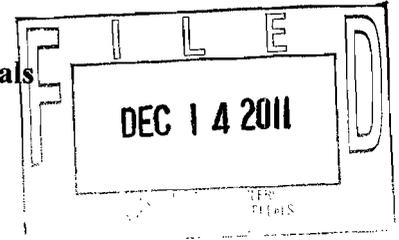


In the West Virginia Supreme Court of Appeals



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

Petitioner,

v.

No.: 11-7690  
Kanawha County Circuit Court  
Civil Action No. 04-C-3189

The Honorable James C. Stucky,  
Judge of the Circuit Court of Kanawha County;  
The West Virginia Department of  
Transportation, Division of Highways;  
The West Virginia Board of Education;  
The Mingo County Redevelopment Authority; and  
Nicewonder Contracting, Inc.,

Respondents.

---

**PETITION FOR WRIT OF PROHIBITION**

---

Presented by:

Vincent Trivelli (W.V. Bar No. 8015)  
The Law Office of Vincent Trivelli, PLLC  
178 Chancery Row  
Morgantown, WV 26505  
(304) 291-5223  
vincenttrivelli@gmail.com

**TABLE OF CONTENTS**

**Table of Contents .....ii**

**Table of Points and Authorities .....iii**

**Questions Presented ..... 1**

**Statement of the Case ..... 1**

**Summary of Argument ..... 3**

**Statement Regarding Oral Argument and Decision ..... 4**

**Argument ..... 4**

**Conclusion and Prayer ..... 8**

**Verification ..... 11**

**Certificate of Service ..... 12**

## TABLE OF POINTS AND AUTHORITIES

### W. Va. Code:

W.Va. Code § 21-5A-1 et seq. ....	6
W. Va. Code § 53-1-1 .....	3

### W. Va. Cases:

<i>The Affiliated Construction Trades Foundation v. West Virginia Department of Transportation, et al.</i> , WV Supreme Court No. 35742 (June 22, 2011) .....	<i>passim</i>
<i>State ex rel. Frazier &amp; Oxley, L.C. v. Cummings</i> (214 W.Va. 802, 591 S.E.2d 728 (2003)).....	5, 6
<i>Glover v. Narick</i> , 194 W.Va. 381, 400 S.E.2d 816 (1990) .....	8
<i>Johnson v. Gould</i> , 62 W.Va. 599, 59 S.E. 611 (1907).....	6
<i>State ex rel. The Tucker County Solid Waste Authority v. West Virginia Division of Labor</i> , Syl Pt. 1, 668 S.E.2d 217 (2008) .	5

### W. Va. Rules of Civil Procedure:

Rule 19(a) .....	1, 3, 8, 9
------------------	------------

### Revised Rules of Appellate Procedure

Rule 19 .....	4
Rule 21(d) .....	4

### Questions Presented

1. Whether the Circuit Court clearly erred as a matter of law in holding that the issue of ACT's standing was open and not determined by this Court in *The Affiliated Construction Trades Foundation v. West Virginia Department of Transportation, et al.* (No. 35742) and thereby misconstrued, failed or refused to obey or give effect to the mandate of this Court upon remand or acted beyond its province related thereto.

2. Whether the Circuit Court clearly erred as a matter of law in Ordering Petitioner to make the Federal Highway Administration a party to this proceeding as an indispensable party under Rule 19(a) of the West Virginia Rules of Civil Procedure.

### Statement of the Case

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. (A.R. Vol. 1, pp. 1-25) On or about June 23, 2010, the Affiliated Construction Trades Foundation ("ACT") filed a *Petition for Appeal* from that Order with this Court. On June 22, 2011 this Court filed its Opinion in *The Affiliated Construction Trades Foundation v. West Virginia Department of Transportation, et al.* (No. 35742). (A.R. Vol. 1, pp. 26-53) In coming to this Decision this Supreme Court held among other things:

"ACT has representative standing to seek the declarations contained in its petition. The order of the circuit court dated May 7, 2010 is reversed and this matter is remanded [to the Circuit Court] for further proceedings consistent with this Opinion." (A.R. Vol. 1, p. 53)

In her Concurring Opinion, Justice Davis stated,

"I agree fully with the majority's conclusion that the Affiliated Construction Trades Foundation (hereinafter referred to as 'ACT') possesses representative standing to bring the declaratory judgment action underlying this appeal." (A.R. Vol. 1, p. 54)

Yet, on November 9, 2011<sup>1</sup> Judge Stucky of the Circuit Court of Kanawha County issued an *Order Denying Plaintiff's Motion for Summary Judgment*<sup>2</sup> in this matter holding:

“This Court concludes that the West Virginia Supreme Court did not render preclusive factual findings with respect to ACT’s standing to maintain its claims such that the defendants may not even attempt to refute them. Rather, the West Virginia Supreme Court essentially found that a genuine issue of material fact existed as to whether ACT has standing.” (A. R. Vol. 1, p. 9)

The Circuit Court stated: “this Court cannot conclude, as a matter of law, that ACT has standing to assert the competitive bidding claim. Rather, the Court finds that a genuine issue of material fact exists as to ACT’s standing on the competitive bidding claim, and therefore summary judgment on this claim is inappropriate.” (A. R. Vol. 1, p. 11)

The Circuit Court also held that ACT must “affirmatively prove, by a preponderance of the evidence, its standing to maintain both the competitive bidding and prevailing wage claims.” (A.R. Vol. 1, p. 15)<sup>3</sup> The Circuit Court has thereby failed to follow the mandate of this Court on remand.

---

<sup>1</sup> Petitioners herein, for some reason, did not timely receive a copy of this November 9, 2011 Order from the Circuit Clerk of Kanawha County. After contacting the Circuit Clerk’s office, a copy was received from that office on December 7, 2011, which indicated at the bottom of page 25 that it was mailed to Petitioner’s counsel by certified/first class mail on November 15, 2011. Petitioner’s counsel did not receive the Order at that time. Petitioner only learned of the existence of the Order on December 1, 2011, through correspondence with counsel for Nicewonder Contracting, Inc. (“NCI”) regarding discovery matters. Upon learning that Petitioner was unaware of the November 9<sup>th</sup> Order, counsel for NCI sent a copy to Petitioner via electronic mail on December 1, 2011. The copy received from NCI’s counsel did not have any indication at the bottom of page 25 of the Order as to whom the Order was mailed. ACT would note that the November 9, 2011 Order appears to be the same as the Proposed Order presented to the Court on November 7, 2011 by the Defendants NCI, WV Division of Highways and Mingo County Redevelopment Authority (A.R. Vol. 2, pp. 276-301), except for the correction of two typographical errors.

<sup>2</sup> Following this Court’s Decision of June 22, 2011, ACT filed a Motion for Summary Judgment. (A.R. Vol. 1, pp. 83-175) A hearing was held on this motion on October 6, 2011 and the parties simultaneously submitted Proposed Findings of Fact, Conclusions of Law and Oder on or about November 7, 2011. (A.R. Vol. 2, pp. 267-275 and 276-301) Responses to these proposals were due fifteen days after filing of the Proposals. However, only ACT filed a Response (A.R. Vol. 2, pp. 302-308), not knowing that the Court had already issued its November 9<sup>th</sup> Order.

<sup>3</sup> The Circuit Court discusses at length (A.R. Vol. 1, pp. 7-15) what ACT must prove in order to have standing by stating, “In order for ACT to ultimately prevail, it must prove by affirmative evidence that it has standing to maintain both the competitive bidding and the prevailing wage claim” and that this means ACT “has the burden to prove standing by a preponderance of the evidence.” (A.R. Vol. 1, pp. 7-8)

Additionally, the Circuit Court ruled that the Federal Highway Administration (“FHWA”) be made a party to the case, even though all causes of action regarding the FHWA were dismissed by the Federal Court in an earlier ruling. (A.R. Vol. 1, p. 82)

The Circuit Court’s holdings in this matter constitute clear cut legal error by which the Petitioner will be damaged and prejudiced in a way that is not correctable on appeal and for which the Petitioner has no other adequate means to obtain relief. Therefore, Petitioner hereby files this Petition for Writ of Prohibition pursuant to West Virginia Code § 53-1-1.

### **Summary of Argument**

The holdings by the Circuit Court in determining that ACT must prove that it has standing to bring competitive bidding and prevailing wage claims, are in direct contravention of a clear legal holding of this Court. These holdings by the Circuit Court constitute clear cut legal error by which the Petitioner will be damaged and prejudiced in a way that is not correctable on appeal and for which the Petitioner has no other adequate means to obtain relief. These holdings are more than sufficient for this Court to entertain and issue a Writ of Prohibition.

Additionally, the Circuit Court determined that the Federal Highway Administration (FHWA) should be a party to this proceeding under Rule 19(a) of the West Virginia Rules of Civil Procedure, even though the Federal Highway Administration was a party to these proceedings previously and all causes of action regarding the FHWA were dismissed by the Federal Court and the FHWA has not been a party since that time. This is a legal error that will prejudice the Petitioner and unnecessarily prolong this matter.

### **Statement Regarding Oral Argument and Decision**

The Petitioner states that this matter need not be set for oral argument in that the dispositive issues raised by this Petition are clear and have been authoritatively decided. If the Court were to determine that oral argument is appropriate the Petitioner believes that oral argument pursuant to Revised Rules of Appellate Procedure 19 is appropriate in this matter in that this matter involves assignments of error in the application of settled law and the findings of the Circuit Court are contrary to a prior holding by this Court. Rule 21(d) of this Court's Rules of Appellate procedure provides that memorandum decisions reversing the decision of a circuit court should be issued in limited circumstances. While the Petitioner believes that the issues raised in this Petition are so clear that a reversal of the decision of the Circuit Court is in order, given Rule 21(d), Petitioner is not prepared to say that this is a case where a Memorandum Decision is appropriate.

### **Argument**

*The Law of Writ of Prohibition* - This Court has consistently held that in determining whether to entertain and issue a writ of prohibition, for cases not involving the absence of jurisdiction, but where the lower Court exceeded its legitimate powers that it will look to five factors: whether the Petitioner has no other adequate means to obtain relief; whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal; whether the lower Court Order is clearly erroneous as a matter of law; whether the lower Court Order contains an oft repeated error or a persistent disregard for either procedural or substantive law; and whether the lower Court's Order raises new or important problems or issues of first impression. In addition, this Court has repeatedly held that the issue of the existence of a clear

error as a matter of law should be given substantial weight. (*State ex rel. the Tucker County Solid Waste Authority v. West Virginia Division of Labor*, Syl Pt. 1, 668 S.E.2d 217 (2008))

This Court has also held that in determining whether to issue a rule to show cause in prohibition when a Court is not acting in excess of its jurisdiction, it will look to the adequacy of other available remedies and to the over-all economy of effort and money among litigants, lawyers and Courts. The substantial, clear-cut legal errors for which this Court will use prohibition may be resolved independently of any disputed facts and where there is a high probability that the trial court will be completely reversed if the error is not corrected in advance. (Syl. Pt. 2, *Tucker County, supra*)

With regard to the question of whether a Circuit Court has complied with the mandate of this Court on remand, the leading case is *State ex rel. Frazier & Oxley, L.C. v. Cummings* (214 W.Va. 802, 591 S.E.2d 728 (2003)). In *Oxley* this Court held a number of key holdings that impact on the instant matter. This Court held that: prohibition is an appropriate means of enforcing compliance by a circuit court with this Court's mandate (Syl. Pt. 5), that a circuit court's interpretations of this Court's mandate are questions of law that are reviewable de novo (Syl. Pt. 4) and importantly (at Syl Pt. 3) that:

“Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.”<sup>4</sup>

---

<sup>4</sup> At Syl. Pt. 2 this Court discussed the differences between remands of general or limited scope. In this instant matter this Court, as discussed herein, provided the Circuit Court with the issues to be considered and indicated that the Circuit Court's actions must be “consistent with this Opinion.” (A.R. Vol. 1, p. 53)

In the instant matter the Circuit Court did not proceed in accordance with the mandate and law of the case established in the appeal, did not implement the letter and spirit of the mandate and did not take into account this Court's Opinion and the circumstances it embraced.<sup>5</sup>

The language of the West Virginia Supreme Court's decision in this matter is clear and unequivocal, "ACT has representational standing to seek the declarations contained in its petition. The order of the circuit court dated May 7, 2010 is reversed and this matter is remanded for further proceedings consistent with this Opinion." (A.R. Vol. 1, p. 53) This Court's Decision permits no further review of issues surrounding ACT's standing and remands this matter back to the Circuit Court. This Court remanded this matter to the Circuit Court to resolve "whether state law required that the Red Jacket Project be submitted for competitive bidding" (A.R. Vol. 1, p. 49) and to permit ACT "to seek the declarations contained in its petition" (A.R. Vol. 1, p. 53) including that "the Red Jacket contract violated *W.Va. Code 21-5A-1 et seq.* on the basis that it did not require Nicewonder to pay a 'fair minimum rate of wages.'" (A.R. Vol. 1, p. 49) This matter was remanded for determining whether the underlying facts of the case regarding the paying of the prevailing wage and competitive bidding support the application of those laws to the project at issue. The remand was for determining if the prevailing wage and competitive bidding laws apply to the underlying project. The remand was not to permit the Circuit Court to reopen the issue of ACT's standing and to permit the other Parties in this proceeding to delay this matter further by engaging in abusive and irrelevant discovery into ACT's standing.

The Circuit Court, however, held that this Court's remand in some manner demonstrates that the issue of ACT's standing remains an open one. (A.R. Vol. 1, p. 9)<sup>6</sup> The Circuit Court is

---

<sup>5</sup> As this Court stated in *Oxley*, (citing Syl. Pt. 1, *Johnson v. Gould*, 62 W.Va. 599, 59 S.E. 611 (1907)), "[a] circuit court has no power, in a cause decided by the Appellate Court, to re-hear it as to any matter so decided, and, though it must interpret the decree or mandate of the Appellate Court, in entering orders and decrees to carry it into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed." (*Oxley, supra* 497, 808)

clearly wrong. In making this and related holdings, the Circuit Court misconstrued, failed or refused to obey or give effect to the mandate of this Court upon remand or acted beyond its province related thereto.

In response to the Circuit Court's November 9, 2011 Order Defendant Nicewonder has served on the Petitioner irrelevant, extensive, intrusive and burdensome discovery requests that seek massive amounts of information on ACT's standing (See A.R. Vol. 2, pp. 309-321). ACT has objected to this effort. (A.R. Vol. 2, pp. 322-345) This action by Defendant Nicewonder demonstrates that the Petitioner will be damaged and prejudiced in a way that is not correctable on appeal and that an appeal of any future final Order in this proceeding is simply not adequate.<sup>7</sup> It also demonstrates that resolving this issue at this point in time will result in an overall economy of effort and money among litigants, lawyers and the courts.

Let us be clear, ACT is not asking this Court to issue an Order granting ACT's Motion for Summary Judgment on the merits – although ACT contends that the Circuit Court is clearly wrong in not granting ACT's Motion.<sup>8</sup> Rather, ACT is urging this Court to issue a Writ of Prohibition to resolve clear errors of law.

---

<sup>6</sup> The Circuit Court states that by not issuing a partial or complete summary judgment in favor of ACT this Court demonstrated that the issue of ACT's standing was not determined by this Court's June Decision. (A. R. Vol. 1, p. 9)

<sup>7</sup> In NCI's Response to ACT's Motion for Summary Judgment, NCI stated, "... the Red Jacket Project is nearly complete. Once all work under the challenged contract has effectively been completed, there are no activities to enjoin, and therefore ACT's claims will be rendered moot." (A.R. Vol. 2, p. 187)

<sup>8</sup> There are numerous errors in the Circuit Court's Order including but not limited to the Court's findings regarding the estimated cost savings, NCI's due process affirmative defense, and the existence of additional factual issues raised in ACT's Complaint. Simply put, the cost savings and additional factual issues in ACT's complaint concern the federal issues that have been dismissed by the District Court and the Defendants provided no evidence whatsoever on this proposed defense in their response to the Plaintiff/Petitioner's Motion either in briefs or at the hearing before the Court. The Defendants are attempting to create a genuine issue of fact on this defense by merely saying one exists. The Defendants have completely failed to meet their burden on this issue and must not be permitted to stall this matter further by the erection of a straw man. In addition, the Circuit Court's Order makes numerous "Findings

In addition to the issue of ACT's standing, the Circuit Court clearly erred in Ordering ACT to make the Federal Highway Administration (FHWA) a party to this proceeding as an indispensable party under Rule 19(a) of the West Virginia Rules of Civil Procedure. (A.R. Vol. 1, pp. 23-24) What the Court fails to acknowledge, and of which Defendants are clearly aware, the Federal Highway Administration was a party to these proceedings and all causes of action regarding the FHWA were dismissed by the Federal Court and the FHWA has not been a party since that time. (A.R. Vol. 1, p. 82) It is important to note that neither the Federal Highway Administration nor any other Defendant opposed the Federal Court's action in any manner. Given these undisputable facts it is impossible to find that the FHWA is an indispensable party to this matter. This Court has held that a Writ of Prohibition is an appropriate remedy in an instance where a lower Court required joinder of a party that does not meet the requirements of the compulsory joinder rule. (*Glover v. Narick*, 194 W.Va. 381, 400 S.E.2d 816 (1990)) This action by the Circuit Court in Ordering ACT to join the FHWA is a clear cut error that will prejudice the Petitioner by extending the time period of this matter into the future while an irrelevant matter is considered by the courts.

#### **Conclusion and Prayer**

The underlying case in this matter was filed in 2004. The argument of the Defendants in this proceeding which has been incorporated into the Circuit Court's Order of November 9, 2011, continues – in direct contravention of this Court's June 22, 2011 Decision – the inquiry into and fight regarding ACT's standing. The impact of the Circuit Court's Order, if left standing, will be to subject the Petitioner and the Courts to great expense and time to consider a matter that has been resolved by this Court earlier this year. If the Circuit Court's Order is left standing, the focus of the Parties and the Courts will be on the Petitioner and on attempting to add a previous Party back into a  

---

of Fact" that are in fact not facts at all but are the Defendants' assertions listed as "facts." ACT objects to these assertions being considered as "facts."

lawsuit for which its issues have been decided years ago. The Petitioner has no other adequate means to prevent the Circuit Court from opening the door to the Defendants' further delay and unwarranted inquiry into ACT's standing. The Petitioner has not brought any disputed facts before this Court – this Court's Decision and the Order of the Circuit Court, while in clear conflict, are not in dispute. The Circuit Court in the instant matter has misconstrued, failed or refused to obey or give effect to the mandate of this Court upon remand regarding ACT's standing. The Circuit Court's holding is therefore erroneous and must be reversed. The Circuit Court has erred as a matter of law in Ordering Petitioner to make the Federal Highway Administration a party to this proceeding as an indispensable party under Rule 19(a) of the West Virginia Rules of Civil Procedure. This matter is exactly the type for which a Writ of Prohibition is intended.

Underlying the effort by the Defendants to reopen the question of ACT's standing can be seen in the Circuit Court's final footnote. At footnote 38, the Circuit Court states that while it is not reaching the issue of mootness at this time, "if the Red Jacket Project is completed before the final decision on ACT's claims is rendered, the Court will evaluate at that time whether ACT's claims have been rendered moot." (A.R. Vol. 1, p. 24) It is the Defendants' intent to continue to delay this matter as long as they can and then to argue that their violations of the law over the years of this project are now moot. Stalling by the Defendants is the only tactic they have since the law in this matter is clear. This matter is not moot and the issues of standing cannot serve as a game of keep away – allowing the laws of the State of West Virginia to continue to be violated.

ACT therefore prays that this Court issue a Writ of Prohibition against the Respondent to prevent the enforcement of its November 9, 2011 Order as it concerns ACT's standing and the joining of the Federal Highway Administration.

Respectfully submitted this 13<sup>th</sup> day of December 2011.

A handwritten signature in black ink, appearing to read 'Vincent Trivelli', with a long horizontal flourish extending to the right.

Plaintiff,  
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**

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

Petitioner,

v.

No.: \_\_\_\_\_

The Honorable James C. Stucky,  
Judge of the Circuit Court of Kanawha County;  
The West Virginia Department of  
Transportation, Division of Highways;  
The West Virginia Board of Education;  
The Mingo County Redevelopment Authority; and  
Nicewonder Contracting, Inc.,

**VERIFICATION**

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA TO-WIT:

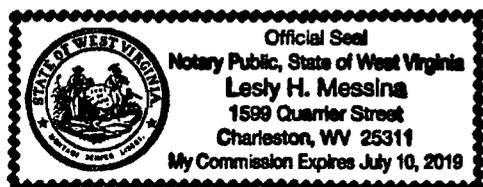
The undersigned, Steve White, Director of the Affiliated Construction Trades Foundation, a division of the West Virginia Building and Construction Trades Council, AFL-CIO, upon his oath, being duly sworn, says that the facts and statements contained in the attached **Petition for Writ of Prohibition** are true insofar as they are based upon information and belief, he believes to be true.

  
\_\_\_\_\_  
Steve White

Taken, subscribed and sworn to before me in my presence this 12<sup>th</sup> day of December, 2011.

My commission expires July 10, 2019

  
\_\_\_\_\_  
Notary Public



**In the West Virginia Supreme Court of Appeals**

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

Petitioner,

v.

No.: \_\_\_\_\_  
Kanawha County Circuit Court  
Civil Action No. 04-C-3189

The Honorable James C. Stucky,  
Judge of the Circuit Court of Kanawha County;  
The West Virginia Department of  
Transportation, Division of Highways;  
The West Virginia Board of Education;  
The Mingo County Redevelopment Authority; and  
Nicewonder Contracting, Inc.,

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on December 13, 2011 a true and correct copy of the **Petition for Writ of Prohibition and Appendix Record** was served upon the following via U.S. Mail, postage prepaid, and addressed as follows:

The Honorable James C. Stucky  
Kanawha County Judicial Annex  
111 Court Street  
Charleston, WV 25301

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

Gene W. Bailey, Esq.  
Charles B. Dollison  
Eric Calvert, 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

The Honorable Darrell V. McGraw, Jr.  
Attorney General, State of West Virginia  
Office of the Attorney General  
State Capitol Building, Room E-26  
1900 Kanawha Boulevard, East  
Charleston, WV 25305

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

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