

ARGUMENT DOCKET

In the West Virginia Supreme Court of Appeals

APR 20 2011

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 35742

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

Appellant,

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.,**

Appellees.

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

Vincent Trivelli (W.V. Bar No. 8015)
The Law Office of Vincent Trivelli, PLLC
178 Chancery Row
Morgantown, WV 26505
Phone: (304) 291-5223
Fax: (304) 291-2240
Counsel for Appellant

TABLE OF CONTENTS

Table of Contents	ii
Table of Points and Authorities	iii
Introduction	1
Argument	1
<i>Nicewonder's Assertion Regarding an "Independent" Ground</i>	1
<i>Nicewonder's Response to First Assignment of Error</i>	4
<i>Nicewonder's Response to Second Assignment of Error</i>	5
<i>Nicewonder's Response to Third Assignment of Error</i>	8
<i>Nicewonder's Response to Fourth Assignment of Error</i>	9
<i>Nicewonder's Response to Fifth Assignment of Error and WVDOT</i>	13
Conclusion	15

TABLE OF POINTS AND AUTHORITIES

W. Va. Code:

§21-5A-1 *et seq.* 11

Federal Statute:

Davis-Bacon Act, 40 U.S.C § 276a to 276a-5 (1994)11

W. Va. Cases:

*Affiliated Construction Trades Foundation v. University of West Virginia
Board of Trustees*, 210 W.Va. 456, 466 (2001).....7, 10

Findley v. State Farm Mutual Automobile Ins. Co., 213 W.Va. 80, (2002)..... 5, 7, 16

Kisner v. The City of Fairmont (166, W.Va. 145, 148 (1980).....5, 7, 16

Pioneer Co. v. Hutchison, 159 W.Va. 276,283 (1975)..... 6, 7, 8, 16

Shobe v. Latimer, 253 W.Va. 779, 253 S.E.2d 54 (1979)..... 5, 6, 16

State ex rel. E.D.S. Fed'l Corp. v. Ginsberg, 163 W.Va. 647 (1979)..... 6, 7, 8

Termnet Merchant Services, Inc. v. Jordan, 217 W.Va. 696, (2005)..... 9

*WV Utility Contractors Association v. Laidley Field Athletic Recreational Center
Governing Board*, 164 W.Va. 127, 130, 260 S.E.2d 847, 849 (1979)..... 5, 6, 7, 16

Federal Cases:

*Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419, Brotherhood
of Painters and Allied Trades, AFL-CIO an unincorporated association,
et al. v. Brown, et al.*, 656 F.2d 564 (10th Cir. 1981) 12

L.P. Cavett Company v. United States Department of Labor, 101 F.3d 1111
(6th Cir. 1996) 12

<i>National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Incorporated</i> , 470 F.2d 265, 270 (10 th Cir. 1972)	10
<i>NLRB v. Westex Boot & Shoe Company</i> , 190 F.2d 12 (5 th Cir. 1951)	10
<i>NLRB v. Postex Cotton Mills</i> , 181 F.2d 919, (5 th Cir. 1950)	10
<i>North Georgia Building and Construction Trades Council v. Goldschmidt</i> , 621 F.2d 697 (5 th Cir. 1980)	12
<i>Sierra Club v. Morton</i> , 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)	10
<i>United States v. Binghamton Constr. Co.</i> , 347 U.S. 171, 174 (1954).....	11, 12
<i>Unity Bank & Trust Company v. the United States</i> , 756 F.2d 870 (Fed. Cir. 1985)	12
<i>Universities Research Ass'n v. Coutu</i> , 450 U.S. 754, 773, 101 S.Ct. 1451, 1463 ...	11, 12

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

Introduction

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. On or about March 3, 2011 ACT filed its *Initial Brief on Appeal*. On April 6, 2011 the Petitioner was served with *Response of the West Virginia Department of Transportation* and a *Response Brief of the Appellee Nicewonder Contracting, Inc.* This is ACT’s *Reply Brief* thereto.

Argument

The only filing of substance served on April 6, 2011 was the Response of Appellee Nicewonder (“Nicewonder Response”). Therefore this Reply will focus on that Response and then briefly touch on the Response of the West Virginia Department of Transportation (“WVDOT Response”) Nicewonder’s Response discusses the five Assignments of Error set forth by the Appellant and, in addition, asserts that Judge Stucky’s Order should be affirmed on grounds not assigned as error. The Petitioner will briefly reply to each of these matters.

Nicewonder’s Assertion Regarding an “Independent” Ground - Nicewonder spends a great deal of time in its Response arguing that the Circuit Court’s Order should

be affirmed because the errors of law cited by ACT fail in some way to challenge an “independent” ground for the Circuit Court Order “that ACT’s membership does not include the individual construction workers whose alleged harm serves as the basis for ACT’s standing.” (Nicewonder Response, p. 17) Without taking too much of the Court’s time arguing against this straw person, ACT will briefly Reply to demonstrate that Nicewonder is incorrect.

ACT challenged the Circuit Court’s holdings regarding its membership in at least two Assignments of Error. ACT challenged the issue of the make-up of its membership as a portion of the Appellant’s first Assignment of Error. That is, the Error (as discussed below) challenges the Court’s review and evaluation of the record of this proceeding in accordance with this Court’s numerous precedents regarding Circuit Court consideration of motions for summary judgment. A key portion of the record, as discussed in ACT’s Initial Brief, includes two affidavits of Mr. Steve White, the first of which details injuries and impacts to ACT itself as well as its members – individual construction workers. The second affidavit details the injuries and impacts to the union locals affiliated with ACT. Thus, the record in this proceeding is uncontested as to the impacts and injuries to all those represented by ACT – construction workers and local unions – making the arguments of Nicewonder in this regard a meaningless distraction.

ACT also challenged the issue of the make-up of its membership as a portion of the Appellant’s fourth Assignment of Error. That is, the Error (as discussed below) challenges the Circuit Court’s findings and conclusions regarding injuries and impacts to itself and its members. A simple reading of ACT’s Initial Brief finds that the discussion regarding this Error starts as follows: “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 requirements of injury in fact, causation and redressability.” (Initial Brief, pp. 25-26) Not only is the Circuit Court’s Conclusion of Law regarding ACT’s members (Number 18) clearly included within the Appellant’s asserted Error by its physical location, the discussion includes the Court’s failures regarding the “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.” Once again the arguments of Nicewonder in this regard are undercut.

In addition, as noted in ACT’s Initial Brief, ACT in fact has been authorized to obtain the proper wages and benefits owed to an individual construction worker, Mr. Robert Sipple. Mr. Sipple authorized ACT to attempt to obtain the proper wages and benefits for his work on the project at issue during the relevant time period. The impact to Mr. Sipple is direct and substantial and has been caused by the actions of the Appellees.

Nicewonder’s argument that somehow ACT has failed to challenge an independent ground for the Circuit Court’s Order – that its members are local unions and not individual workers – and therefore the injuries to local workers cannot be used as a basis for ACT’s standing is not only incorrect (given the fact that ACT did challenge the Circuit Court’s Order on this point) but is a dead-end argument in that ACT has demonstrated injuries and impacts to itself, to individual construction workers and to local unions who are affiliated with ACT (the entities that Nicewonder and the Circuit Court contend are ACT’s real members). Any or all of these impacts and injuries can

form the basis for ACT's standing to prosecute the matter. The Court should not be misdirected by Nicewonder's efforts in this regard.

Nicewonder's Response to First Assignment of Error - As it does throughout its Response Appellee Nicewonder's argument in opposition to Appellant's first Assignment of Error is based on a misstating not only of the error itself but also of the record in the underlying proceeding.

With regard to Nicewonder's characterization of Appellant's first Assignment of Error, Nicewonder appears to fail to appreciate that the Error includes the complete failure of the Circuit Court to evaluate the facts presented by the Appellant in accordance with this Court's numerous precedents regarding Circuit Court consideration of motions for summary judgment. That is, the Circuit Court simply fails to view the evidence underlying the facts in a light most favorable to the non-moving party, fails to draw – or even discuss – reasonable inferences from the evidence in the record from any source, fails to place the burden of showing there are no genuine issues of material fact on the moving party and fails to resolve any doubt as to the existence of any issues of material fact against the moving party, all of which is required in accordance with this Court's numerous holdings as discussed in ACT's Initial Brief. As noted in the Appellant's Initial Brief (at footnote 4) the Circuit Court, at Conclusion of Law No. 1, briefly mentions the standard for its review of a motion for summary judgment and then never returns to these matters again. In its Response Nicewonder, like the Circuit Court, ignores this Court's numerous holdings with regard to a Circuit Court's consideration of motions for summary judgment. The error of the Circuit Court is clear and its Order should be reversed.

With regard to Nicewonder's mischaracterization of the record, at no point in this proceeding does Nicewonder – like the Circuit Court – even acknowledge the evidence in the record regarding the injuries to local union entities affiliated with ACT.¹ As detailed in Steve White's testimony, the Appellant provided uncontested evidence on the adverse impacts, affects and injuries to individual construction workers who are members of ACT as well as adverse impacts, affects and injuries to local unions affiliated with ACT. (Initial Brief, pp. 6–9) While Nicewonder's failure to acknowledge the record is one thing, the Circuit Court's failure constitutes an error and therefore its Order should be reversed.

Nicewonder's Response to Second Assignment of Error - The Appellant's second assignment of error is that the Circuit Court disregarded this Court's holdings regarding standing in declaratory judgment actions that involve public contracts, governmental actions and the public interest. Appellee Nicewonder's Response merely sets out the paragraphs of the Circuit Court's Order where the Court touches on the cases cited in the Appellant's Initial Brief and concludes that the Plaintiff in each case satisfies the *Findley* standing test. What neither Nicewonder nor the Circuit Court address is the holdings of this Court in those cases as they apply to standing in declaratory judgment actions in matters that involve public contracts (*Laidley*) governmental actions (*Shobe*) and the public interest (*Kisner*). While the evidence in this matter clearly demonstrates that ACT has standing, this Court's holdings for standing in cases involving public contracts, governmental actions and the public interest were clearly not followed by the Circuit

¹ In fact the Circuit Court incorrectly finds that "ACT has not demonstrated any injury suffered by the local union organizations themselves by the absence of a prevailing wage provision in the NCI agreement." (Order, Conclusion of Law No. 18, p. 16)

Court and would have added to the basis for the Circuit Court to Deny Nicewonder's Motion for Summary Judgment.

In addition, the Circuit Court's Conclusions of Law, as cited by Nicewonder, repeatedly misstate ACT's arguments regarding these important precedents. For instance, the Circuit Court states that ACT cited *Shobe* to support the idea that "a party need not establish the three essential standing elements to bring a claim under the DJA." (Conclusion of Law 13) In fact ACT cited *Shobe* as the underlying basis for this Court's Decision in *Laidley*, *Shobe's* holding on standing where governmental actions are concerned, and the rationale for that holding. (Initial Brief, pp. 15-16) It is worth noting in this regard that in *Shobe* this Court stated with regard to standing where governmental actions are concerned and the significant interests are involved, "[s]ufficient interest will be in close cases, a question of degree; a formula fitting all cases does not exist." (*Shobe*, supra 791)

With regard to the case of *Pioneer Company v. Hutchinson* (159 W.Va. 276, (1975)) Appellee Nicewonder quotes Conclusion of Law 16 regarding the fact that this Court, in *E.D.S. Federal Corporation v. Ginsberg* (259 S.E.2d 618, 163 W.Va. 647 (1979)) overruled the holding in *Pioneer* regarding the standing of unsuccessful bidders to challenge the awarding of public contracts. Specifically, in *Ginsberg* this Court overruled Syllabus Point 2 of *Pioneer*. This Court overruled its prior holding that an unsuccessful bidder does not have standing "to prosecute an action for an injunction to enjoin a proposed violation of statute or ordinance requiring contracts to be awarded to the lowest responsible bidder, except where he seeks such relief as a taxpayer." The Appellant acknowledge this action by this Court in its Initial Brief and therein cited

Pioneer not for the standing of unsuccessful bidders, but for this Court's holding in *Pioneer* that bidding statutes are enacted for the benefit of the public and to protect the public coffers.² (Initial Brief, pp.17-18) The fact that the bidding statutes are thus designed demonstrates that the public interest is deeply involved in this matter and therefore the Circuit Court in the instant matter should have looked to the deep public interest in this matter and, as this Court has held, "[t]he Court has frequently recognized that the presence of a public interest is a factor favorable to an award of standing." (*Kisner v. The City of Fairmont* (166 W.Va. 145, 148 (1980)) In the Circuit Court's Order Judge Stucky simply ignored this Court's longstanding holdings regarding the impact of the public interest on the instant case and found rather that *Kisner* and the other cases cited by the Appellant were "effectively overruled by *Findley*." (Order, Conclusion of Law 10, p. 11) The Circuit Court is wrong and erred in this holding and must be reversed.

It is worth noting that while the Appellee Nicewonder continues to contend that unsuccessful bidders are the only entities that have standing to challenge public bidding results (see discussion of *Laidley*, Appellant's Initial Brief, pp. 15, 20-21), in *Ginsberg* this Court held otherwise. That is, while noting that unsuccessful bidders are the "most likely to bring notice of irregularities" due to the "expense and annoyance of prosecuting an action", this Court held that there may well be others – such as taxpayers (particularly

² It should be noted that this Court likewise cited *Pioneer* for this same premise in *Affiliated Construction Trades Foundation v. University Board of Trustees*, 557 S.E.2d 863,878 (2001); "Our decision to go beyond the four corners of the statutory language is bolstered by our prior recognition in *Pioneer Co. v. Hutchinson*, 159 W.Va. 276, 220 S.E.2d 894 (1975), overruled on other grounds by *State ex rel. E.D.S. Fed'l Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979), that competitive bidding statutes, 'are enacted for the benefit of the public, to protect public coffers.'" *Id.* at 283, 220 S.E.2d at 900."

those that are “otherwise involved in the bidding process”) – that could bring actions as well. (*Ginsberg, Supra* 623-624, 654-656)

The first issue presented to us is whether E.D.S. Federal had standing to sue either in mandamus or for a declaratory judgment to cause the State to award them the contract. Upon the suggestion of the Department of Welfare in the lower court that E.D.S. Federal lacked standing to sue because they had not brought their action as a taxpayer E.D.S. Federal amended their complaint to assert a cause of action as a West Virginia corporate taxpayer. Their relief in that capacity would be limited to having the contract voided since recent case law holds that there is no standing to demand that the contract be awarded to the lowest responsible bidder. This would clearly follow from *Pioneer Co. v. Hutchinson, W.Va., 220 S.E.2d 894 (1975)* where it is said in syl. pt. 2:

An unsuccessful bidder has no standing to prosecute an action for an injunction to enjoin a proposed violation of a statute or ordinance requiring contracts to be awarded to the lowest responsible bidder, except where he seeks such relief as a taxpayer.

We have reviewed the policy behind this syllabus point and have concluded that *Pioneer Co., supra* should be overruled in this regard. Although theoretically taxpayers could bring actions to force the State to comply with purchasing statutes, in fact no taxpayer is sufficiently interested to stand the expense and annoyance of prosecuting an action unless he is otherwise involved in the bidding process. Absent a statute permitting it, litigation expenses cannot usually be obtained against the State of West Virginia, and consequently, it is highly unlikely that taxpayers will gratuitously vindicate the public interest. The individual or corporation most likely to bring to notice irregularities in contracting procedures is an unsuccessful bidder; unless the unsuccessful bidder can receive relief in the form of compelling the State to award him the contract he also will lack incentive to vindicate public rights. (*Id.*)

ACT, with its clear involvement in the public bidding, public construction and wage statutes, is an entity – other than an unsuccessful bidder – that is otherwise involved in the bidding process which can stand the expense and annoyance of protecting the public’s expenditures.

Nicewonder’s Response to Third Assignment of Error - The Appellee’s third Assignment of Error concerns the Circuit Court’s reliance on the “law of the case

doctrine.” In its Response Appellee Nicewonder asserts that Judge Stucky, in saying that he and the parties were bound by the law of the case doctrine to the “findings concerning ACT’s standing to assert the prevailing wage claim under federal law” for the remainder of the litigation, meant only “factual findings” and not “legal conclusions.” Once again Nicewonder is simply incorrect.

In addition to the points raised in the Appellant’s Initial Brief (pp. 21–25) the Court should note that the decisions cited by the Circuit Court in support of its reliance on the law of the case doctrine concern the doctrine’s application to matters much broader than facts alone such as the judgment as a whole. For example, this Court stated in *Termnet Merchant Services, Inc. v. Jordan* (217 W.Va. 696, (2005) cited by the Circuit Court in its footnote 21 that, “[a]lthough finding the court lacked jurisdiction to enforce the judgment in the manner by which Ms. Marson proceeded, the underlying judgment in this case is valid and enforceable. When this Court refused to hear Petitioner’s appeal of that judgment, it became law of the case.” (*Id.*, 702) To say now that the Circuit Court was looking to the doctrine for purposes of facts alone is inconsistent with the legal basis the Circuit Court used to support its utilization of the doctrine.

Nicewonder’s Response to Fourth Assignment of Error - In opposition to ACT’s fourth Assignment of Error concerning the Circuit Court’s holdings regarding the injuries and impacts to ACT’s members as it relates to standing, Nicewonder asserts that the injuries and impacts set forth in the record are insufficient, fail to “make any logical sense”, and are speculation and conjecture. (Nicewonder Response, p. 27). While the arguments of Nicewonder add little or nothing to the Circuit Court’s actions in this area, there are a few issues that ACT will briefly address.

Let us be clear, ACT is a labor organization³ and the law clearly supports standing of labor organizations in matters such as the instant matter. For example, in reviewing the standing of the National Association of Letter Carriers, AFL-CIO to maintain a declaratory judgment action against a private postal system, the Tenth Circuit Court of Appeals looked to the United States Supreme Court's decision in *Sierra Club v. Morton* (405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)) and held that because there was economic detriment to the members of the labor organization in the form of lost work time, overtime, employment opportunities, future pension and insurance benefits and morale the Labor organization had standing to challenge the actions of the private postal system.⁴ The Court further held that the labor organization was within the "zone of interests" that the statute at issue in that matter was designed to protect and could therefore maintain the action. (*National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Incorporated*, 470 F.2d 265, 270 (10th Cir. 1972))

The harm that ACT and its members have suffered is more than sufficient for association standing under the West Virginia Declaratory Judgments Act and the cause of that harm has long been recognized by the Courts, this State's Legislature and the Congress of the United States.

As this Court stated in *Affiliated Construction Trades Foundation v. The University of West Virginia Board of Trustees* (557 S.E.2d 863 (2001)):

³ It has long been the law that coalitions of unions are considered labor organizations for purposes of the NLRA. See *NLRB v. Westex Boot & Shoe Company*, 190 F.2d 12 (5th Cir. 1951) regarding the AFL and *NLRB v. Postex Cotton Mills*, 181 F.2d 919, (5th Cir. 1950) regarding the CIO. ACT is governed by an Executive Board consisting of local and regional union representatives and is, like those local and regional labor organizations, a labor organization.

⁴ Similar injuries to those cited by Mr. White in his affidavits.

“Like its federal counterpart⁵, the prevailing wage provisions found in West Virginia Code §§ 21-5A-1 to -11 (Repl. Vol. 1996 & Supp. 2001) were enacted for the purpose of protecting laborers engaged in the construction of public improvements from substandard wages by ensuring the payment, at a minimum, of the prevailing level of wages. Section two of our wage act announces the unmistakable policy of this State to secure the payment of the prevailing wage rate for construction performed on public improvements “by or on behalf of any public authority.” (*Id.* at 873)

Both West Virginia’s prevailing wage and the federal Davis-Bacon wages are determined by surveying the wages paid in a particular community and the purpose of both Acts is to ensure that public funds are not utilized to depress wages. The fact that the Appellee admittedly paid wages less than the Davis-Bacon or prevailing wage rates results in a depression of wages for ACT’s members in the area where the work is being undertaken. (See Exhibit A to Plaintiff’s Supplemental Reply, White Affidavit, ¶5)⁶

The public policy underlying the prevailing wage statutes’ importance in protecting local wage standards when public moneys are being used for construction has long been recognized by the United States Congress and the United States Supreme Court. The Davis-Bacon Act, enacted in 1931, is “a minimum wage law designed for the benefit of construction workers.” *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178, 74 S.Ct. 438, 442 “The Act was ‘designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.’ ” *Universities Research Ass’n v. Coutu*, 450 U.S. 754, 773, 101 S.Ct. 1451, 1463 (quoting House Committee on Education and Labor, Legislative History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm.Print 1962)). It is the impact of the loss of

⁵ The Court footnote at this point states: “see Davis-Bacon Act, 40 U.S.C § 276a to 276a-5 (1994).”

⁶ There is nothing “magical” about how a favorable decision could remedy the alleged harm. By paying the correct wage the wages of all construction workers on public works jobs would rise.

the protection from this long-recognized harm that ACT's members have suffered due to the Appellees' violations of law.⁷

The injuries to ACT's members are concrete and affect them in a personal and individual way – including in a reduction in wage rates that they receive for their work. This harm is not hypothetical or speculative. It is a harm that the federal and state prevailing wage Acts were specifically designed to prevent – the reduction of local wage standards and wage rates. It is a harm that has been caused by the Appellees' violations of the law. The members of ACT do not have a “mere generalized grievance” that “could be shared by any member of the public” (Order, Conclusion 19) They are working men and women of West Virginia who have suffered immediate or threatened injury to their wages, benefits, lives and working conditions by the Appellees' admitted failure to pay the required prevailing wage. The matter brought before the Courts of this State in this declaratory judgment action by the Appellant is the very type of matter that the West Virginia Declaratory Judgments Act was enacted to permit. ACT is the very type of association that is permitted to bring such a matter before the Court.

⁷ See also for example *L.P. Cavett Company v. United States Department of Labor*, 101 F.3d 1111 (6th Cir. 1996) wherein the Sixth Circuit stated:

The dual purposes of the Act are to give local laborers and contractors fair opportunity to participate in building programs when federal money is involved and to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area. See S.Rep. No 963, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 2339, 2340.

Unity Bank & Trust Company v. the United States, 756 F.2d 870 (Fed. Cir. 1985) wherein the Court looked to the *Coutu* Court in holding that the Act was enacted to “preserve local wage standards”; *North Georgia Building and Construction Trades Council v. Goldschmidt*, 621 F.2d 697 (5th Cir. 1980) wherein the Fifth Circuit looked to the *Binghamton* Court in holding that the Act was to protect against “substandard wages and to promote the hiring of local labor rather than cheap labor from distant sources”; *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419, Brotherhood of Painters and Allied Trades, AFL-CIO an unincorporated association, et al. v. Brown, et al.*, 656 F.2d 564 (10th Cir. 1981) wherein the Court reiterated its holding that “the purpose of the Davis-Bacon Act is to provide protection to local craftsman who were losing work to contractors who recruited labor from distant cheap-labor areas.”

Appellee Nicewonder and in turn the Circuit Court's Order portray the issues in this dispute in terms of a struggle between union and nonunion employees. In fact the Circuit Court in its Conclusions of Law regarding the injuries and impacts to ACT and its members states, "ACT has not identified any legally protected interest in having union labor employed on the Red Jacket section of the KCH [King Coal Highway]." (Order, Conclusion of Law 19, p. 16). This is entirely a false framework for the issues before this Court. West Virginia and federal prevailing wage act wage rates apply to union and non-union workers alike. The matter before this Court is not related to some theoretical damages that may or may not be caused by non-union employment and ACT has not alleged so in any manner whatsoever. The matter before this Court involves the Appellees' clear violations of law that are the cause of harm to ACT and its members - construction workers and local unions. In that prevailing wage rates are determined by an evaluation of wage rates in a locality, the payment of the wages due will work to reverse the depression of wage rates that occurs by violations of the law. The Supreme Court and Congress' recognition of the role that Davis-Bacon plays in protecting local wage rates only serves to demonstrate that point.

Nicewonder's Response to Fifth Assignment of Error and WVDOT - In opposition to ACT's fifth Assignment of Error regarding the Circuit Court's findings regarding disputed claims including purported cost savings and Nicewonder's alleged expertise, Nicewonder argues that the Court merely "observes the reasons given by the State and Federal Governments" for entering into the underlying contract or are part of "background information to provide context for the project and ACT's claims." (Nicewonder Response, p. 32-33).

One need only undertake a fair reading of the Findings of Fact contained in the Circuit Court's Order to appreciate that the Court was in fact making findings on contested issues. Without repeating the Findings herein, when Finding of Fact number 8 starts with the finding that, "[b]ecause of its unique position, NCI could simultaneously perform the engineering and earthwork necessary to create a roadbed in the rugged mountainous terrain of southern West Virginia, and also obtain value from the recovery of incidental coal reserves encountered that could not otherwise economically be mined", it is difficult to see how that sentence and many of those surrounding it are not Findings of the Court.

More importantly, a significant portion of Nicewonder's argument and the entirety of Appellee WVDOT's argument before this Court is based on the alleged cost savings that has purportedly been achieved by utilizing the supposed expertise of Nicewonder and undertaking to violate the competitive bidding and prevailing wage statutes of the State of West Virginia. Appellee WVDOT comes to this Court having cited no law whatsoever in its filings to attempt to justify its actions or to argue against ACT's standing to challenge those actions. Rather WVDOT states that it "writes separately to emphasize the importance of the project at the center of the dispute, the unique nature of the opportunity presented, and the extraordinary cost savings realized by the defendants below, the U.S. Department of Transportation, Federal Highway Administration, and the citizens of Mingo County, the State of West Virginia and the United States." (WVDOT Response to Petition, p. 2).

The extraordinary position of the government of this State has two immediate lessons. First, violations of law by the State in partnership with private parties can be

justified if it is alleged that the violations have or will result in financial savings. Second, no entity – even one whose duty and responsibility it is to represent the interests and rights of working West Virginians – has the standing to challenge the State’s violations of its own laws.

Conclusion

A fair reading of the Nicewonder and WVDOT Responses finds that they provide nothing that demonstrates that ACT does not meet the standard for standing set out by this Court’s long-standing precedents. Rather, they demonstrate how many times the Appellees have shifted their arguments in an attempt to prevent ACT from bringing the underlying matter to Court. If one were to review the many filings in this matter one would find numerous argued and abandoned positions of Appellee Nicewonder. For example Nicewonder has presented and then abandoned an idea that the ACT is resting its claim to relief on the legal rights or interests of third parties, and that ACT does not fall within the broad definition of a labor organization and therefore that ACT cannot sue or be sued.

Now Appellee Nicewonder comes to the Court arguing that ACT’s Appeal must fail because its members are not its members and their alleged injuries cannot form the basis for standing. Now Appellee Nicewonder comes before this Court supporting the Circuit Court’s holding that this Court’s long-standing precedents on standing in matters of the public interest, governmental action and public contracts have been effectively overruled, that it need not follow this Court’s long-standing precedents on lower Court’s consideration of motions for summary judgment and the Circuit Courts’ remarkable and completely unsubstantiated holding that ACT cannot challenge the failure of the State to

award the underlying contract through competitive bidding because, “[a] person that would not bid on a construction project does not suffer an ‘injury-in-fact’ if bids are not solicited.” (Order, Conclusion of Law 21, p. 18)

In its Order the Circuit Court states that ACT’s reliance on this Court’s holdings in *Laidley, Shobe, Kisner* and *Pioneer* equate to ACT arguing for “a standing threshold less stringent than the three-part test adopted by *Findley*” (Order, Conclusion of Law 10, p. 11). What the Circuit Court and the Appellees fail to appreciate is that this Court has long held that a declaratory judgment action that concerns the actions of the government, or a public contract, or which involves the interests of the public is of a different nature or character than a declaratory judgment action that involves a private contract or similar dispute between private parties. What the Court and the Appellees fail to appreciate is that in declaratory judgment actions that concern the actions of the government, or a public contract or which involve the interests of the public when it comes to standing the Courts are to view issues of standing from a slightly different perspective. A perspective that is not less stringent but one that takes into consideration such issues as the need for access to the courts to question the actions of one’s government or the adverse impact and affect of a public contract on the significant interests of individuals. A perspective that recognizes that the presence of a public interest is a factor favorable to an award of standing. The record in this proceeding is clear that ACT has the standing to bring this matter even under the Circuit Court’s interpretation of the law. However, the record is also clear that the circumstances of the underlying matter that concern a public contract, involve governmental action and deeply implicate the public interest make the denial by the Circuit Court of ACT’s standing contrary to the purpose and spirit of the Declaratory

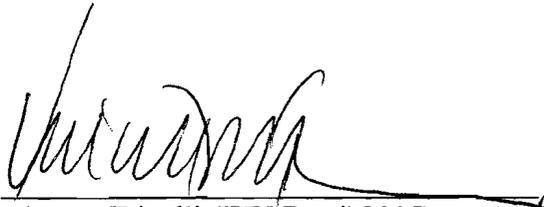
Judgments Act and in direct contradiction to the law of this State as repeatedly articulated by this Court.

The State may believe that this is merely a question of “dirt being where it was *not* wanted, and not being where it *was* wanted.” (WVDOT Response, p. 2), but the fact is that it is much more. It is a question of whether any entity – including an entity that is deeply involved in construction bidding and wage payments – has the standing to challenge the Appellees’ attempt to waive the application of this State’s laws in violation of the public’s interest and the law. The law of this State is not as the Appellees would prefer and is not as it is set out by the Circuit Court in the Order under appeal.

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

Respectfully submitted this 19th day of April, 2011.

Appellant
By Counsel



Vincent Trivelli (WV Bar # 8015)
The Law Office of Vincent Trivelli, PLLC
178 Chancery Row
Morgantown, WV 26505
(304) 291-5223

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

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.

CERTIFICATE OF SERVICE

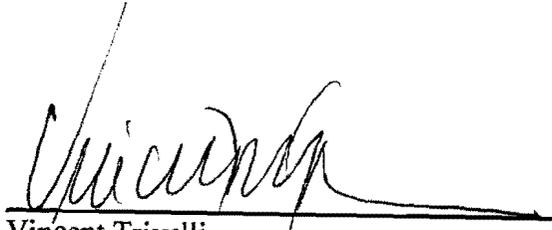
The undersigned attorney hereby certifies that on April 19, 2011 a true and correct copy of the **Reply Brief of the Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades Council, AFL-CIO** was served upon the following via U.S. Mail, postage prepaid, and addressed as follows:

Robert M. Stonestreet, Esq.
Forrest H. Roles, Esq.
Dinsmore & Shohl, LLP
900 Lee Street
Huntington Square, Suite 600
Charleston, WV 25301

Anthony G. Halkias, Director, Legal Division
Jeff J. Miller, Esq.
West Virginia Department of Transportation
Division of Highways
1900 Kanawha Boulevard, East
Building Five, Room 519
Charleston, WV 25305-0430

Eric Calvert, Esq.
Charles Dollison, Esq.
Bowles Rice McDavid Graff & Love, LLP
600 Quarrier Street
P.O. Box 1386
Charleston, WV 25325-1386

Kelli D. Talbott, Esq., Deputy Attny. General
State of West Virginia
Office of the Attorney General
State Capitol, Building 1, Room E-26
Charleston, WV 25305

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

Vincent Trivelli
The Law Office of Vincent Trivelli, PLLC
178 Chancery Row
Morgantown, WV 26505
(304) 291-5223