S.E.2d 280 (1996).

²⁸ Syl. Pt. 4, *Glover v. Sims*, 121 W. Va. 407, 3 S.E.2d 612, (1939).

duty in the context of a mandamus action is one that “is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]”²⁹

When it comes to extraordinary writs, courts are gate keepers, and if the petition fails to make a prima facie case in its initial verified pleading the court should not issue a rule to show cause.³⁰ Furthermore:

This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal Constitutions.³¹

At its heart, the extraordinary writ of mandamus empowers the judiciary to require those in lower tribunals or other branches to perform clear legal obligations. To go beyond this limited power of mandamus is to usurp the legislative and executive branches of their policymaking and administrative authorities and upset the balance of powers among the three branches.³² For that reason, in order for a court to issue a rule to show cause, a petitioner must provide verified evidence establishing a prima facie case that shows: “(1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.”³³ Moreover, the right alleged must be concrete as “[m]andamus does not lie for the vindication of a mere abstract right.”³⁴ When deciding whether all the elements of a writ of mandamus have been established, “the denied material allegations of petition are not considered as sustained, and

²⁹ Syl. Pt 3, in part, *Walter v. Ritchie*, 156 W.Va. 98, 191 S.E.2d 275 (1972).

³⁰ W. Va. Code § 53-1-5.

³¹ Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323, (2009).

³² See generally *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 9 L. Ed. 1181 (1838).

³³ Syl. Pt. 3, *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781 (1981).

³⁴ *Lucas v. Bd. of Canvassers of Lincoln Cty.*, 116 W. Va. 427, 181 S.E. 77 (1935).

undenied material allegations contained in the answer must be considered as being true.”³⁵ In regard to the first prong of the test, whether a plaintiff or petitioner has a clear legal right to relief “is generally a question of standing . . . where the individual has a special interest in the sense that he is part of the class that is being affected by the action then he ordinarily is found to have a clear legal right.”³⁶

ARGUMENT

I. The circuit court correctly found that ACA lacked traditional standing because it had no concrete actual or imminent injury that could be redressed by a mandamus action.

ACA incorrectly claims that the circuit court conflated traditional standing with taxpayer standing when it did not. The circuit court held that traditional standing requires a demonstration of a particularized injury to compel performance of a ministerial duty, while taxpayer standing requires the claim to be by a taxpayer to enforce a public right. The circuit court reviewed whether ACA had traditional standing, prior to analyzing taxpayer standing to enforce a public right. Traditional standing requires an actual or imminent injury that is concrete and particularized.³⁷ Further, traditional standing requires that the actual or imminent injury will be redressed through a favorable ruling by the Court.³⁸

Standing 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

³⁵ *State ex rel. Wiley v. State Rd. Comm'n*, 148 W. Va. 76, 76, 133 S.E.2d 113, 113–14 (1963).

³⁶ *State ex rel. Billy Ray C. v. Skaff*, 190 W. Va. 504, 507, 438 S.E.2d 847, 850 (1993).

³⁷ Syl. pt. 5, *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

³⁸ *Id.*

must be likely that the injury will be redressed through a favorable decision of the court.³⁹

Standing cannot be inferred and the party asserting a claim for relief bears the burden of demonstrating that it has standing.⁴⁰ The injury-in-fact element to standing as it pertains to interest groups must still be concrete and not hypothetical or conjectural:

An organization has representative standing to sue on behalf of its members when the organization proves that: (1) at least one of its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.⁴¹

Citing an animal welfare case similar to this case, Louis Palmer and Justice Davis summarized organizational standing:

An organization may establish standing if it can show that the defendant's actions cause a concrete and demonstrable injury to the organization's activities that is more than simply a setback to the organization's abstract social interests. An organization's abstract social interest in a problem is insufficient to establish standing, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem. This is because an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required. Accordingly, organizations who seek to do no more than vindicate their own value preferences through the judicial process generally cannot establish standing.⁴²

Here, ACA has no concrete 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 hypothetical animal. Even if

³⁹ Syl. Pt. 5, *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

⁴⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

⁴¹ Syl. Pt 4, *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation*, 227 W. Va. 653, 713 S.E.2d 809 (2011).

⁴² Louis J. Palmer, Robin J. Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b), 344 (5th ed. 2017) citing *Am. Soc. for Prevention of Cruelty to Animals v. Feld Ent., Inc.*, 659 F.3d 13 (D.C. Cir. 2011).

there was a current animal in the custody of BCAC, and there was a specific veterinary care decision at issue, ACA would not have standing to seek a writ unless it was the lawful owner of the animal. Because ACA has no injury-in-fact, the circuit court found that it lacked traditional standing.

II. The circuit court correctly found that ACA lacked taxpayer standing because ACA failed to offer sufficient evidence that it is a taxpayer of the state of West Virginia.

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.”⁴³ However, ACA is not a taxpayer, citizen, or voter, and the right sought is not a public right.

This Court initially broadened traditional standing to those seeking the performance of nondiscretionary constitutional duties to persons that are both a citizen and a taxpayer.⁴⁴ Then over time the Court broadened taxpayer standing to “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.”⁴⁵ Many of the taxpayer-citizen-voter standing cases involve elections issues because of the special and often time sensitive public

⁴³ Syl. Pt. 3, *Myers v. Barte*, 167 W.Va. 194, 279 S.E.2d 406 (1981).

⁴⁴ See Syl. Pt. 3, *Spilman v. City of Parkersburg*, 35 W. Va. 605, 14 S.E. 279 (1891)(“Any tax-paying resident and voter of such city, suing on behalf of himself and of all other tax-payers of such city, has a right to enjoin the creation of any such unconstitutional indebtedness.”); Syl. Pt. 1, *State ex rel. Brotherton v. Moore*, 159 W. Va. 934, 230 S.E.2d 638 (1976)(“A citizen and taxpayer of this State has a right to maintain a mandamus proceeding in order to compel a public official to perform a nondiscretionary constitutional duty.”).

⁴⁵ Syl. Pt. 3, *Myers v. Barte*, 167 W. Va. 194, 279 S.E.2d 406 (1981)

Smith v. W. Virginia State Bd. of Educ., 170 W. Va. 593, 596, 295 S.E.2d 680, 683 (1982).

concern of insuring that election officials lawfully discharge their duties.⁴⁶ In federal cases, taxpayer standing regarding the constitutionality of federal expenditures is limited by U.S. Const. Art. 3, § 2, to those with an actual cognizable injury beyond the expenditure of tax dollars or a nexus between the tax paid the writ sought.⁴⁷

In a memorandum decision in a non-election case, this Court affirmed the dismissal of a suit wherein an individual taxpayer, citizen, and voter sought a writ of mandamus 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.⁴⁸ In *Robb v. West Virginia Consolidated Public Retirement Board* the complainant, Richard Robb, was not only a taxpayer, voter, and citizen, but also a beneficiary of the public retirement system.⁴⁹ In *Robb*, this Court adopted and incorporated the circuit court's order, which found that Mr. Robb did not have standing because he "failed to establish that the payment of retirement benefits to the three judicial officers has had any negative financial impact upon him or upon the taxpayers of this state."⁵⁰ Further, Mr. Robb "failed to articulate any other legal basis upon which he might have standing."⁵¹

⁴⁶Syl. Pt. 3. *State ex rel. Sandy v. Johnson*, 212 W. Va. 343, 571 S.E.2d 333 (2002). See also, *Rogers v. Hechler*, 176 W. Va. 713, 348 S.E.2d 299 (1986); *State ex rel. Alsop v. McCartney*, 159 W.Va. 829, 838 n. 7, 228 S.E.2d 278, 283 n. 7 (1976); *White v. Manchin*, 173 W.Va. 526, 318 S.E.2d 470 (1984); Syl. pt. 1, *State ex rel. Booth v. Board of Ballot Commissioners*, 156 W.Va. 657, 196 S.E.2d 299 (1972); Syl. pt. 1, *State ex rel. Baker v. Bailey*, 152 W.Va. 400, 163 S.E.2d 873 (1968); *State ex rel. Zickefoose v. West*, 145 W.Va. 498, 116 S.E.2d 398 (1960); *State ex rel. Pack v. Karnes*, 83 W.Va. 14, 97 S.E. 302 (1918); *State ex rel. Heironimus v. Town of Davis*, 76 W.Va. 587, 85 S.E. 779 (1915).

⁴⁷ *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007); *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).

⁴⁸ *Robb v. W. Virginia Consol. Pub. Ret. Bd.*, No. 11-1650, 2013 WL 1301294, (W. Va. Mar. 29, 2013).

⁴⁹ *Id.*

⁵⁰ *Id.* at 10.

⁵¹ *Id.* at 10.

ACA argues that it has standing to enforce a duty for the BCC and the BCAC to not commit criminal animal abuse by providing necessary medical treatment, not because ACA has an injury, but because it is a “taxpayer of the State of West Virginia and Jefferson and Berkeley Counties.”⁵² It is unclear what taxes ACA pays in West Virginia. It is a nonprofit tax-exempt charitable organization. If anything, its existence reduces tax revenue in the state as it solicits and receives tax deductible donations. 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.⁵³ 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.

ACA argues in its brief that the circuit court was required to presume all allegations of fact as to standing as true when assessing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.⁵⁴ 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. Standing cannot be inferred and the party asserting a claim for relief bears the burden of demonstrating that it has standing.⁵⁵ Moreover, “(w)hen reviewing a factual attack on subject matter jurisdiction, a () court may not presume the truthfulness of the complaint’s factual allegations.”⁵⁶

Rather than offer any proof of taxes paid, or how the status of a taxpayer is somehow related to the treatment decisions of animals rescued by BCAC, ACA broadly argues that the mere

⁵² Complaint. App. at 10.

⁵³ W. Va. Code § 11-3-9(a)(12).

⁵⁴ Petitioner’s Brief at 12.

⁵⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

⁵⁶ *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

payment of taxes itself confers standing. ACA does not argue that there is some connection between whatever taxes it has paid or is obligated to pay in the future and the actions of BCAC, nor does it explain how treatment decisions for rescued animals may cause injuries to taxpayers generally. 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 Petition is filed. If that were that case, it would open the door to any person anywhere gaining standing in West Virginia simply by purchasing something in West Virginia and paying a consumption tax (sales tax, excise tax, transfer tax, etc.). If paying a West Virginia transaction tax or property tax is sufficient to confer taxpayer standing, then the claim would need to have some connection to the status of a taxpayer. It is also unclear how long would the taxpayer have standing if it was no longer obligated to pay any future taxes.

Because ACA has failed to demonstrate that it is a taxpayer, the circuit court correctly found that it is without jurisdiction because ACA lacks standing to bring this suit.

III. The circuit court correctly found there is no public right to various treatment decisions of rescued animals in the care of Berkeley County Animal Control, and because of that no taxpayer standing suit could be brought to enforce any such rights.

In addition to lacking taxpayer standing for failing to demonstrate that ACA is a taxpayer, the rights alleged to have been violated 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. Otherwise, every time a citizen, taxpayer or voter did not like how an animal control officer treated an animal, it could haul that public officer into court. The same

would go for all law enforcement activity, regardless of whether the person bringing the suit had any interest in the outcome of the case.

Certainly there is a private property right of animal owners, but ACA argues that any citizen or taxpayer, regardless of whether that person has an ownership interest, may bring an action against the BCAC for the treatment of animals previously in its care. Mandamus cases in West Virginia dealing with constitutional duties of elected officials and election matters have often been deemed to be public rights that may be enforced by citizen voters. However, no cases extend jurisdiction of public rights to the government's treatment of private property such as pets. If the notion of a public right is extended to the treatment of private property, then anyone, merely by paying a tax in the state, could bring suit against county officers in mandamus regarding an action taken by various county officials dealing with private property such as claims regarding: individual property assessments (Assessor), property taxes (Sheriff), property seized under civil asset forfeiture (Sheriff), code inspection and enforcement (County Commission); land use or subdivision decisions (Planning Commission), etc.

Applying ACA's reasoning, this would presumably also extend to the state as well as all political subdivisions which often make decisions affecting private property. The provision of standing to include all citizens and taxpayers to government actions that deal with private property would broaden standing for mandamus to such an extent that anyone could simply file a lawsuit any time a government actor did something that the citizen or taxpayer did not like regardless of whether the person bringing the suit had any real interest in the outcome. Because the only controverted rights at issues in the treatment decisions of rescued animals is a private property right, no public right exists and ACA lacks taxpayer standing to enforce a public right.

IV. The circuit court correctly found that a favorable decision by the circuit court would not redress any of the alleged wrongdoing or injuries, because such order could only require all public officers to not abuse rescued animals by giving an adequate level of veterinary care without specifying what is an adequate level in all situations.

The circuit court, contrary to ACA's claims, did not find that mandamus is not an appropriate remedy to require performance of lawful duties in all animal welfare cases, but rather found that, in this case, hypothetical future treatment decisions are discretionary and any broad order by the court could not redress the alleged injuries. The lower court found that the suit lacked redressability, 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.⁵⁷ Thus, the court could do nothing more than simply order the respondents to obey the law and not commit criminal animal abuse.

Standing requires that injuries be capable of being redressed by a court.⁵⁸ Moreover, ministerial duties, for which mandamus may apply are ones which are "to be performed **under a given state of facts**, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to or exercise of the judgment of the one doing it upon the propriety of the acts being done."⁵⁹ Rather than seeking a redress of injuries, ACA seeks an advisory opinion that some treatment decisions in the past were improper, but offers nothing in the way of specific mandatory guidance in future veterinary care decisions. Because all parties agree that everyone must not violate the criminal laws of the state of West Virginia, and a general order requiring Respondents

⁵⁷ See W. Va. Code § 61-8-19(a).

⁵⁸ Syl. pt. 5, *Findley v. State Farm Mutual Automobile Insurance Company*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

⁵⁹ Syl. Pt. 2, *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S.E. 281 (1896) (emphasis added).

to do so would not redress any prior or future injuries, and no writ can be molded to alleviate any such injuries.

ACA argues that there is a clear, definable, legal duty for BCAC to provide necessary medical treatment to injured animals BCAC rescues. To be clear, BCAC provides necessary medical care to all animals in its care. Nonetheless, determining what care is needed requires the use of sound discretion as to what is necessary under the circumstances. Officers are trained to use their discretion in care decisions, and the policy directives set forth by the Sheriff provide guidance in how to utilize that discretion.⁶⁰

Even if a foreign special interest group had a right for animals it did not own in this state to receive “necessary medical care,” such duty is a vague, abstract notion that necessarily requires some discretion under the circumstances guided by community standards of morality. Because there is no specific case at issue or facts to assess, ACA seeks a broad rule compelling the BCAC to not commit a specific crime because it believes unnamed BCAC officers committed that crime in the past. Were mandamus awarded, then every time that ACA thinks veterinary treatment was necessary, but the trained animal control officers make a different decision, it will haul BCAC (or the officer) into court for contempt of the mandamus order. ACA is not arguing that any BCAC officers are currently committing animal abuse against any animals now in its care. Because this action is focused solely on future hypothetical factual situations, any such directive from this court beyond “don’t violate W. Va. Code § 61-8-19” would go beyond this Court’s authority into the policy making or administrative realms. And because the Sheriff and the Chief Animal Control Officer of Berkley County agree to follow the law and not commit animal abuse, there is no real dispute for the court to compel some action. Any questions as to past care decisions are not suited

⁶⁰ Ex. 2. - Supreme Court Appendix at 6-8.

for mandamus actions, because the writ of mandamus is prospective, not retrospective, and requires a specific action to be taken.

The Sheriff believes the criminal statute on withholding medical care is a vital tool in prosecuting animal abusers, and does not agree that the criminal animal abuse statute as it applies to the neglect of animals in need of medical care is unconstitutionally vague when applied to specific sets of circumstances. That being said, other courts have found such notions as necessary medical care and unnecessary pain to be void for vagueness. In New York, a court found a statute prohibiting “unjustifiable physical pain” as being too vague to criminalize the failure to give medical care or pain treatment to a dog with a cancerous tumor.⁶¹

Unless there is a clear legal obligation or rule to take all animals picked up by BCAC to a veterinarian, it is unclear what directive this writ would entail. Is it the case that more animals need more medical care? If so, how much? What are the rules? When does the failure to provide medical care become criminally intentional or reckless rather than negligent? These ideas of necessary veterinary care under all circumstances are general broad duties that entail the use of discretion and are questions for policy makers and administrators, not courts. Accordingly, the Court should affirm the lower court’s finding that ACA lacks standing.

- V. The circuit court’s consideration of this court’s finding that no rule to show cause should issue in this writ was not error as it was not the basis for the circuit court’s dismissal, but even if such consideration was error it is not reversible error because ACA lacks standing, and the case is moot.**

⁶¹ *People v. Arroyo*, 3 Misc. 3d 668, 777 N.Y.S.2d 836 (Crim. Ct. 2004); *See also People v. Curcio*, 22 Misc. 3d 907, 908, 874 N.Y.S.2d 723, 726 (Crim. Ct. 2008).

The circuit court found that this Court’s prior consideration of ACA’s claims was not controlling and did not find that this Court’s refusal to issue as show cause is *res judicata*. Rather, the circuit court dismissed the case because ACA lacks standing and because the case is moot. After both parties filed briefs in ACA’s initial original jurisdiction petition before this Court, this Court, applying Rule 16(i) of the Rules of appellate procedure “fully considered the arguments of the parties”⁶² and found that “a rule should not be awarded.”⁶³

Rule 16(j) of the West Virginia Rules of Appellate Procedure provides that when this Court refuses an original jurisdiction petition it is without prejudice unless the Court orders otherwise. Rule 16(j) simply clarifies that the Supreme Court’s refusal to issue a rule is not an absolute bar to refiling the same or similar claim for extraordinary relief in circuit court; it 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. Moreover, the circuit court did not base its finding that it lacked jurisdiction on this Court’s prior decision, but merely noted that it “finds at least persuasive, though not controlling, that the petition to the West Virginia Supreme Court of appeals was summarily dismissed.”⁶⁴ Accordingly, the circuit court did not err by considering the fact that this court dismissed the initial suit, and if it did err, the error was not reversible because ACA lacks standing and the case is moot.

⁶² W. Va. R. App. 16(i).

⁶³ Supreme Court Order Refusing Petition for Writ of Mandamus. App. at 261.

⁶⁴ Circuit Court Order. App. at 7.

VI. Although ACA does not contest the lower court’s finding that the case is moot, the case is moot and this appeal should be dismissed for being moot.

In addition to ACA lacking standing to bring the claims, the veterinary care decisions at issue are moot as none of the animals cited in the Complaint are in the care or custody of the Sheriff, any animal control officer, the County Council, or any other county government agency or official. Mootness occurs when there is a “lack of any actual controversy between litigants, as a result of which any judicial ruling would have no practical effect.”⁶⁵ A moot case generally cannot properly be considered on its merits. In fact “[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.”⁶⁶ Furthermore, “(a) case ‘in which a controversy no longer exists’ and which ‘presents only an abstract question that does not arise from existing facts or rights’ is, by definition, moot.”⁶⁷

Here, there are no controverted rights to determine, or even the care decisions of animals named in the Complaint, but rather abstract questions of what level of veterinary care must be provided so as not to constitute animal abuse. These sorts of abstract questions are ones to be addressed by policy makers, not by courts. If it was the case that ACA owned a pet that was retrieved by BCAC and believed that the animal was suffering from animal abuse at the behest of one or more BCAC officers, then it certainly would be the Court’s role to award mandamus if the court found that the officer was refusing to take some action required by law. Without a controversy before the Court as to a medical care decision for an animal in the custody of the

⁶⁵ MOOTNESS, Black’s Law Dictionary (11th ed. 2019).

⁶⁶ Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908).

⁶⁷ *City of Martinsburg v. Cnty. Council of Berkeley Cnty.*, 880 S.E.2d 42 (W. Va. 2022) (citing Black’s Law Dictionary (11th ed. 2019)).

Sheriff, there is simply no mandamus order that could provide clarity as to when medical treatment is necessary under W. Va. Code § 61-8-19(a) for all hypothetical future situations.

Because all claims are moot the Court lacks subject matter jurisdiction and the court should either affirm the lower court's dismissal for mootness, or dismiss the Appeal for being moot.

CONCLUSION

This Court, as the lower court found, lacks subject matter jurisdiction, because 1) ACA lacks standing to bring the claims, and 2) any claims alleged are moot. Accordingly, the Court should affirm the lower court's dismissal.

Respectfully submitted,

Berkeley County Animal Control, and
Berkeley County Council
Respondents,

/s/ Anthony J. Delligatti
Anthony J. Delligatti, (WV State Bar No. 12345)
Jeffery T. Mauzy, (WV State Bar No. 11178)
400 W. Stephens Street, Suite 201
Martinsburg, West Virginia 25401
Phone: (304) 264-1900 Ext. 8
adelligatti@berkeleywv.org
jmauzy@berkeleywv.org