

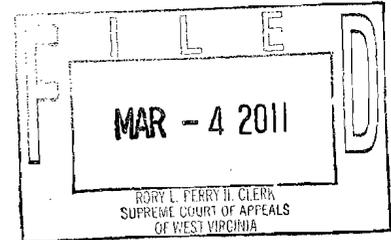
In the West Virginia Supreme Court of Appeals

The Affiliated Construction Trades
Foundation, a division of the
West Virginia State Building and
Construction Trades Council, AFL-CIO,

Appellant,

v.

No.: 35742
Kanawha County Circuit Court
Civil Action No. 04-C-3189
Judge James C. Stucky



The West Virginia Department of
Transportation, Division of Highways;
The West Virginia Board of Education;
The Mingo County Redevelopment Authority; and
Nicewonder Contracting, Inc.,

Appellees.

**Initial Brief on Appeal of the Affiliated Construction Trades Foundation, a division of
the West Virginia State Building and Construction Trades Council, AFL-CIO
from the Order of the Circuit Court of Kanawha County that Granted Defendant
Nicewonder Contracting Inc.'s Motion for Summary Judgment
Based on Plaintiff's Lack of Standing**

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On May 7, 2010, the Honorable James C. Stucky, Judge, Circuit Court of Kanawha County entered an Order that Granted *Defendant Nicewonder Contracting, Inc.'s Motion for Summary Judgment Based on Plaintiff's Lack of Standing* in this matter. On or about June 23, 2010, the Affiliated Construction Trades Foundation ("ACT") filed a *Petition for Appeal* from that Order with this Court. On November 17, 2010 this Court Granted ACT's Petition. This is ACT's *Initial Brief on Appeal*.

Proceedings Below and Statement of Facts

On December 2, 2004 the Appellant filed the underlying Declaratory Judgment Action alleging that an Agreement entered into by Appellees herein Nicewonder Contracting, Inc. (hereinafter "Nicewonder" or "NCI") and West Virginia Department of Transportation, Division of Highways for the construction of a portion of the King Coal Highway violated the laws of this State with regard to competitive bidding (West Virginia Code § 5-22-1 *et seq.*) and the payment of prevailing wages (West Virginia Code § 21-5A-1 *et seq.*) as well as similar violations of federal bidding and prevailing wage laws. The Declaratory Judgment prayed that the Court, among other things, Declare that the Agreement is void, that the Defendants be enjoined from continuing to construct the highway at issue in this proceeding until the Defendants comply with the laws of this State, and any other relief the Court deemed proper.

This matter was removed to Federal Court for the Southern District of West Virginia where it was considered by Judge Copenhaver.

During the time the matter was in the Federal Court, Judge Copenhaver issued a number of Memorandum Opinions and Orders. On September 5, 2007 the Federal Court

found that the Appellant/Plaintiff “has satisfied the standing requirements,” granted the Plaintiff’s Motion for summary judgment as to the Federal prevailing wage statute (commonly referred to as the Davis-Bacon Act) and declined to exercise jurisdiction over the state claims regarding allegations of violations of state law, holding that the state claims “involve novel or complex issues not related to federal policy.”

On March 18, 2007 the Federal Court, in response to briefing on the issue of the appropriate declaratory relief, stated that it “treats Nicewonder’s briefing as a motion for the court to reconsider its authority to hear the Davis-Bacon Act claim only.”

On September 30, 2009, the Federal Court held that the Plaintiff lacked the standing to maintain a federal Davis-Bacon action before the Federal Court, dismissed the Plaintiff’s federal claims and remanded the state claims to the Circuit Court.

On March 12, 2010 Defendant Nicewonder filed a Motion for Summary Judgment Based on Plaintiff’s Lack of Standing and a Memorandum of Law in Support thereof. On April 9, 2010, a hearing on this motion was held in the Circuit Court of Kanawha County. On or about May 7, 2010, after receiving proposed Findings of Fact and Conclusions of Law from the Appellant and Nicewonder, the Court signed Nicewonder’s proposed Order unchanged and thereby Granted Defendant Nicewonder’s Motion for Summary Judgment. On or about June 18, 2010 Appellant filed its Petition for Appeal therefrom. This is Appellant’s *Initial Brief on Appeal*.

On May 6, 2004 the West Virginia Department of Transportation and its Division of Highways, in the person of Secretary/Commissioner Fred VanKirk, entered into an agreement with Defendant Nicewonder Contracting, Inc., a West Virginia corporation that first came into existence on November 10, 2003. The Agreement states that it is “for

State Project U330-52-30.34” and obligates the State of West Virginia (subject to appropriations by the West Virginia Legislature) to reimburse millions of dollars of costs for the construction of the Red Jacket Section of the King Coal Highway in Mingo County, West Virginia.¹ The record of this proceeding is clear – including admissions – that this Agreement, despite the expenditure of millions of federal and state funds, was entered into *without having undergone any competitive bidding process whatsoever*. (See Exhibit 2 to *Plaintiff’s Memorandum in Support of its Motion for Summary Judgment as to Defendants the West Virginia Department of Transportation, Division of Highways and Nicewonder Contracting, Inc.*, filed on or about April 28, 2006) The Agreement includes a number of provisions which are of interest in the instant matter, including among other things, despite the expenditure of millions of federal and state funds, that the construction work to be performed is in some unspecified manner “*exempt*” from the provisions of the federal Davis-Bacon Act and the West Virginia prevailing wage law.² The record is also clear that the Agreement is designed in a manner that is for the benefit of Defendant Nicewonder Contracting, Inc. and not for the benefit of the people of the State of West Virginia and the United States. Finally, the state governmental actions related to its entering into the contract at issue in this matter, despite the lack of

¹ Simply stated, the Agreement provides that the State of West Virginia will pay Defendant Nicewonder Contracting, Inc. millions of dollars of the costs associated with the construction and the removal of coal associated with the Red Jacket portion of the highway. The Defendants allege that such an arrangement will reduce the public’s cost of the construction of the highway by permitting Defendant Nicewonder to, in essence, offset much of the cost of construction through the sale of the recovered coal. (See Exhibit 1 to *Petition for Declaratory Judgment and Injunctive Relief of the Affiliated Construction Trades Foundation*, filed on or about December 2, 2004)

² When the District Court looked at the substance of the issues related to the federal prevailing wage law it found that the Agreement’s attempt to exempt the project at issue was “in violation of an unambiguous federal statute.” This finding was subsequently vacated by the Court’s later Order regarding standing.

competitive bidding and the lack of prevailing wages, were made in such a manner that are in violation of the law.

While the Court recites supposed cost savings to the State and the federal government of between \$170,000,000 and \$193,000,000 (See Order, p. 3) as a result of the lack of bidding and prevailing wage provisions – as if the saving of funds in some manner justifies the Appellees’ failure to comply with the laws of the State of West Virginia - the record in this matter includes expert opinions that contradict those assertions. Those expert opinions are briefly summarized below.

Plaintiff’s expert, H. Joseph Johnson, P.E., P.S.P., of O’Connell & Lawrence, Inc., following a review of the record, found that the cost estimates utilized by Appellee/Defendant West Virginia Department of Transportation (“WVDOT”) in an effort to justify handing the work at issue to Nicewonder without competitive bidding were flawed and speculative and placed all of the risk on the State and all of the benefits on Defendant Nicewonder. In his March 29, 2006 Report, Mr. Johnson stated:

“The WVDOT cost analysis contained in the *King Coal Highway Joint Development Project – Decision Document* is flawed because it is based, in part, on estimated costs for different alignments (i.e., it is not an apples-to-apples comparison.)

“The WVDOT cost-analysis fails to consider cost differentials associated with the relaxed requirements (e.g., embankment methodologies.)

“The WVDOT cost analysis is speculative. It is not based upon binding, competitive proposals.

“The WVDOT cost analysis fails to consider changes in the market price of coal and fails to acknowledge that all benefits arising from increases to those prices accrue to NCI and all risk associated with decreasing prices is borne by WVDOT.”

(See Plaintiff’s March 30, 2006 *Supplemental Expert Witness Disclosure*)

ACT expert Alan K. Stagg, P.G., AIMA, President of Stagg Resource Consultants, Inc. points out that NCI had experience in mountaintop removal mining and not in highway construction and that “a number of firms have existed, and likely did at the time of the negotiation of the NCI Contract, that were experienced in both highway construction and in surface coal mining.” (See Stagg Report, pp. 13-14, filed on or about April 5, 2006 as attachment to *Plaintiff’s Second Supplemental Expert Witness Disclosure*) Stagg goes on to say that in his opinion “there would have been a reasonable expectation that other bidders for construction of the Red Jacket Section would have accepted less of an economic benefit [than NCI] in order to be awarded this construction contract, thus increasing the economic benefit (that is, savings) to the WV DOT.” (*Id.*, p. 14). Additionally, Stagg echoes the findings of Johnson when he states, “the NCI Contract limits the downside risk to NCI regarding selling price [of coal] with no concomitant sharing of the upside potential by the WVDOT.” (*Id.*, p. 18)

The instant matter involves a public contract and actions by a government that, along with Defendant Nicewonder, violates the public bidding and prevailing wage statutes of this state. When the public’s funds are involved, the public’s interest is in seeing that the State’s statutes are complied with and not in permitting a contract to exempt private parties from compliance with the law. That is why ACT began the underlying Declaratory Judgment. If the Circuit Court’s ruling that ACT does not have standing to bring the declaratory judgment action is allowed to stand, the public’s interest will be thwarted and there will be no review of the actions of the West Virginia Department of Transportation and Nicewonder in entering into a contract that was not let to bid and does not require the payment of prevailing wages.

The record of this matter concerning the issues of ACT's standing to bring this matter before the Court consists of two affidavits of Mr. Steve White, Director of The Affiliated Construction Trades Foundation (ACT) and Mr. White's verification of the Complaint and the Amended Complaint. Defendant Nicewonder filed little or no evidence in support of its Motion.³

In the Affidavit previously filed (See *Plaintiff's Supplemental Reply Addressing the Issue of Standing*, filed on April 4, 2008) in this matter Mr. White states that the Appellant, ACT, is a labor organization that represents more than 20,000 residents of West Virginia and surrounding counties, including many of whom that are residents of Mingo County, West Virginia and the surrounding geographic area. Many of the construction workers represented by ACT are regularly employed in construction projects such as the construction of the King Coal Highway.

Mr. White further states that ACT is funded by dues received from its members and that the amount of dues paid by its members is tied to the number of hours worked in construction. According to Mr. White, the central objects and principles of ACT include but are not limited to protecting, aiding and assisting affiliated local unions and their members with regard to wages, hours and working conditions of construction workers; providing construction contract bid information; monitoring compliance with the State and federal wage and bidding laws; and, providing legal services to aid in the achievement of those goals.

Mr. White testified that the matter before this Court has had and will continue to have an immediate, direct harm, negative impact and injury on construction workers who are ACT's members, including but not limited to lost work time, overtime, employment

³ See further discussion below at pages 11-13.

opportunities, future pension and insurance benefits, lives, working conditions and morale of the construction worker members of ACT. The harm includes the depression of wages, the reduction of apprenticeship and other training, and loss of employment opportunities for West Virginia union construction workers.

Mr. White further testified the remedies proposed by ACT will uphold the application of this State's prevailing wage and competitive bidding to state-funded construction projects, thus benefiting the wages and working conditions of all construction workers in West Virginia and protecting the public's interest in the expending of the public's funds.

Mr. White further testified that this is due to the fact that the payment by Defendant Nicewonder of wages that are less than the required wage has depressed the wage levels of construction workers in the local area as well as in West Virginia. Through the payment of wages to those individuals who have worked on or are working on the project at issue, the proposed remedy will counter the depression of wages that has occurred by the failure of the Appellees to pay the prevailing wage to the workers on this project. In that prevailing wages are determined by a review of construction wage rates in the construction industry in areas of the state, ACT's members will benefit in that wages on other construction projects will rebound to levels that more truly reflect the wage rates that prevail. If the correct wages are not paid, the impact on the wages and benefits of ACT's members will be reduced.

Mr. White filed a second affidavit (See *Plaintiff's Response to Defendant Nicewonder Contracting Inc.'s Motion for Summary Judgment Based on Plaintiff's Lack of Standing*, filed on March 25, 2010) in response to the Defendant Nicewonder's Motion

in which he testified with regard to local unions that are affiliated with and thereby members of ACT, to the following:

- ACT has a total of 56 local unions and 5 local building trades councils that are affiliated with ACT, all of which are directly interested in public construction within the State of West Virginia;
- Many of the local unions and local building trades councils affiliated with ACT are directly involved in the construction of public projects such as the construction of the King Coal Highway. These local unions have collective bargaining agreements with contractors who have been denied the opportunity to submit bids for consideration for construction of the King Coal Highway because the contract for construction of that public project was awarded without competitive bidding.
- All of the local unions affiliated with ACT have a duty to represent the interests of the construction workers who are members of their local union.
- All of the local unions affiliated with ACT are protecting and representing the interests of the construction workers who are members of their local union through ACT's prosecution of this civil action.
- All of the local unions affiliated with ACT have been impacted, adversely affected and injured by the public contract and governmental actions that are the subject of this civil action. These adverse impacts and injuries include lost work time, lost overtime, lost employment opportunities, lost future pension and insurance benefits of construction workers who are members of their respective local unions.

- All of the local unions affiliated with ACT have been impacted, adversely affected and injured by the public contract and governmental actions that are the subject of this civil action in that the violations of law by the Defendants impede and impair their ability to protect the interests of construction workers through the loss of dues paid by those members who have lost job opportunities.
- One of the objects and principles of ACT is to carry out the duties and objectives set forth in the Constitution and By-laws and for “such additional purposes and objectives not inconsistent therewith and which will further the interest of the Council and its members directly or indirectly, as well as the interests of the citizens of West Virginia in a healthy economy, a healthy political system and in a healthy environment.”

Given the record of this proceeding it is clear that ACT, local unions affiliated with ACT as well as West Virginia construction workers represented by ACT have been injured and impacted by the public contract at issue in this matter. These injuries and impacts caused by the alleged actions of the Appellees include the depression of wages, lost job opportunities, and lost benefits. In that the prevailing wages are determined by a review of construction wage rates in the construction industry in areas of the state, these impacts and injuries are actual and concrete. In that a favorable underlying decision of the Circuit Court would have ended the depression of wages and that the Circuit Court was empowered to grant additional relief (West Virginia Code § 55-13-8), it is likely that the injury and impacts would have been redressed through a favorable underlying decision of the Circuit Court.

In addition, the significant interests (including protecting the rights and livelihoods of construction workers in West Virginia) of ACT, local unions affiliated with ACT and the construction workers they represent have been adversely affected by the actions of their State government and are germane to ACT's purpose.

Assignments of Error

The Circuit Court of Kanawha County erred in its Order as follows:

The Circuit Court erred in not applying this Court's numerous holdings regarding the review of motions for summary judgment, including but not limited to, not evaluating the facts presented by the Plaintiff/Appellant in accordance with this Court's holdings regarding reviewing motions for summary judgment.

The Circuit Court erred in disregarding this Court's holdings regarding standing in Declaratory Judgment actions that involve public contracts and governmental actions and the public interest.

The Circuit Court was not bound by the holdings of the federal Court on issues related to a federal statute on the state matters and erred in applying the law of the case doctrine. In so doing, the Circuit Court erred in applying the law of the case doctrine and disregarding the holdings of the United States Supreme Court.

The Circuit Court erred in Granting Defendant Nicewonder's Motion for Summary Judgment by finding that ACT failed to demonstrate that the injuries and impacts to itself and its members were sufficient to meet the standing requirements established by this Court, by failing to find that an inquiry is desirable to clarify the

application of the law and by failing to set out sufficient findings of fact and conclusions of law.

The Circuit Court erred in Granting Defendant Nicewonder's Motion for Summary Judgment and in finding that actions of the Defendants resulted in significant cost savings to the federal and state governments and that the Defendants possessed the expertise and readily available labor and equipment to undertake the project at issue.

Points and Authorities Relied Upon, Discussion of Law, Relief Prayed For

The Circuit Court erred in not applying this Court's numerous holdings regarding the review of motions for summary judgment, including but not limited to, not evaluating the facts presented by the Plaintiff/Appellant in accordance with this Court's holdings regarding reviewing motions for summary judgment.

With regard to motions for summary judgment this Court of Appeals has held, "[w]here varying inferences may be drawn from the same evidence, we must view the underlying facts in a light most favorable to the non-moving party." *Armor v. Lantz*, 207 W.Va. 672, 677 535 S.E.2d 737, 742 (2000) In addition, this Court held in *Hanlon v. Chambers* (195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995)), "if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper." In addition, it has long been held that the moving party has the burden of showing that there is no genuine issue of material fact and that any doubt as to the existence of an issue of material fact must be resolved against the moving party. (*Mountain Lodge Ass'n v. Crum & Forster Indemnity Company*, 558 S.E.2d 336, 210 W.Va. 536 (2001)

Thus, it is clear that the Circuit Court, when evaluating the evidence in the record in the proceeding as it relates to the issue of standing, was required to place the burden of showing that there is no genuine issue of material fact on Defendant Nicewonder; required to view the facts in a light most favorable to the Appellant; required to consider all reasonable inferences in the favor of the Appellant; and to resolve any doubt regarding the existence of a genuine issue of material fact against the Defendant Nicewonder. In reality, not only did the Court not undertake any of these required steps, the Court failed to even consider this Court's longstanding holdings regarding a Circuit Court's review of motions for summary judgment.⁴

In this regard several matters stand out. The evidence in the record includes uncontested sworn testimony of Mr. Steve White, Director of the Affiliated Construction Trades Foundation. As discussed above, the testimony details the impact and injury the actions of the Defendants have had on ACT and its members. This detailed testimony is not referenced or seemingly even considered by the Circuit Court. Rather, the Court references conclusory statements by Judge Copenhaver in coming to its Order in this matter. At no time does the Court appear to consider or evaluate the facts in the record or the reasonable inferences therefrom as required by this Court. At no time does the Circuit Court appear to consider the question of the existence of a genuine issue of fact in this matter. At no time does the Circuit Court appear to even consider this Court's precedents in this area.

⁴ The Circuit Court, at Conclusion of Law No. 1 briefly mentions that standard for its review of a motion for summary judgment. However, the Court then never returns to these matters while evaluating the Defendant's Motion in its Order.

It is also of deep concern that Defendant Nicewonder, despite having the burden of showing that no genuine issue of fact existed, placed little or no evidence in the record.⁵ The Defendant's clear failure to carry its burden – or even the existence of the burden – was seemingly never considered and certainly never discussed by the Circuit Court.

In this regard the Circuit Court erred, this Petition should be Granted and the Circuit Court's Order should be reversed.

The Circuit Court erred in disregarding this Court's holdings regarding standing in Declaratory Judgment actions that involve public contracts, governmental actions and the public interest.

The West Virginia Uniform Declaratory Judgments Act provides as follows:

- at West Virginia Code § 55-13-2:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

- at West Virginia Code § 55-13-8:

⁵ In its Petition, ACT stated that NCI placed no evidence into the record. NCI objected to this characterization in its response stating that it had "resubmitted Act's own responses to discovery requests, as acknowledged by Judge Stucky, in which ACT admitted that it would not have bid on the KCH project." (Response, page 17). While NCI produced no evidence at the hearing, NCI did cite to one Admission by ACT in its *Memorandum of Law in Support of Motion for Summary Judgment Based on Plaintiff's Lack of Standing* (filed March 12, 2010). The Admission was that ACT would not bid on a project such as the one at issue herein. NCI then argued, "Given this stark concession, ACT cannot possibly establish standing in its own right to challenge WVDOT's decision to award NCI a contract for the Red Jacket Project without a public bidding process." (at page 16). That is, according to NCI, since ACT could not bid, and only those who can bid can challenge the lack of bidding, ACT has no standing. First, as discussed herein, it is not the law of this State that only bidders have standing to challenge actions such as were taken in these matters. Second, the citation to one Admission – particularly the one cited - simply does not form a sufficient basis for the Defendant to carry its burden or for a Court to base granting a motion for summary judgment.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore shall be by petition to the court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

- at West Virginia Code § 55-13-12:

This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

West Virginia Code § 55-13-13 defines “person” for purposes of the Uniform Declaratory Judgments Act as “any person, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever.”

This Court of Appeals has viewed this provision broadly and in such a manner that, for example, a declaratory judgment action brought by an unincorporated labor organization confers on that organization the status of a legal entity for jurisdictional purposes. (See *Chesapeake & Ohio System Federation, Brotherhood of Maintenance of Way Employees, v. Hash*, 170 W.Va. 294, 294 S.E.2d 96 (1982))

With regard to the issue of standing generally, this Court has held:

Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury-in-fact” – an invasion of 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. (*Findley v. State Farm Mutual Automobile Ins. Co.*, 213 W.Va. 80, Syl. Pt. 5 (2002))

With regard to standing in instances where a public contract is concerned this Court has held, “where a *public contract* is involved and where the contract has an

impact on individuals, those individuals have standing to bring a declaratory judgment action.” (*WV Utility Contractors Association v. Laidley Field Athletic Recreational Center Governing Board*, 164 W.Va. 127, 130, 260 S.E.2d 847, 849 (1979))(Emphasis added).⁶

In coming to the *Laidley* holding this Court looked to its ruling in *Shobe v. Latimer*, 253 W.Va. 779, 253 S.E.2d 54 (1979), Syl. Pt. 1 where the Court held, with regard to standing in instances where governmental actions are concerned:

“When significant interests are directly injured or adversely affected by governmental action, a person so injured has standing under the Uniform Declaratory Judgments Act, W.Va. Code § 55-13-1 *et seq.* [1941] to obtain a declaration of rights, status, or other legal relations.”

The *Laidley* Court also held that “[f]or standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest.” (*Supra, Laidley*, Syl. Pt 2)

Thus, in matters brought pursuant to the West Virginia Uniform Declaratory Judgments Act, this Court has held that the standing standard is met in cases in which a *public contract* is concerned where the government contract has *an impact* on persons bringing the Declaratory Judgment and is met in cases where *government actions* are

⁶ In its September 2007 Order in this matter, the District Court stated the following at footnote 2: It appears that were a West Virginia court to address the standing question under the West Virginia Declaratory Judgment Act, it would similarly conclude that plaintiff has standing inasmuch as the West Virginia supreme court has held, in the context of a standing analysis under the West Virginia Declaratory Judgment Act, that where a public contract has an impact on individuals, those individuals have standing to bring a declaratory judgment proceeding. *WV Utility Contractors Association v. Laidley Field Athletic Recreational Center Governing Board*, 164 W.Va. 127, 130, 260 S.E.2d 847, 849 (W.Va.1979) Furthermore, the same court has recognized that organizations have a right to sue on behalf of its members when ‘(1) its members would otherwise 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.’ *Snyder [Matthew] v. Callaghan* 284 S.E.2d 241, 251 (W.Va. 1981) (internal citations omitted)

concerned where significant interests are involved⁷ and persons have been “directly injured or adversely affected.” The Circuit Court simply disregarded these rulings of this Court.

In *Shobe* the West Virginia Supreme Court of Appeals set out its rationale for its holding regarding standing for Declaratory Judgment Actions with regard to government actions as follows:

We are bound to observe that if people have an ‘inalienable and indefeasable right to reform, alter or abolish [the government]’ in order to correct the excesses of maladministration, they surely, through one or more of their numbers, individually or acting on behalf of the whole should have access to the courts to achieve the same end by judicial means. Moreover, it has been held in other jurisdictions that a declaratory judgment proceeding is an appropriate remedy for resolving controversies regarding the legality of acts of public officials. (*Supra, Shobe, 790*)⁸

The West Virginia Supreme Court’s holdings with regard to standing in matters related to public contracts and in matters related to governmental actions are applicable to the instant matter. The Parties concur that this matter concerns a public contract that is the heart of the underlying matter and the actions of this State’s government in entering into said public contract that are at issue. The Circuit Court simply disregarded these rulings of this Court.

This Court has also reviewed issues of standing when matters of the public interest are at issue. The West Virginia Supreme Court summarized this history in *Kisner*

⁷ The *Shobe* Court held at 791, “when a person’s significant interests are directly injured or adversely affected by governmental action, such persons have standing under the Declaratory Judgments Act, to obtain a declaration of rights, status or other legal relations.” (internal citations omitted)

⁸ It is also worth noting that this Court, in *Shobe*, held that “for standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest. (*Shobe, Supra, Syl Pt. 2*).

v. *The City of Fairmont* (166, W.Va. 145, 148 (1980)) with regard to a declaratory judgment action that concerned a municipal ordinance:

The appellants assert not only an economic interest, but raise a constitutionally-based challenge and assert that the code violates a city ordinance requiring a public hearing and notice before amendment of ordinances, and so they raise matters that are intermingled with the public interest. The appellants and all members of the public have an interest in the constitutionality, regularity and validity of the municipal ordinances that govern their affairs. It is also apparent that the appellants and the public have a significant interest in any ordinance which relates to the safety of the structures in which they live and work. The Court has frequently recognized that the presence of a public interest is a factor favorable to an award of standing. See, *Walls v. Miller*, 162 W.Va. 563, 251 S.E.2d 491 (1978)(Miller, J. concurring); *State ex rel. Brotherton v. Moore*, 159 W.Va. 934, 230 S.E.2d 638 (1976); *State ex rel. W. Va. Lodge, Fraternal Order of Police v. City of Charleston*, 133 W.Va. 420, 56 S.E.2d 763 (1949); *Prichard v. DeVan*, 114 W.Va. 509, 172 S.E. 711 (1934); *State ex rel. Matheny v. County Court of Wyoming County*, 47 W.Va. 672, 35 S.E. 959 (1900). See also, *Shobe, supra*. The remedial nature of the Declaratory Judgments Act and the presence of significant public interests in the matter at hand require resolution in favor of a present adjudication.

With regard to the competitive bidding and prevailing wage concerns at issue in the instant matter the public interest is likewise deeply involved. The competitive bidding and prevailing wage statutes at both the federal and state levels were enacted in an attempt to protect the public against the expenditure of the public funds in a manner that violates the public policy of the state or federal government or in a manner that benefits certain parties rather than the public. In reviewing a matter concerning a competitive bidding ordinance the West Virginia Supreme Court of Appeals held:

Statutes and ordinances of this type are enacted for the benefit of the public, to protect public coffers, and confer no rights upon individual contractors. *Colorado Paving Co. v. Murphy*, 78 F. 28 (8th Cir.), aff'd 166 U.S. 719 (1897); *Joseph Rugo, Inc. v. Henson*, 190 F. Supp. 281 (D.C. Conn. 1960); *Malan Construction Corp. v. Board of County Road Commissioners*, 187 F. Supp. 937 (E.D. Mich. 1960). See, *Butler v.*

Printing Commissioners, 68 W.Va. 493, 70 S.E. 119 (1911). (*Pioneer Co. v. Hutchison*, 159 W.Va. 276,283 (1975) overruled on other grounds by *State ex rel. E.D.S. Fed'l Corp. v. Ginsburg*, 163 W.Va. 647 (1979))

With regard to the West Virginia prevailing wage statute, the statute itself sets out the policy of the State of West Virginia as follows:

§21-5A-2. Policy declared.

It is hereby declared to be the policy of the state of West Virginia that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in this state in which the construction is performed, shall be paid to all workmen employed by or on behalf of any public authority engaged in the construction of public improvements.

The federal and state courts have long recognized that the expenditure of the public's funds for public construction are to be expended in a manner that is consistent with that policy and that the prevailing wage laws were "enacted not to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on government projects." (*United States v. Binghamton Constr. Co.*, 347 U.S. 171, 174 (1954); see also, *Affiliated Construction Trades Foundation v. University of West Virginia Board of Trustees*, 210 W.Va. 456, 466 (2001))

The Appellant's allegations in the underlying matter concern an Agreement between the Defendant Nicewonder and The West Virginia Department of Transportation, Division of Highways and whether it is in violation of the declared policy of this State and this State's prevailing wage and competitive bidding statutes. As such this matter raises significant public interest issues with regard to the expenditure of millions of dollars of the public's funds. While this Court has held that the existence of significant public interest is a factor favorable to the awarding of standing in such matters, the Circuit Court disregarded this Court's rulings in this area and failed to weigh

the issue of the public interest at all when it should have weighed it in ACT's favor in the instant case.⁹

This Court has also held that an organization such as ACT has the right to sue on behalf of its members where the members would have standing in the same legal matter. (*Matthew v. Callaghan*, 168 W.Va. 265 (1981)) In Syllabus Pt. 2 of *Matthew v. Callaghan*, 168 W.Va. 265 (1981), the West Virginia Supreme Court of Appeals held that:

An association which has suffered no injury itself, but whose members have been injured as a result of the challenged action, may have standing to sue solely as the representative of its members when: (1) 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.¹⁰

Appellee Nicewonder argued before the Circuit Court - and the Circuit Court concurred (See Order, Conclusion of Law No. 10) - that these West Virginia Supreme Court decisions regarding standing, public contracts, government actions and the public interest, and standing and the Declaratory Judgments Act have been "effectively

⁹ In the instant matter, in that the State of West Virginia and Appellee/Defendant Nicewonder have acted jointly to violate this State's prevailing wage and competitive bidding statutes, if an entity such as the Appellant does not have standing to prosecute this matter, the violations of the law will go unchallenged and the public's interest will not be protected.

¹⁰ The injuries to the members of ACT, both individual workers and local unions, have been described previously in this Appeal and are referenced in the later portions of this Brief on Appeal. In their Response to ACT's Petition for Appeal NCI alleges that ACT's Petition should fail, even if they were to agree with the harms discussed by ACT, because none of the harmed individuals are members of ACT and that ACT in some manner did not challenge that conclusion. NCI's assertions are simply incorrect. First, ACT demonstrated injuries to its individual members as well as its local union affiliates (See Affidavits of Steve White). Second, ACT's fourth alleged error urges this Court to find that the Circuit Court erred in finding that ACT failed to demonstrate that the injuries to its members "be they construction workers or local unions" (ACT Petition at page 26) is a direct challenge to the Finding of the Circuit Court. What Appellee NCI is pointing to is, at best, a semantical issue not one of substance.

overruled” by the West Virginia Supreme Court’s decision in *Findley*.¹¹ This is simply not the case. This Court has had a number of opportunities to explicitly overrule these cases¹² and has not done so. In addition, of course, the underlying case in *Findley* did not involve public contracts, governmental actions or the public interest. Despite the fact that this Court has spoken on how it will apply the standing standard in matters such as the instant case, the Circuit Court decided it would simply not follow the Supreme Court precedents.

Rather, the Circuit Court accepted the arguments of Defendant Nicewonder that the facts of this Court’s decisions regarding standing, public contracts, government actions and the public interest, and standing and the Declaratory Judgments Act are in opposition to the holdings of this Court. That, for example, unlike the Association in the *Laidley* case, the Plaintiff/Appellant “is not a contractor and admitted in discovery that it would not have submitted a bid” on the underlying project and “there is no evidence that ACT’s members are contractors who would have submitted bids” on the underlying project and that, “[t]herefore, *Laidley* does not support ACT’s standing in the instant case because, unlike the contractor association in *Laidley*, neither ACT nor its members suffered any direct injury from the decision to award the contract to [Defendant Nicewonder] NCI without soliciting other bids.” (Order, pp. 12-13)

¹¹ The Circuit Court also held that the applicability of this Court’s holdings in cases such as *Laidley*, *Kisner* and *Shobe* was “foreclosed by *Findley*” (Order, p. 15) and strangely because, “[i]n any event, the Legislature may not reduce the standing threshold for claims asserted before the judicial branch of government below the constitutional minimum established by *Findley*.” (*Id.*) As discussed herein this Court has not overruled these decisions and more importantly the actions of the Legislature are not at issue and it is unclear as to why the Circuit Court made such a statement.

¹² Including but not limited to in the *Findley* decision itself, wherein the West Virginia Supreme Court cited its decision in *Shobe* on the issue of standing, “‘It is a primary requirement of the Declaratory Judgment Act that plaintiffs demonstrate they have standing to obtain the relief requested.’ *Shobe v. Latimer*, 162 W. Va. 779, 784, 253 S.E.2d 54, 58 (1979).” (*Findley*, *supra* at 95)

Here again, the Court is merely following the Defendant's arguments rather than applying the law of this State. First, the *only* evidence before the Circuit Court demonstrated that ACT and its members *have been injured and impacted* by the Defendant's failure to bid and Defendant Nicewonder provided no contrary evidence whatsoever. Secondly, this Court has not held that only contractors who have been blocked from bidding have sufficient injury to challenge the actions of the government in the awarding of contracts without bidding and this Court should not do so here.

The Circuit Court erred in its effort to "effectively overrule" this Court's long-standing precedents regarding standing and public contracts, governmental actions and the public interest. Therefore, this Petition must be Granted and the Circuit Court's Order should be reversed.

The Circuit Court was not bound by the holdings of the federal Court on issues related to a federal statute on the state matters and erred in applying the law of the case doctrine. In so doing, the Circuit Court disregarded the holdings of the United States Supreme Court.

Before the Circuit Court Defendant Nicewonder's Motion and Memorandum also argued that, "the requirements to establish standing to pursue court actions are exactly the same" under West Virginia and federal law. (Nicewonder Memorandum, p. 8) This assumption led the Defendant to the conclusion that the Order of Judge Copenhaver with regard to the standing of the Plaintiff for purposes of the federal prevailing wage statute (commonly referred to as Davis-Bacon Act) is correct with regard to West Virginia's prevailing wage and competitive bidding laws and binding on the Circuit Court.

(Nicewonder Memorandum, p. 20) The Circuit Court, in turn, held that the ruling of Judge Copenhaver was binding given the law of the case doctrine. (Order, Conclusion of Law No. 8) As discussed below, the cases cited by Nicewonder and the Circuit Court do not establish that such a doctrine was binding on the Circuit Court and the Court erred in holding so.

In this regard the Circuit Court failed to note several key issues. First, Defendant Nicewonder did not demonstrate that the federal and state laws are exactly the same. Secondly, a simple reading of Judge Copenhaver's decisions and orders makes it clear that he never ruled on the issue of standing as it applies to the federal competitive bidding statutes and thus it is simply impossible for the federal Court's non-ruling to be binding on the Circuit Court.

Importantly, the cases cited by the Circuit Court in support of this argument do not in fact support the assertions regarding the "law of the case doctrine" and its holding that Judge Copenhaver's factual findings and conclusions of law are binding on the parties for the remainder of these proceedings. In this regard the Circuit Court looks to *Termnet Merchant Services, Inc. v. Jordan*, 217 W.Va. 696, (2005) at footnote 14. In turn, footnote 14 cites to *State ex rel. Frazier & Oxley v. Cummings*, 214 W.Va. 802, 591 S.E.2d 728 (2003). The West Virginia Supreme Court of Appeals in *Oxley* was concerned with remands from the West Virginia Supreme Court to Circuit Courts in West Virginia and whether the Circuit Court had or had not followed the mandate of the Supreme Court. The situation in the instant matter does not involve a mandate from the Supreme Court and those cases are of no assistance in this matter.

The Circuit Court also looks to *Armstrong v. Armstrong*, (201 W.Va. 244, 496 S.E.2d 194 (1997)) for the proposition that one non-appellate court of general jurisdiction may not overrule the decision of another court of general jurisdiction. (Order, p. 11) However, in *Armstrong* this Supreme Court was reviewing the issue of one West Virginia Circuit Court as it relates to the holdings of another West Virginia Circuit Court. Again the situation in the instant matter does not involve such a scenario. Thus it is clear, Judge Copenhaver made no rulings regarding the laws of the State of West Virginia, so his holding regarding the federal laws are in no way binding on this Court as to this State's laws.

Fourth, The Federal Court in the instant mater, in declining jurisdiction over the state claims in this matter, held that the state claims “involve novel or complex issues not related to federal policy.” (Copenhaver Order, Sept. 5, 2007, p. 41) Thus stating its clear intention not to involve itself in, nor rule on, issues related to this State's laws.

Fifth, the holding of the Federal Court in the instant matter looked to by the Circuit Court and Defendant Nicewonder in this matter was in fact very limited in its scope. The Federal Court's September 30, 2009 decision in this matter clearly holds that the *sole question* before that Court was that “court's ability to adjudicate the [federal] Davis-Bacon claim.” Once again, making it clear that its rulings were limited to federal law and not intended to encompass state law issues.

Finally, the United States Supreme Court, as noted by another federal court, has long held that state courts “could entertain a case even if a federal court would not do so under federal rules of standing that would eliminate federal-court jurisdiction.” (*Two Rivers Terminal, L.P., v. Chevron USA, Inc.*, 96 F. Supp. 2d 426, 429 (M.D.Pa. 2000)

citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 2046 (1989)).¹³ This important holding of the U.S. Supreme Court was simply ignored by the Circuit Court.

Thus, while the Appellant has high regard for Judge Copenhaver and the Federal District Court, the Circuit Court was not bound by the holdings of that Court on issues related to a federal statute in the state matters before the Circuit Court and erred in holding that it was so bound and in disregarding the holdings of the United States Supreme Court.

The Circuit Court notes that in the alternative Judge Copenhaver concluded that since there was no federal private right of action under the Davis Bacon or Federal-Aid Highway Acts neither ACT nor its members could bring a claim to challenge the lack of prevailing wage provisions in the Agreement at issue in this proceeding. In its Motion Defendant Nicewonder made the assertion that “nothing in West Virginia’s prevailing wage statutes creates a private cause of action in favor of NCI’s employees to challenge the absence of a prevailing wage provision in NCI’s contract with WVDOT.” (Nicewonder Memorandum, pp. 14-15) Like the other arguments of Defendant Nicewonder this one must fail as well. Defendant Nicewonder fails to note that the West Virginia prevailing wage statute clearly provides a private right of action for workers who have been “paid less than the posted fair minimum rate of wages.”¹⁴ West Virginia Code § 21-5A-9(b) states:

¹³ The District Court in *Chevron* also noted, “[b]ecause federal courts do not have the power to authoritatively construe state legislation, (See *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); *Virginia Society For Human Love, Inc. v. Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998)), state courts are not bound in the interpretation of their own statutes by federal construction of similar federal statutes.”(*Id.*) (Emphasis original)

¹⁴ The Order, at page 20, states that “the construction workers ACT claims to represent do not work on the current project.” Also, NCI, in its Memorandum regarding its Motion for Summary Judgment (at page 20) claimed that ACT “does not represent any of the employees whose wages it claims were improper.” Both

(b) Any skilled laborer, workman or mechanic who is engaged in construction on a public improvement let to contract, who is paid less than the posted fair minimum rate of wages applicable thereto, may recover from such contractor or subcontractor the difference between the same and the posted fair minimum rate of wages, and in addition thereto, a penalty equal in amount to such difference, and reasonable attorney fees. The venue of said action shall be in the county where the work is performed: Provided, however, That an honest mistake or error shall not be construed as a basis for recovery under this subsection.

Thus, Defendant Nicewonder's arguments that the Circuit Court was somehow bound by the actions of the Federal Court regarding federal law in the Circuit Court's review of this state's prevailing wage law is simply incorrect.

The Circuit Court erred in applying the law of the case doctrine and in so doing, the Circuit Court disregarded the holdings of the United States Supreme Court. Therefore, this Petition must be Granted and the Circuit Court's Order should be reversed.

The Circuit Court erred in Granting Defendant Nicewonder's Motion for Summary Judgment by finding that ACT failed to demonstrate that the injuries and impacts to itself and its members were sufficient to meet the standing requirements established by this Court, by failing to find that an inquiry is desirable to clarify the application of the law and by failing to set out sufficient findings of fact and conclusions of law.

Beginning at Conclusion of Law 17 the Circuit Court makes a series of what are essentially conclusory statements asserting that the Appellant has failed to meet the

NCI and the Court know that this is not the case. In fact, ACT submitted to the District Court the Authorization of Mr. Robert Sipple who worked on the project at issue during the relevant time period and authorized ACT to attempt to obtain the proper wages and benefits owed as a result of his work on the Red Jacket portion of the King Coal Highway. (See *Plaintiff's Supplement to Plaintiff's Surreply Memorandum*, filed on or about December 23, 2008, and attachments thereto)

requirements of injury-in-fact, causation and redressability. In this regard the Court erred – not only by failing to apply this Court’s holdings regarding Circuit Court consideration of motions for summary judgment as discussed above¹⁵ - but by Granting the Defendant’s Motion in light of the law and the evidence.

This Court has long-held that summary judgment is only appropriate when the totality of the evidence in the record could not lead a rational trier of fact to find for the nonmoving party and when an inquiry concerning the facts is not desirable to clarify the application of the law. This Court has also consistently held that its review of a circuit court’s entry of summary judgment is reviewed *de novo* (See for example, *Jochum v. Waste Management of West Virginia, Inc.*, 224 W.Va. 44, Syl. Pts 1–3, (2009)) and that the Circuit Court must set out findings of fact and conclusions of law sufficient to permit meaningful review by this Court and include facts the Court finds relevant, determinative of the issues and undisputed. (*Fayette County National Bank v. Lilly*, 199 W.Va. 349, Syl Pt. 3, (1995))

With regard to the issues of injury-in-fact, causation and redressability the evidence in the record clearly establishes the existence – or at a minimum demonstrates that there exist genuine issues of fact – of the three matters. As detailed above, the Appellant details clear undisputed injuries and impacts to it and its members – be they construction workers or local unions – that are caused by the actions of the Defendants. These injuries and impacts include but are not limited to depression of wages, lost work, lost overtime, lost employment opportunities, lost benefits and the impairment of the ability of ACT and its local union affiliates to protect the interests of construction

¹⁵ As discussed with regard to the first error set out by the Appellant, the Court failed, among other things, to view the facts in the light most favorable to the non-moving party and failed to draw reasonable inferences in favor of the nonmoving party.

workers. The Court asserts – without citing to any evidence in the record whatsoever – that these injuries are insufficient and “more akin to a ‘generalized grievance’” in that the injuries would occur any time a project is undertaken with nonunion labor. (Order at page 16)

What the Court fails to note is that the *only evidence* in the record – established by the sworn testimony of Mr. White¹⁶ – directly contradicts the Court. For example, the evidence is that the failure of Defendant Nicewonder to pay the required prevailing wage, despite the fact that the instant project is a public project, depresses the wages of all local workers because prevailing wages are determined by a review of rates in the construction industry in various areas of the State and the lower rates paid on the instant project will form the basis for lower payments on future publicly funded projects. Therefore, not only are the injuries and impacts real, they impact both union and nonunion workers when those workers are employed on prevailing wage projects.¹⁷ The Defendants’ violation of the law then results in public funds being used to depress the wages for construction workers on public projects. This result is precisely what the prevailing wage law was designed to prevent and is not present in solely privately funded construction projects. The Court’s unsubstantiated assertions such as, “all non-union construction projects would contribute to these alleged harms” or that injuries and impacts to ACT and its members are “‘generalized grievances’” are incorrect and not supported by the record in this matter. It simply cannot be said that no rational trier of fact would find for the

¹⁶ This evidence is in the form of sworn affidavits. Mr. White is the Director of ACT which is an entity that works extensively within the construction industry in West Virginia, his testimony is not mere allegations or speculation.

¹⁷ In addition, these injuries and impacts are not grievances common to the entire public, as asserted by the Circuit Court (Order, p. 17), but are injuries specific to construction workers.

Appellant with regard to the existence or extent of the injuries or impact, or that there is no evidence to support the Appellant's injuries.¹⁸

The Circuit Court cannot simply ignore the record of this proceeding and make findings and conclusions that, in essence, find the opposite of the evidence in the record.¹⁹ Such an outcome is not appropriate and should be reversed.

Not only are there, at a minimum, genuine issues of fact at issue with regard to the Motion for Summary Judgment, the issues raised by the underlying Declaratory Judgment action concerning the applicability of this State's competitive bidding and prevailing wage laws in circumstances such as the instant matter require this Court's clarification as to their applicability. That is, the questions as to whether the State has the power to waive the application of these statutes when it decides to can be resolved through the underlying matter. In addition, issues regarding this Court's long-standing holdings on standing as they relate to questions involving the public interest, governmental actions and public contracts are also at issue and can be clarified by this Court's actions. The Circuit Court erred in not considering this aspect of motions for summary judgment and its action therefore should be reversed.

The Circuit Court erred in Granting Defendant Nicewonder's Motion for Summary Judgment and in finding that actions of the Defendants resulted in significant cost savings to the federal and state governments and that the Defendants possessed the expertise and readily available labor and equipment to undertake the project at issue.

¹⁸ *Adkins v. K-Mart Corporation*, 204 W.Va. 215220 (1998).

¹⁹ Thus, the Circuit Court has erred in that it does not set out findings of fact and conclusions of law that are sufficient for this Court to review its critical holdings on the existence and the extent of the injuries and impacts on the Appellant in part because there simply is nothing in the record that supports the Court's assertions.

As a foundation for its Granting of the Defendant's Motion for Summary Judgment, the Circuit Court makes a series of Findings concerning alleged benefits to the State and Federal governments that will occur through the Defendants failure to comply with competitive bidding and prevailing wage laws. (See for example, Order, Findings of Fact Nos. 7 and 8) These allegations include the supposed savings that would result from the Defendant's actions and the expertise and readiness with regard to labor and expertise of Defendant Nicewonder. At a minimum there are significant material questions of fact with regard to these matters.

Simply put, the record is clear that these matters are deeply disputed by the Appellant and cannot be said in any manner to meet the requirements for Granting Summary Judgment. Not only are the purported cost savings strongly contested by the Appellant's experts (see pages 4-5 above) but the supposed expertise and readiness of Defendant Nicewonder at the time the Agreement was signed (May 6, 2004) is contradicted by the Appellee/Defendant's own testimony and documents.²⁰ The Circuit Court erred in making these Findings, and the Court's actions should be reversed.

Conclusion

Defendant Nicewonder's proposed Order in this matter, which was accepted without change by the Circuit Court, states that the Circuit Court is persuaded by Judge Copenhaver's decision after an independent review of the evidence, although there is no

²⁰ The record demonstrates that Defendant Nicewonder Contracting, Inc. did not come into existence until November 13, 2003 and, according to its discovery responses undertook no other highway construction projects prior to the project at issue in this litigation. Further, it was not until March 31, 2005 that Defendant Nicewonder undertook to purchase equipment for the work at issue. (See Exhibits 13, 14, 15 and 16 to *Plaintiff's Motion for Summary Judgment as to Defendants the West Virginia Department of Transportation, Division of Highways and Nicewonder Contracting, Inc.*, filed April 26, 2006, Case No. 2:04-1344)

evidence of such a review in the Order itself. The fact remains, however, that any review by the Circuit Court failed to follow the law of this State.

Let us be clear, despite having the burden to show that there is no genuine issue of fact, the Defendant in this matter failed to produce evidence – except that ACT is not a construction bidder - to support its summary judgment motion. The Circuit Court in turn erred in failing to require that the Defendant properly support its own motion to demonstrate that no genuine issue of material fact existed. Second, rather than follow this Court’s holdings that any doubt as to the existence of genuine issues of fact be resolved against the moving party, and holdings that provide that the Court must view the underlying facts in a light most favorable to the non-moving party, the Court seemingly failed to even consider that the “facts” cited by the Defendant were in dispute by the Plaintiff. The Circuit Court erred in not evaluating the facts presented by the Plaintiff/Appellant in accordance with this Court’s holdings.

Given the record of this proceeding it is clear that ACT, the local unions affiliated with ACT as well as West Virginia construction workers represented by ACT have been injured and impacted by the actions of the government in this matter involving a public contract. These injuries and impacts are concrete, actual and have a causal connection to actions of the Defendants. Given the record of this proceeding it is clear that local unions affiliated with ACT as well as West Virginia construction workers represented by ACT would have standing to bring this action in their own right and the Appellees have not provided a convincing argument that the participation of either the construction workers represented by ACT nor the local unions affiliated with ACT is required in order to maintain this proceeding. In addition, given the record in this proceeding, ACT has

standing to bring this action on behalf of its members – whether ACT itself has been injured or not. The existence of a significant public interest in the issues involved in this matter is a factor in favor of awarding standing to ACT and its members and affiliated local unions. Given all of the above, it is clear that ACT has the standing to bring this action in the Circuit Court under this State’s laws.

Throughout the years of this proceeding, Defendant NCI has been consistent in its argument that it must be permitted to continue its violations of the laws of this State with impunity because there is no entity or mechanism that can question or address its actions. Inasmuch as the violations of law in the instant matter arise from a public contract and the actions of the government of this State, the State of West Virginia is not in a position to enforce its own laws²¹ -- it is in the position of violating them.²² It is for just such a situation that this Supreme Court has consistently held that in matters of the public interest, in matters related to public contracts, in matters that concern governmental actions, entities such as ACT have the standing under the West Virginia Uniform Declaratory Judgments Act to come to this Court and to have “determined any question of construction or validity arising under the instrument, statute, ordinance, contract or

²¹ In fact, the record includes correspondence from the Office of the West Virginia Attorney General, representing the West Virginia Division of Labor dated May 13, 2005 to the West Virginia Department of Transportation, Division of Highways wherein Assistant Attorney General Farber states that the Division of Labor “strongly believes that the Red Jacket Project – King Coal Highway falls within the mandate of the West Virginia Construction of Public Improvements Act (more commonly referred to as the Prevailing Wage Act), W.Va. Code §21-5A-1 *et seq.*” (See Exhibit 20 to *Plaintiff’s Motion for Summary Judgment as to Defendants the West Virginia Department of Transportation, Division of Highways and Nicewonder Contracting, Inc.*, April 28, 2006) Despite this correspondence the Defendants WVDOT and NCI have continued to fail to comply with the law.

²² In its Response to ACT’s Petition, Appellee WVDOT Division of Highways argues that this matter is one about the movement of dirt (Response, p. 2) and that, in some manner, the State of West Virginia has saved millions of dollars (*Id.*, p. 7). This savings is, apparently in the WVDOT’s judgment, sufficient to violate the law. With all due respect, not only are the cost savings highly disputed by ACT, they are not relevant to the issue before this Court in this Appeal. Simply put, it is difficult to comprehend the Defendant’s logic and reasoning before this Court.

franchise, and obtain a declaration of rights, status or other legal relations thereunder.”
(West Virginia Code § 55-13-2) That is what ACT asked the Circuit Court to do²³ and
that is what ACT has the standing to do under West Virginia law and precedent.

Appellant therefore prays that this Court Reverse the Decision of the Circuit
Court and Grant ACT standing in this matter.

Respectfully submitted this 3rd day of March, 2011.

The Affiliated Construction Trades
Foundation, a division of the
West Virginia State Building and
Construction Trades Council, AFL-CIO,
by counsel



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²³ West Virginia Code §55-13-8 authorizes Courts to grant further relief “whenever necessary or proper.”
At the end of the day the instant matter is one where such relief will be both necessary and proper and
meets the third element of the standing test.

In the West Virginia Supreme Court of Appeals

The Affiliated Construction Trades
Foundation, a division of the
West Virginia State Building and
Construction Trades Council, AFL-CIO,

Plaintiff,

v.

The West Virginia Department of Transportation,
Division of Highways;
The West Virginia Board of Education;
The Mingo County Redevelopment Authority; and
Nicewonder Contracting Inc.,

Defendants.

CERTIFICATE OF SERVICE

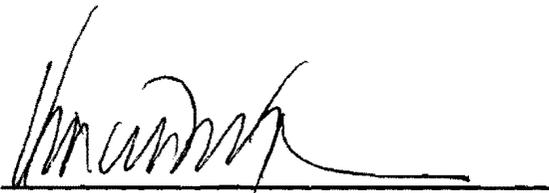
The undersigned attorney hereby certifies that on March 3, 2011 a true and correct copy of the **Initial Brief on Appeal of the Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades Council, AFL-CIO from the Order of the Circuit Court of Kanawha County that Granted Defendant Nicewonder Contracting Inc.'s Motion for Summary Judgment Based on Plaintiff's Lack of Standing** was served upon the following via U.S. Mail, postage prepaid, and addressed as follows:

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A handwritten signature in black ink, appearing to read 'Vincent Trivelli', is written over a solid horizontal line.

Vincent Trivelli
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