IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 100858

AFFILIATED CONSTRUCTION TRADES FOUNDATION,

PETITIONER

v.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS; WEST VIRGINIA BOARD OF EDUCATION; MINGO COUNTY REDEVELOPMENT AUTHORITY; and NICEWONDER CONTRACTING, INC.

RESPONDENTS.

RESPONSE TO PETITION FOR APPEAL ON BEHALF OF NICEWONDER CONTRACTING, INC.

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I. Introduction

Petitioner The Affiliated Construction Trades Foundation (commonly known as "ACT") seeks review of an order granting summary judgment in favor of the Respondents on ACT's claims under the West Virginia Declaratory Judgments Act, W. Va. Code § 55-13-1 *et seq.* The Circuit Court of Kanawha County, Judge Stucky presiding, concluded, as did Judge Copenhaver before him, that ACT did not have judicial standing to maintain its claims. Both Judge Stucky and Judge Copenhaver found that ACT's membership, according to its own constitution, does not include the individual union construction workers from whose alleged harm ACT claims to derive standing. Additionally, Judge Stucky concluded that even if these individuals were members of ACT, the alleged "harms" did not satisfy any of the three standing elements: injury-in-fact, causation, and redressability. ACT did not claim any harm to itself as an organization.

Critically, ACT does not assign as error Judge Stucky's finding that ACT's membership does not include the individual union construction workers from whom ACT claims to derive standing. Rather, ACT devotes nearly its entire Petition to arguing why these individuals, who are not even members of ACT, suffered harm from a project on which none of these persons ever worked. Even if this Court were to agree with ACT's arguments that the theoretical harms suffered by these individuals were cognizable in a court of law, Judge Stucky's summary judgment order would still stand because none of those individuals are members of ACT, and thus their alleged harm does not give ACT standing to sue on their behalf. Granting ACT's Petition would therefore be a futile endeavor because Judge Stucky's summary judgment order should still be affirmed even if ACT prevails on its assignments of error. Accordingly, ACT's Petition should be denied.

II. Factual Background

The facts essential to the standing issue are undisputed. However, some background on the project at issue provides helpful context to the standing issue.[1]

A. The Highway Project

This case arises out of a contract between defendant Nicewonder Contracting, Inc. ("NCI") and the West Virginia Department of Transportation, Division of Highways ("WVDOT"), entered in May 2004, for construction of the roadbed for what is known as the "Red Jacket Project" section of the King Coal Highway ("KCH"). The KCH itself is an approximately 93-mile section of the proposed I-73/I-74 corridor that runs through southern West Virginia. The Red Jacket Project makes up approximately 11.4 miles of the KCH. The Federal Highways Administration ("FHWA") provided 80% of the funding for the project with WVDOT providing the balance. A unique convergence of various interests made this project possible.

NCI owned or controlled a large portion of the surface and mineral properties situate along the proposed route for the Red Jacket section of the KCH. Under the traditional method of highway construction, WVDOT would have to condemn by eminent domain such properties along the route of the proposed highway necessary to build the roadway and pay each property owner fair market value for the property. Disputes over what constitutes fair market value inevitably occur and WVDOT spends untold amounts of time and money not only litigating what constitutes fair market value, but also paying fair market value for the property, which increases the cost of road construction. NCI also had access to expertise in large earth moving projects in

[1] Additional background factual details can be found in two orders issued by Judge Copenhaver while the case was pending in the District Court for the Southern District of West Virginia. *See* Affiliated Construction Trades Foundation v. West Virginia Department of Transportation, et al., 2007 WL 2577690 (No. 2:04-1344, September 5, 2007) (hereafter "September 5, 2007 Order"), attached as Exhibit 1; and 2009 WL 3188694 (No. 2:04-1344, September 30, 2009) (hereafter "September 30, 2009 Order"), attached as Exhibit 2.

southern West Virginia incident to mining as well as access to readily available equipment and labor to employ in constructing the project. NCI's unique position presented a "win-win" situation for both NCI and the State of West Virginia. 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. NCI could then sell the recovered coal, and use portions of that revenue to partially offset the cost of construction. All told, FHWA and WVDOT estimated that a partnership with NCI to build the Red Jacket Project's roadbed would save the State of West Virginia between $170,000,000 and $193,000,000 as compared to traditional construction methods using eminent domain and private contractors. This amounts to an estimated savings of up to roughly $17,000,000 per mile of roadbed constructed. In addition to the tremendous cost savings for the Red Jacket Project, NCI would also donate and prepare a suitable site, approximately 75 acres, for construction of the consolidated Mingo Central High School. This likely saved the State millions of dollars that would otherwise have been necessary to acquire and prepare the property for construction of a school. Construction on the school itself, at a cost in excess of $28,000,000 based on executed contracts, is currently underway and is expected to be completed this summer. The road bed is expected to be completed in the summer of 2011.

This huge cost savings was essential to the viability of the project. Had the project been proposed using traditional methods of construction, neither the State of West Virginia nor the FHWA would likely have had sufficient resources to fund the project in the foreseeable future. Additionally, the construction of the consolidated Mingo Central High School would likely have been delayed significantly - if not permanently. Therefore, it is unlikely the project would have

moved forward in 2004 - if ever - and southern West Virginia would continue to be denied the economic boost that highway infrastructure can bring and a modern high school.

Since only NCI owned or controlled the majority of the properties along the highway's route, had expertise in large earth-moving projects in southern West Virginia and readily available equipment and labor in the area, and could partially offset the cost of construction through incidental coal recovery, no other contractor could offer WVDOT the type of cost savings that NCI proposed. As such, both WVDOT and FHWA realized it would be futile to subject the project to a public bidding process. Instead, WVDOT signed a contract with NCI dated May 6, 2004 without advertising the project for other bids. Since the contract was let without a public bidding process, and NCI would use its existing work force to complete the project, FHWA and WVDOT concluded that the contract did not need to have a "prevailing wage" provision.[2]

Work commenced on the Red Jacket Project shortly after the contract was signed. Construction has now been underway for approximately six years, which has directly provided over eighty good paying jobs and numerous additional jobs that indirectly support construction. NCI estimates that construction of the roadbed should be complete during the first half of 2011. Paving, installation of guard rails, lighting, and other work necessary to completely finish the highway have been, and will be, performed by other contractors selected by WVDOT through a competitive bidding process. Upon information and belief, WVDOT has now awarded a contract for paving of two lanes of the four-lane roadbed, and contracts for installation of water and sewer lines to support the new school and future development have also been awarded

[2] Both West Virginia and federal law require that most contracts for highway projects include a provision requiring the contractor to pay "prevailing wages" to various classes of employees working on the project as established by either the federal Department of Labor or its West Virginia counterpart. *See* 23 U.S.C. § 113; W. Va. Code § 21-5A-1 *et seq.*

All of the above information is useful only as background. The necessary facts for consideration of the discrete and narrow factual findings germane to ACT's standing to assert its claims are set forth in the following section. Those findings of facts, described below, all involve the nature of ACT as an organization and whether the harms it alleges are sufficient to establish standing to pursue its claims.

B. The Nature of ACT and Its Members

These facts arise from ACT's constitution, its bylaws, and its answers to discovery requests. ACT is an unincorporated division of the West Virginia Building and Construction Trades Council, AFL-CIO ("Council"). The Council is a labor organization that represents and is composed of local unions involved in the construction trades. The Council's membership is made up of these local union organizations - not the individuals who belong to those local unions.[3]

"The Council's objectives, broadly defined, include 'aid[ing] and assist[ing] all affiliated local unions in the building and construction trades industry," among other, more specific objectives, such as "promot[ing] the development of safety and health programs.'"[4] ACT's objectives and principles, as set forth in the Council's constitution, are as follows:

> a. To aid and assist all affiliated local unions within the construction industry in all lawful activities as may from time to time be appropriate.
>
> b. To aid in marketing the construction trades.
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> c. To aid in providing construction contract bid in-formation to interested parties when it is in the best interests of [Affiliated] and the Council to do so.
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> d. To provide legal services to aid in the achievement of the goals of [Affiliated].
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> e. Political action function.

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[3] September 30, 2009 Order at *2.

[4] September 30, 2009 Order at *1 (quoting Article III of the Council's constitution) (alteration in original).

> f. To manage, invest, expend or otherwise use funds and property received from the Council to carry out the duties and to achieve the objectives set forth in this 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.[5]

As its constitution clearly establishes, ACT is essentially the government relations or lobbying arm of the Council that engages in various activities to promote issues in the interest of organized labor.[6]

ACT's complaint, as amended, alleges that the contract between NCI and WVDOT, to which ACT is not a party, is improper for two reasons: (1) the contract allegedly does not comply with West Virginia and federal law governing competitive bidding for highway construction contracts; and (2) the contract allegedly does not comply with West Virginia and federal law governing payment of "prevailing wages" (commonly known as Davis-Bacon Act provisions) to certain persons employed on highway construction projects. ACT commenced this action notwithstanding two very important facts. First, as it admitted in discovery, neither ACT, the Council, nor any of the local unions who make up the Council's membership are contractors who would have bid on the project had it been publicly advertised. Second, as revealed by the documents ACT produced in discovery, neither ACT, the Council, nor any of the local unions who make up the Council's membership represented a single person employed by NCI who would work on the project.

III. Procedural History

NCI removed ACT's complaint filed in Kanawha County Circuit Court to federal court on the basis of federal question jurisdiction. FHWA was later added as a defendant pursuant to

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[5] September 30, 2009 Order at *1 (quoting the Council's constitution) (alteration in original).
[6] September 30, 2009 Order at *1.

ACT's claim under the federal Administrative Procedures Act. The Mingo County Redevelopment Authority and the West Virginia Board of Education were also added as interested parties because of need for the Mingo Central High School site and desire for economic development along the highway.

In April 2006, ACT moved for summary judgment on its two claims. By order dated September 5, 2007, Judge Copenhaver denied ACT's motion on the competitive bidding claim, and instead awarded judgment in favor of the defendants, because federal regulations expressly provided an exception to the general public bidding requirement for this type of project.[7] With regard to the prevailing wage claim, Judge Copenhaver initially concluded that the contract should have contained a prevailing wage provision.[8] Judge Copenhaver requested that the parties submit briefing on the appropriate remedy for the absence of a prevailing wage provision.[9]

In response, ACT submitted a brief requesting, among other things, an award of back wages for the employees of NCI and any subcontractors who worked on the project for the difference, if any, between the actual wage paid and the "prevailing wage" for each position as established by law. In its briefing, NCI pointed out that ACT did not represent those employees, and federal law did not establish a private right of action for an employee to challenge the absence of a prevailing wage provision in a construction contract. Therefore, ACT did not have judicial standing to pursue any type of relief for an alleged failure of the contract to call for payment of prevailing wages. Judge Copenhaver treated NCI's brief as a motion to reconsider ACT's standing to assert the prevailing wage claim and ordered the parties to further brief the issue of whether ACT had judicial standing to assert a violation of the "prevailing wage" laws.

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[7] September 5, 2007 Order at *6-8.
[8] September 5, 2007 Order at *13-15.
[9] September 5, 2007 Order at *15.

By order entered September 30, 2009, Judge Copenhaver agreed with NCI that ACT did in fact lack judicial standing to pursue the prevailing wage claim.[10] Consequently, Judge Copenhaver vacated the portion of his September 5, 2007 order addressing the prevailing wage claim, but allowed the ruling on the competitive bidding claim to stand. Having addressed all the federal claims, Judge Copenhaver declined to continue to exercise jurisdiction over the state law claims, and remanded those to the Circuit Court of Kanawha County for disposition (discussed in Section V, below).

IV. Judge Copenhaver's Order on ACT's Lack of Standing to Pursue the Prevailing Wage Claim

A. Judicial Standing

Under both West Virginia and federal law, the requirements to establish standing to pursue a court action are exactly the same. A party must satisfy three essential elements to establish judicial standing to assert a cause of action: (1) a "concrete and particularized" injury that is actual or imminent as opposed to conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's alleged conduct; and (3) the ability of judicial action to redress the injury.[11] These three essential elements apply to any type of legal claim - including those asserted under the West Virginia Declaratory Judgments Act. "It is a primary requirement of the [West Virginia] Declaratory Judgments Act that plaintiffs demonstrate they have standing to obtain the relief requested."[12]

Since ACT is an organization, it can establish standing to sue on its own behalf to remedy a particular harm it may have suffered or "to protect its interest in preserving its resources such

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[10] September 30, 2009 Order at *4-5.

[11] Syl. Pt. 5, Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002); (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

[12] Findley v. State Farm Mut. Auto. Ins. Co. 213 W.Va. 80, 95, 576 S.E.2d 807, 822 (2002) (quoting Shobe v. Latimer, 162 W.Va. 779, 784, 253 S.E.2d 54, 58 (1979)).

as time and revenue."[13] ACT can also sue on behalf of its members, if any of those members can establish standing in their own right.[14] In briefing submitted to Judge Copenhaver, ACT argued that it had suffered an injury in its own right in the form of lost revenue from NCI's payment of a wage package to its non-union workforce that differed from "prevailing wages." ACT also alleged an injury to the Council's members (local unions) in the form of lost work time.[15]

To determine whether ACT itself had suffered any "concrete and particularized" injury from NCI's wage package paid to its non-union workforce whom ACT does not represent, Judge Copenhaver conducted a careful evaluation of the nature of ACT as an organization and how the payment of "prevailing wages" may affect ACT. Although ACT claims to be a labor organization itself, a more accurate description is that ACT is a division of the Council, and the Council is a labor organization.[16] The Council's membership consists of local trade unions - not the individual union members who belong to those local unions.[17] The Council derives its revenue from a "per capita tax" that is paid by each local union at a minimum rate of $0.25 per hour of work performed by individual members of the local unions. Of the minimum $0.25 tax, $0.23 is designated to fund ACT.[18]

In light of this structure, Judge Copenhaver concluded that neither ACT nor the Council would suffer any "concrete and particularized" injury even if the wages paid to NCI's employees were less than "prevailing wages." The Council's revenue is based on the number of hours worked by individual union members - not on the hourly wage rate paid to those individual union members. Therefore, even if NCI's employees were members of a local union represented by

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[13] September 30, 2009 Order at *4. Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982).

[14] United Food & Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 554, 553 (1996); Syl. Pt. 2, Snyder v. Callaghan, 284 S.E.2d 241 (W.Va. 1981).

[15] September 30, 2009 Order at *4.

[16] September 30, 2009 Order at *2.

[17] September 30, 2009 Order at *2.

[18] September 30, 2009 Order at *2.

ACT or the Council, the hourly wage rate paid to those individuals would have absolutely no impact on ACT's revenue. ACT's revenue would be the same regardless of the hourly wage rate paid since the "per capita tax" is based on numbers of hours worked. For the same reason, ACT failed to establish the second necessary standing element - causation. Assuming that ACT had experienced a reduction in revenue during the time the Red Jacket project was underway, there cannot be a causal link between that revenue decrease and NCI's payment of a different compensation package to its non-union workforce. Again, ACT's revenue is based on the number of hours worked by individual union members - not the hourly wage rate paid for those hours, much less the wage rate paid to NCI's non-union employees.

Judge Copenhaver further determined that ACT could not establish standing to sue on behalf of its members - the local unions - because none of those unions had standing in their own right to challenge NCI's wages paid to its non-union workforce. As mentioned above, the alleged injury suffered by the local unions was in the form of lost work time. ACT failed to demonstrate, however, how the amount of NCI's wages paid to its non-union workforce caused these local unions to lose work time:

> [ACT] has failed to identify any injury that may have been suffered by any member union. Nor does the court perceive any injury that a union may have suffered from the evidence presented. Thus, no member union would have standing inasmuch as [ACT] has failed to demonstrate that any such member has suffered an injury in fact. Accordingly, [ACT] lacks standing to sue on behalf of any member union inasmuch as the member lacks standing to sue on its own behalf.[19]

What is unsaid here is that ACT's local unions have no right to take away the jobs of NCI's existing employees in favor of the union members.

[19] September 30, 2009 Order at *5.

B. Absence of Private Right of Action

As an alternate ground to support dismissal of ACT's prevailing wage claim, Judge Copenhaver concluded that the Federal-Aid Highway Act, 23 U.S.C. 112, ("Highway Act") which provides the basis for ACT's claim, does not provide a private right of action to challenge a contract that does not contain a prevailing wage provision. "Congress did not intend to create a private right of action under the Federal-Aid Highway Act for a laborer under a contract that does not contain prevailing wage stipulations. Inasmuch as the laborers could not institute this action on their own behalf, [ACT] cannot do so for them."[20] Therefore, even if ACT somehow had standing to assert the putative rights of NCI's non-union employees, those employees would not have a cause of action to challenge the absence of a prevailing wage provision in NCI's contract.[21]

ACT did not appeal Judge Copenhaver's decision and it, along with its findings, is final.

V. Basis for Summary Judgment Below

Following Judge Copenhaver's remand order, NCI moved for summary judgment on ACT's "competitive bidding" and "prevailing wage" claims under West Virginia law on essentially the same basis - that ACT lacked standing to maintain those claims. By order entered May 7, 2010, Judge Stucky granted NCI's motion. Upon his independent review of the record and Judge Copenhaver's findings, Judge Stucky concurred that ACT, according to its own constitution, does not represent the individual union construction workers from whose alleged harm ACT claims to derive standing. Instead, "ACT's membership is comprised of local union organizations - not the individual construction workers who belong to those local union organizations."[22] Under West Virginia law, an organization can establish standing to sue on

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[20] September 30, 2009 Order at *7.

[21] Judge Stucky did not address the issue of whether a private right of action exists under West Virginia law for alleged violations of the prevailing wage or competitive bidding statutes.

[22] May 7, 2010 Order at Conclusion of Law ¶ 18.

behalf of its members if one or more of those members would have standing to sue in their own right.[23] Since the individual union construction workers are not members of ACT, any harm they may have suffered would not give ACT standing. Accordingly, Judge Stucky concluded that "ACT cannot establish standing based on the alleged harm to the individual union members because those individuals are not members of ACT."[24] Judge Stucky further agreed with Judge Copenhaver that ACT had not demonstrated any injury to itself or the local union organizations that it claims to represent. "ACT has not claimed any injury to itself in the briefing submitted to this Court in support of its standing to assert its claims under West Virginia law."[25] "The Court further agrees with Judge Copenhaver 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."[26] Instead, ACT relied only on the alleged "harms" to individual union construction workers to support its arguments for standing.

As an alternative basis for awarding summary judgment, Judge Stucky also concluded that even if ACT's membership included individual union construction workers, the "harms" alleged to have befallen those individuals failed to satisfy any of the three standing elements adopted by this Court in *Findley v. State Farm:* (1) a "concrete and particularized" injury that is actual or imminent as opposed to conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's alleged conduct; and (3) the ability of judicial action to redress the injury.[27] Judge Stucky declined to adopt ACT's argument that claims under the West Virginia Declaratory Judgments Act that involve public contracts, government actions, and the

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[23] Syl. Pt. 2, Snyder v. Callaghan, 284 S.E.2d 241 (W.Va. 1981).
[24] May 7, 2010 Order at Conclusion of Law ¶ 18.
[25] May 7, 2010 Order at Conclusion of Law ¶ 9.
[26] May 7, 2010 Order at Conclusion of Law ¶ 18.
[27] Syl. Pt. 5, Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002); (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

public interest are subject to less stringent standing requirements than set forth in *Findley* - a case addressing claims asserted under the West Virginia Declaratory Judgments Act.

Since ACT's assignments of error focus on this alternative basis for summary judgment, the facts and law supporting Judge Stucky's conclusions will be discussed in Section VIII below in response to each of those assignments of error.

VI. Standard of Review

This Court's review of an award of summary judgment is "de novo."[28] Summary judgment under W. Va. R.C.P. 56(c) is appropriate when "there is no issue as to any material fact" or if the case "only involves a question of law."[29] When ruling of a motion for summary judgment, the trial court must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.[30] If it appears that no genuine issue of material fact is involved, it is the duty of the court to grant the motion.[31] A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact.[32] If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either: (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) or the West Virginia Rules of Civil Procedure.[33]

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[28] Syl. pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).
[29] Miller v. City Hosp., Inc., 475 S.E.2d 495, 499 (W. Va. 1996).
[30] Floyd v. Equitable Life Assurance Soc'y, 264 S.E.2d 648 (W. Va. 1980).
[31] Spangler v. Fisher, 159 S.E.2d 903 (W. Va. 1968).
[32] Thomas v. Goodwin, 266 S.E.2d 792 (W. Va. 1980).
[33] Syl. Pt. 3, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995).

VII. The Petition Should Be Denied as Futile Because One Ground for Summary Judgment Has Not Been Assigned as Error

Judge Stucky based his summary judgment order on two distinct and independent grounds. Although ACT asserts five assignments of error, each of these assignments only addresses one of the grounds for summary judgment - ACT's failure to satisfy each of the standing elements - assuming *arguendo* ACT's membership includes the individual union construction workers.

However, Judge Stucky's primary basis for awarding summary judgment is that ACT's membership does not include individual union construction workers, and therefore any harm those individuals may have suffered would not give ACT standing. "ACT cannot establish standing based on the alleged harm to the individual union members because those individuals are not members of ACT."[34] ACT did not demonstrate any harm to itself or its actual claimed members - the local union organizations - so ACT failed to show any alleged injury that would establish standing.

Based on the arguments set forth in the Petition, ACT's assignments of error can be best summarized as follows:[35]

(1) Judge Stucky failed to address the substance of the affidavits submitted by ACT in support of the alleged harms to individual construction workers; and failed to require NCI to submit evidence in support of its summary judgment motion;

(2) Judge Stucky erred by not applying a less stringent standard than set forth in *Findley* for establish standing for claims under the West Virginia Declaratory Judgments Act that involve public contracts, government actions, and the public interest;

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[34] May 7, 2010 Order at Conclusion of Law ¶ 18.

[35] The exact text of the assignments of error are set forth in Section VIII below.

(3) Judge Stucky erred by concluding he was bound by Judge Copenhaver's findings under the "law of the case" doctrine;

(4) ACT's allegations of harm were sufficient to establish standing or at least create a genuine issue of material fact concerning standing; and

(5) Judge Stucky erred by making factual findings concerning cost savings and NCI's expertise to perform the project, both of which were disputed.[36]

Notably, none of these assignments of error challenges Judge Stucky's conclusion that ACT's membership does not include individual union construction workers, and therefore the alleged harms to those individuals cannot form a basis for ACT's standing. That failure is understandable because ACT's constitution shows its members can only be the local unions. Likewise, the arguments set forth in the Petition in support of these assignments of error do not address the issue of ACT's membership. Instead, each assignment of error challenges different aspects of Judge Stucky's alternative basis for summary judgment - the failure of the alleged harms to individual construction workers to satisfy the elements of standing. ACT has therefore waived any claim that Judge Stucky's initial ground for awarding summary judgment is erroneous. "Our cases have made clear that this Court ordinarily will not address an assignment of error that was not raised in a petition for appeal."[37]

Even assuming this Court was inclined to agree with any, or all, of ACT's assignments of error, Judge Stucky's summary judgment order would still have a separate and independent basis for support that ACT has not challenged in its Petition. Accordingly, the summary judgment order should be affirmed even if ACT prevails on its assignments of error. "This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on

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[36] Petition at 10-11.

[37] Canterbury v. Laird, 221 W.Va. 453, 458, 655 S.E.2d 199, 204 (2007).

any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment."[38] "[A] grant of summary judgment may be sustained on any basis supported by the record."[39] Given that Judge Stucky's order sets forth an independent ground for awarding summary judgment that ACT has not challenged, the Petition should be denied as futile.

VIII. The Petition Should be Denied Because ACT's Assignments of Error Lack Merit

Even though Judge Stucky's order should be affirmed on grounds not assigned as error in the Petition, NCI will briefly address each of ACT's assignments of error to demonstrate why they lack merit and constitute further grounds to deny the Petition.

A. ACT's Affidavits and Submission of Evidence to Support Summary Judgment Motion

ACT's initial assignment of error is actually two-fold.[40] ACT first chastises Judge Stucky for not addressing the substance of two affidavits submitted by ACT's Director, Steve White, that purports to detail the harm suffered by the individual construction workers that ACT erroneously claimed as its members.[41] No discussion of these affidavits was required for two reasons. First, the alleged harm to these individuals is irrelevant to ACT's standing because these individuals are not members of ACT, and therefore ACT cannot derive standing from harm to them.[42] Second, Judge Stucky adequately summarized the nature of the alleged harm by none other than quoting from ACT's own briefing as follows:

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[38] Syl. Pt. 11, State ex rel. Vernatter v. Warden, 207 W. Va. 11, 528 S.E.2d 207 (1999) (quoting Syl. Pt. 3, Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E.2d 466 (1965)).

[39] Subcarrier Communications, Inc. v. Nield, 218 W.Va. 292, 297, 624 S.E.2d 729, 734 (2005).

[40] The assignment reads 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/Petitioner in accordance with this Court's holdings regarding reviewing motions for summary judgment." Petition at 11.

[41] Petition at 12.

[42] Syl. Pt. 2, Snyder v. Callaghan, 284 S.E.2d 241 (W.Va. 1981).

> Below is ACT's description of the purported harm that ACT seeks to redress through its claims:
>
> The matter before this Court has had and will continue to have an adverse impact on construction workers, including but not limited to lost wages and work time, overtime, employment 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 in apprenticeship and other training, and loss of employment opportunities for West Virginia union construction workers.[43]

As discussed more fully in response to ACT's fourth assignment of error (Sub-section D below), Judge Stucky then went on to apply these alleged harms to the standing elements formally adopted by *Findley* and ultimately concluded that they failed to establish standing. While the specific allegations set forth in the affidavits were not discussed in the order, Judge Stucky clearly addressed the alleged harms described in the affidavits in support of ACT's claims for standing.

The second component of this assignment of error is that NCI failed to place any evidence in the record in support of its summary judgment motion.[44] Such a statement is patently false. NCI 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.[45] NCI previously introduced these responses, which also included ACT's membership roster and constitution, while the case was pending in federal court. The membership roster and constitution reveal, as Judge Copenhaver found, that ACT's membership does not include individual union construction workers. These discovery responses are certainly evidence, are set forth in the record of this matter, and were considered by Judge Copenhaver in ruling on ACT's standing to assert the federal prevailing wage claim. To claim that NCI did not introduce any

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[43] May 7, 2010 Order at Conclusion of Law ¶ 19 (quoting ACT's Response in Opposition to Summary Judgment Motion at 15).

[44] Petition at 12-13.

[45] May 7, 2010 Order at Conclusion of Law ¶ 20.

evidence to support its summary judgment motion is preposterous. If ACT's Petition were governed by this Court's proposed revisions to the West Virginia Rules of Appellate Procedure, specifically Rule 7, an appendix would be required and ACT may not have been so brazen in disregarding the record.

While NCI did introduce evidence in support of its motion, NCI had no obligation to do so because ACT, as the plaintiff, has the burden to establish evidence in support of its standing.[46] Summary judgment "is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove."[47] NCI does not have the burden to *disprove* ACT's claims. By contrast, if a plaintiff fails to produce evidence to support each and every element of a claim on which it has the burden of proof, including standing, summary judgment is appropriate.[48] Here, not only did ACT fail to demonstrate evidence in support of its standing to pursue its claims, but NCI demonstrated by affirmative evidence that ACT lacks standing. Therefore summary judgment was appropriate.

B. Standing Requirements for Declaratory Actions Involving Public Contracts, Government Actions, and the Public Interest

ACT's second assignment of error asserts that Judge Stucky erred by not applying a less stringent standing test than set forth in *Findley*.[49] In support of this argument, ACT's claims that a number of standing cases decided prior to *Findley* between 1975 and 1980 support the notion that this Court has developed special rules for establishing standing for claims under the West Virginia Declaratory Judgments Act that involve public contracts, government actions, and the

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[46] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

[47] Syl. Pt. 4, in part, Painter v. Peavy, 192 W.Va. 189, 190, 451 S.E.2d 755, 756 (1994).

[48] Syl. Pt. 4, in part, Painter v. Peavy, 192 W.Va. 189, 190, 451 S.E.2d 755, 756 (1994).

[49] The assignment reads as follows: "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." Petition at 13.

public interest. The Petition states that the "Circuit Court simply disregarded these rulings of this Court."[50]

A review of the summary judgment order reveals that Judge Stucky meticulously addressed each and every one of the four cases cited by ACT in support of its "special standing" argument, and found each of them distinguishable from ACT's claims.[51] For the sake of brevity, NCI incorporates by reference here the three pages worth of analysis set forth in the May 7, 2010 Order addressing each of these cases.[52] Suffice it to say that Judge Stucky concluded that the plaintiffs in each of those cases would have satisfied the *Findley* standing test, and none of them supported ACT's assertion of standing in this case. In the alternative, Judge Stucky determined that "[t]o the extent any of those cases suggest that standing requirements are somehow relaxed for cases involving public contracts and the Declaratory Judgments Act, that notion was foreclosed by Findley - a case squarely addressing standing in the context of a DJA claim."[53] In other words, Judge Stucky simply recognized that *Findley* sets forth the law in West Virginia with regard to standing, and to the extent any prior cases are inconsistent with *Findley*, they are no longer controlling precedent.

In short, Judge Stucky did not "disregard" this Court's precedent. By contrast, he analyzed each of the cases cited by ACT and found them inapposite. He also made the rather unremarkable conclusion that *Findley*, which was the first time this Court formally adopted the three-part test for standing, is the controlling precedent in West Virginia concerning standing.

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[50] Petition at 16.
[51] May 7, 2010 Order at Conclusion of Law ¶¶ 10 - 17.
[52] May 7, 2010 Order at Conclusion of Law ¶¶ 10 - 17.
[53] May 7, 2010 Order at Conclusion of Law ¶ 17.

C. Judge Stucky Was Persuaded, Not Bound, By Judge Copenhaver's Findings

ACT's third assignment of error is that Judge Stucky erred by concluding that he was bound by Judge Copenhaver's findings under the "law of the case" doctrine.[54] ACT misconstrues the nature of Judge Stucky's reliance on the Judge Copenhaver's findings. Judge Stucky did not conclude that he was bound by Judge Copenhaver's rulings. Instead, he determined that the prior factual findings concerning the nature of ACT and its membership are "binding on the **parties** for the remainder of the litigation" because they were made in prior stages of the same litigation.[55] In other words, the parties could not now seek to re-litigate factual findings concerning ACT as an organization, such as whether ACT's membership includes individual construction workers. Judge Stucky did not consider himself bound by Judge Copenhaver's legal conclusions concerning ACT's standing to assert its federal law claims. Instead, Judge Stucky specifically noted that he was *persuaded* - not bound - by Judge Copenhaver's reasoning concerning how the nature of ACT's membership impacted its ability to establish standing "and upon independent review of the record and law . . . finds that decision to be sound."[56] Judge Stucky simply applied the record evidence to the standing elements under West Virginia law for each of ACT's remaining claims. It is not surprising that Judge Stucky found Judge Copenhaver's analysis particularly persuasive since the standing elements applied by Judge Copenhaver under federal law are exactly the same elements adopted by this Court in

[54] The assignment reads as follows: "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." Petition at 20.

[55] May 7, 2010 Order at Conclusion of Law ¶ 8 (emphasis added).

[56] May 7, 2010 Order at Conclusion of Law ¶ 8.

Findley. In fact, the syllabus point in *Findley* setting forth the three standing elements cites to the very same United States Supreme Court decision applied by Judge Copenhaver.[57]

Judge Stucky reached the same conclusion as Judge Copenhaver not because Judge Stucky was bound by that decision, but because it was the right result under the applicable law.

D. ACT's Alleged "Harm" Failed to Establish Standing

ACT's fourth assignment of error is that the alleged "harm" to the individual union construction workers was sufficient to establish standing or at least create a genuine issue of material fact concerning standing.[58] This assignment of error takes issue with Judge Stucky's application of the alleged "harms" to individual construction workers (assuming *arguendo* they are members of ACT) to the three standing elements. ACT essentially complains that standing should be satisfied if it can allege, by way of affidavit, that its members have suffered harm, caused by the NCI contract, which can be redressed by a favorable court decision *regardless* of whether those allegations make any logical sense. That is not the law. As this Court has recognized, an "affidavit that is conclusory only is not sufficient to meet the burden on the party opposing the motion[.]"[59] While all reasonable inferences should be resolved in favor of the non-moving party when considering a summary judgment motions, the operative word is *reasonable*. "We need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences."[60] "Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the

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[57] Syl. Pt. 5, Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002); (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)); September 30, 2009 Order at *3 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

[58] The assignment reads as follows: "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 insufficient 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." Petition at 24-25.

[59] Syl. Pt. 2 (in part), Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).

[60] Williams v. Precision Coil, Inc., 194 W.Va. 52, 60, 459 S.E.2d 329, 337 n. 10 (1995).

necessary inference is so tenuous that it rests merely upon speculation and conjecture."[61] In other words, ACT's bare allegations are insufficient to create an injury where none actually exists. As cogently explained in Judge Stucky's Order, as discussed below, one must "indulge in speculation, or draw improbable inferences" to find that the harms allegedly suffered by the individual construction workers satisfy each of the standing elements.

1. Absence of an "Injury-in-Fact"

An injury-in-fact for standing purposes is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical."[62] As discussed above, ACT's alleged injuries to the individual construction workers consisted of the following: lost wages and work time, overtime, employment opportunities, future pension and insurance benefits, working conditions and morale, depression of wages, reduction in apprenticeship and other training, and loss of employment opportunities.[63] As Judge Stucky recognized, these alleged "injuries" from the absence of a prevailing wage provision in the NCI contract are more akin to a "generalized grievance" about the purported impact of non-union labor on union wages:

> The unspoken premise for these harms is the following: since individual union members were not afforded a chance to be employed on the Red Jacket section, and NCI allegedly paid its non-union workforce wages less than called for by the prevailing wage statute, the project therefore deprives ACT's union members of employment and depresses their wages. The fallacy of this logic is revealed when one considers that all non-union construction projects would contribute to these alleged harms. Any time a project is undertaken without union labor, union workers are not working or training on the project and union wages are not being paid to a union workforce. ACT has not identified any legally protected interest in having union labor employed on the Red Jacket section of the KCH. Even assuming such harm exists, the NCI agreement for the Red Jacket section would not contribute to

[61] Williams v. Precision Coil, Inc., 194 W.Va. 52, 60, 459 S.E.2d 329, 337 n. 10 (1995) (quoting Ford Motor Co. v. McDavid, 259 F.2d 261, 266 (4th Cir. 1958)).

[62] Syl. Pt. 5, Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002).

[63] May 7, 2010 Order at Conclusion of Law ¶ 19 (quoting ACT's Response in Opposition to Summary Judgment Motion at 15).

> these alleged harms any more than other non-union construction projects would. ACT's alleged harms are more akin to a "generalized grievance." As the Fourth Circuit noted in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corporation*, "[t]he injury-in-fact requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the entire public." A plaintiff "must somehow differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense." ACT has only a mere generalized grievance about the contract in the abstract sense - one that could be shared by any member of the public - that non-union projects are bad as a matter of public policy because, according to ACT, non-union projects deprive union members of employment and depress wages. This is insufficient to establish standing. In the words of *Gaston Copper*, ACT has not differentiated itself from the mass of people who may believe that construction contracts that do not require payment of "prevailing wages" are objectionable in an abstract sense. ACT has no more standing to pursue its claims than a general member of the public who either opposes non-union construction projects or favors higher wages in general. ACT has simply failed to allege any "concrete and particularized injury" to a legally protected interest caused by the absence of a prevailing wage provision in NCI's agreement for construction of the Red Jacket section of the KCH.[64]

In other words, ACT failed to allege any "concrete and particularized" harm from the absence of a prevailing wage provision in a contract governing a project that employed non-union labor. ACT produced no evidence that these harms even existed other than Mr. White's macro-economic theory that payment of less than prevailing wages to anyone must perforce lead to a depression of wages for others. This is pure conjecture and speculation - particularly from a lay witness - that Judge Stucky did not have to accept at face value.

Likewise, Judge Stucky reached the rather unremarkable conclusion that ACT lacked standing to assert the competitive bidding claim because neither ACT nor any of its alleged members would have bid on the KCH project had bids been solicited, and therefore suffered no injury by the absence of a bidding process. "A person that would not bid on a construction project does not suffer an 'injury in fact' if bids are not solicited."[65]

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[64] May 7, 2010 Order at Conclusion of Law ¶ 19 (citations omitted).
[65] May 7, 2010 Order at Conclusion of Law ¶ 21.

In short, Judge Stucky had ample support for this conclusion that ACT's alleged injuries in support of its prevailing wage and competitive bidding claims were not sufficiently "concrete and particularized" to constitute an "injury-in-fact" for standing purposes.

2. Lack of Causal Link Between NCI Contract and Alleged Harm

Even if the alleged harms to individual construction workers did satisfy the "injury-in-fact" element, Judge Stucky found that ACT failed to show how those alleged harms were "fairly traceable" to either the absence of a prevailing wage provision in the NCI contract or the lack of a public bidding process:

> Lost time, employment, training, depressed wages, etc. can be linked to a variety of economic factors. They are consequences of capitalism and fluctuations in the economy. As mentioned above, all non-union construction contracts would contribute to the alleged harms. ACT has not demonstrated that the absence of a prevailing wage provision in NCI's contract in particular has caused the harms ACT claims to have befallen the individual construction workers. Likewise, there is no evidence that the absence of a public bidding process contributed to ACT's harms. In *Laidley*, the contractors alleged injury - denial of the opportunity to bid on the public project - was directly linked to the government agency's decision to award the contract without public bidding. By contrast, the alleged injuries to individual construction workers do not flow from the absence of a public bidding process. Had public bids been solicited, these injuries may have occurred nonetheless. For example, if another contractor had been were [sic] awarded the contract for the Red Jacket section through public bidding, and did not choose to employ union labor on the project, the individual union workers would presumably suffer the same alleged harms. In other words, the absence of a public bidding process is not a "but for" cause of the alleged injuries.[66]

In short, ACT submitted no evidence other than Mr. White's unsubstantiated speculation tying the alleged harms, to the extent they even existed, to the absence of a prevailing wage provision in the NCI contract or the letting of the contract without a public bidding process - a process in which neither ACT nor its members would have participated.

ACT's Petition contains no explanation of a "cause and effect" relationship between the NCI contract and the alleged injuries to the individual construction workers. Instead, ACT

[66] May 7, 2010 Order at Conclusion of Law ¶ 22.

simply repeats its conclusory allegation that the NCI contract causes the specified harms without anything to support that claim besides mere *ipse dixit*. This sort of bootstrapping is insufficient to overcome a summary judgment motion.

3. Inability of a Favorable Court Decision to Redress Alleged Harms

Lastly, ACT failed to present any credible evidence that the alleged harms could be redressed by a court decision in its favor:

> In order to satisfy the final standing element of redressability, ACT must demonstrate that it is *likely*, rather than "merely speculative," that the alleged injuries will be redressed by a favorable decision. Again, ACT has submitted no evidence that the alleged harms to the construction workers will be remedied to any ascertainable degree by either a bidding process for the Red Jacket section or payment of different wages to NCI's non-union employees. There is no evidence that soliciting bids or paying different wages to NCI's non-union workforce will even incrementally affect the employment or wages of individual union workers. As mentioned above, ACT has not shown that either it or its members would bid on the Red Jacket section anyway, and the construction workers ACT claims to represent do not work on the current project. ACT has not shown that it is likely that the local union construction workers would be employed and have higher wages if the project were open to public bids. In fact, there is no evidence that any particular contractor would be awarded the contract through a public bidding process - much less a contractor who has a collective bargaining agreement with ACT's local union organizations. Again, the injury alleged by ACT is not a lost opportunity to bid, it is the alleged lost opportunity to be employed on a project, and there is no evidence that a public bidding process would likely result in more employment for individual union members - particularly where neither ACT, its member unions, nor the individual workers would have bid on the project. Therefore, ACT has not established that any remedy this court may grant is likely to address the alleged injuries - even if ACT did represent the individual construction workers.[67]

Like the causation element discussed above, ACT's Petition contains no explanation of how a favorable court decision could possibly remedy the alleged harms. In nothing more than a footnote, ACT states that the West Virginia Declaratory Judgments Act empowers courts to grant further relief "whenever necessary or proper" and "[a]t 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

[67] May 7, 2010 Order at Conclusion of Law ¶ 23 (citations omitted).

standing test."[68] Yet, ACT does not explain what relief is possible, much less "necessary and proper," and how that relief would assuage the alleged harm to any ascertainable degree. Even assuming union wages were somehow depressed by NCI's paying its roughly 80 employees a wage package different than the "prevailing wage" for union laborers, ACT offers no rationale for how a favorable court decision would remedy that situation. For example, ACT fails to explain how payment of back-wages to NCI's non-union employees for the difference between the prevailing wage and the actual wage paid would magically create work and higher wages for union laborers who do not work on the KCH project. Similarly, there is no credible evidence that soliciting bids for the KCH project would lead to jobs for union construction workers - especially when neither ACT nor the union construction workers would bid on the project.

Having found that ACT failed to satisfy any, much less all, of the standing elements, Judge Stucky properly ruled that summary judgment was appropriate.

E. Judge Stucky Did Not Make Factual Findings on Disputed Issues

ACT's last assignment of error is that Judge Stucky made factual findings on a number of disputed issues - namely NCI's expertise and the estimated cost savings enjoyed by the State and Federal governments by having NCI perform the KCH project.[69] The Petition mischaracterizes the nature of the factual findings. In Findings of Fact paragraphs 7 and 8, Judge Stucky simply observes the reasons given by the State and Federal governments for entering into the NCI contract, but does not purport to find that those reasons have factual support. For example, it cannot be disputed that that the State and Federal governments "estimated that a partnership with NCI to build the Red Jacket section's roadbed would save the federal government and the State

[68] Petition at 31, n. 18.

[69] The assignment reads as follows: "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." Petition at 28.

of West Virginia between $170,000,000 and $193,000,000 as compared to traditional construction methods using eminent domain and private contractors."[70] What ACT disputes is the accuracy of this estimate, which Judge Stucky does not, and did not need to, address. The order simply recognizes that such an estimate was made, and served as a basis for the decision to award the KCH project to NCI, but does not place any kind of judicial imprimatur on the validity of this estimate. The same goes for NCI's expertise in performing highway construction projects - Judge Stucky merely referenced a conclusion reached by the highway authorities without addressing the validity of that conclusion. ACT's alleged "findings of facts" on disputed issues are simply part of the background information to provide context for the project and ACT's claims. They are clearly not intended to resolve disputed factual issues.

Regardless of how these findings are characterized, they are ultimately immaterial to ACT's Petition because they are not germane to the grounds for awarding summary judgment - ACT's lack of standing. Whether the estimate of cost savings is accurate, or whether NCI had the expertise to perform the project, has no bearing on ACT's failure to establish standing. So even if the Court were to agree with ACT's interpretation of these "findings," those findings are irrelevant to Judge Stucky's conclusions with respect to ACT's lack of standing to challenge the NCI contract.

XI. Conclusion

ACT's Petition should be denied for the simple reason that it only assigns as error one of the two independent grounds for the award of summary judgment. ACT does not challenge Judge Stucky's finding that ACT does not represent the individual union construction workers from whose alleged harm ACT claims to derive standing, and therefore any harm to those

[70] May 7, 2010 Order at Findings of Fact ¶ 8.

individuals cannot give rise to ACT's standing. Instead, each of ACT's five assignments of error only challenge aspects of Judge Stucky's alternative basis for summary judgment - that the alleged harms to individual union construction workers (assuming *arguendo* they were members of ACT) failed to satisfy the elements of standing. As discussed above, Judge Stucky had ample basis to conclude that those alleged harms (depression of wages, lost work, etc.) were not true injuries-in-fact that were fairly traceable to the NCI contract and could be redressed to any ascertainable degree by a court decision in ACT's favor.

Even if this Court were to agree with ACT's arguments that the theoretical harms suffered by these individuals were cognizable in a court of law, Judge Stucky's summary judgment order would still stand based on his conclusion, which is unchallenged by ACT, that none of those individuals are members of ACT, and thus their alleged harm does not give ACT standing to sue on their behalf. Granting ACT's Petition would therefore be a futile endeavor because Judge Stucky's summary judgment order should still be affirmed even if ACT prevails on its assignments of error.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 100858

AFFILIATED CONSTRUCTION TRADES FOUNDATION,

PETITIONER

v.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS; WEST VIRGINIA BOARD OF EDUCATION; MINGO COUNTY REDEVELOPMENT AUTHORITY; and NICEWONDER CONTRACTING, INC.

RESPONDENTS.

CERTIFICATE OF SERVICE

I, Robert M. Stonestreet, counsel for Respondent Nicewonder Contracting, Inc., do hereby certify that on this 23rd day of July, 2010, I have served the foregoing "Response to Petition for Appeal on Behalf of Nicewonder Contracting, Inc." upon the remaining parties herein by mailing true and accurate copies thereof to their respective counsel of record at the following addresses:

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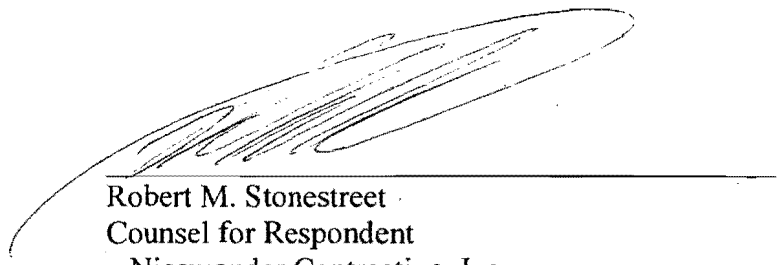

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EXHIBITS

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