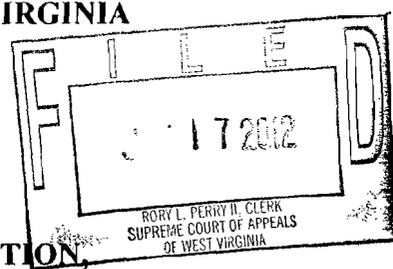


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

\_\_\_\_\_  
No. 11-1690  
\_\_\_\_\_



**AFFILIATED CONSTRUCTION TRADES FOUNDATION**

**PETITIONER**

v.

**THE HONORABLE JAMES C. STUCKY, WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION, DIVISION OF HIGHWAYS; WEST VIRGINIA BOARD OF  
EDUCATION; MINGO COUNTY REDEVELOPMENT AUTHORITY; and  
NICEWONDER CONTRACTING, INC.**

**RESPONDENTS.**

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**RESPONSE BRIEF ON BEHALF OF NICEWONDER CONTRACTING, INC.,  
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,  
AND MINGO COUNTY REDEVELOPMENT AUTHORITY  
IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION**

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## **I. Questions Presented (as Stated in the Petition)**

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.

## **II. Statement of the Case**

The Petition before the Court arises from a challenge by the Affiliated Construction Trades Foundation ("ACT") to a contract between Nicewonder Contracting, Inc. ("NCI") and the West Virginia Department of Transportation ("WVDOT") for construction of the rough-grade roadbed for what is known as the Red Jacket section of the King Coal Highway. ACT seeks a declaratory judgment that NCI's contract for the Red Jacket project violates West Virginia law governing competitive bidding of publicly funded projects and payment of "prevailing wages" for workers employed on the project.

On June 22, 2011, this Court issued an opinion in *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation*<sup>1</sup> that reversed an award of summary judgment in NCI's favor. As more fully discussed in *Affiliated*, the Circuit Court of Kanawha County, Judge Stucky presiding, had determined that even assuming the truth of ACT's evidence and viewing all inferences in ACT's favor, ACT still failed to demonstrate its standing to

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<sup>1</sup> *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation*, 713 S.E. 2d 809, 818 (W. Va. 2011).

maintain its competitive bidding and prevailing wage claims as required by *Findley v. State Farm Mutual Automobile Insurance Co.*<sup>2</sup> This Court found that ACT's evidence in support of standing was sufficient to survive a summary judgment motion, and reversed Judge Stucky's order. "We find that ACT has representative standing to seek the declarations contained in its petition."<sup>3</sup> With regard to the competitive bidding claim, this Court observed that "ACT's members who were interested in bidding for the Red Jacket project were ostensibly denied a claimed legal right[,]" which is the alleged "injury-in-fact" suffered by ACT's members.<sup>4</sup> As for the prevailing wage claim, this Court noted that "[r]eason suggests the strong likelihood that a project of that size and duration would eventually depress the local prevailing wage and affect ACT's members."<sup>5</sup>

Within days after the Court issued its formal mandate remanding the case to circuit court, ACT served a motion for summary judgment on the merits of its claims. The motion was fully briefed and subsequently argued before Judge Stucky. On November 9, 2011, Judge Stucky issued an order denying ACT's summary judgment motion and setting forth detailed findings of fact and conclusions of law explaining why summary judgment was inappropriate. Judge Stucky concluded that a host of genuine issues of material fact precluded summary judgment, including the issues related to the following: (1) NCI's "as-applied" due process affirmative defense; (2) estimated cost-savings of the project; (3) whether the contract was in the public interest; (4) whether the contract complied with rules and regulations promulgated by WVDOT for construction of public highways;<sup>6</sup> (5) ACT's failure to satisfy the necessary elements for

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<sup>2</sup> *Findley v. State Farm Mutual Automobile Insurance Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002).

<sup>3</sup> *Affiliated*, 713 S.E. 2d at 820.

<sup>4</sup> *Affiliated*, 713 S.E. 2d at 818.

<sup>5</sup> *Affiliated*, 713 S.E.2d at 819.

<sup>6</sup> November 9, 2011 Order at ¶¶ 29 – 33 (ACT Appendix at 16 – 18).

issuance of a permanent injunction to enjoin any further work on the project;<sup>7</sup> and (6) the absence of the Federal Highway Administration (“FHWA”) as a party in light of its substantial interest in the project.<sup>8</sup>

In addition to the litany of issues identified above, each of which served as an independent ground to deny ACT’s motion, Judge Stucky also concluded that a genuine issue of material fact existed with regard to ACT’s standing to maintain its claims. The November 9, 2011 Order goes to great lengths to analyze *Affiliated* to determine the scope of this Court’s decision with regard to ACT’s standing. As a result of that painstaking analysis, Judge Stucky determined that this Court “did not render preclusive factual findings with respect to ACT’s standing to maintain its claims such that 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.”<sup>9</sup> Pertinent portions of Order are set forth below:

16. In support of its standing to assert the competitive bidding claim, ACT has alleged that its members were harmed by the absence of a bidding process for the Red Jacket Project. As the West Virginia Supreme Court noted in its opinion, “ACT’s members who were interested in bidding for the Red Jacket project were ostensibly denied a claimed legal right[,]” which is the alleged “injury-in-fact” suffered by ACT’s members.<sup>10</sup> The Court did not, however, make any factual determinations regarding which, if any, of ACT’s members “were interested in bidding for the Red Jacket project[.]” The Court simply made a legal determination based on a presumed set of facts, which provided sufficient grounds for reversing the prior grant of summary judgment. But to grant summary judgment on the basis of a presumed fact is another matter altogether.

17. ACT’s evidence on standing to assert the competitive bidding claim is comprised of two affidavits executed by its Director, Steve White. Neither of those affidavits identifies any specific ACT member that expressed interest in bidding on the Red Jacket Project, or has even bid on a road construction project ever in the past. Based on the current record, this Court cannot discern that any such member exists, or ever has existed. In the absence of evidence identifying at

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<sup>7</sup> November 9, 2011 Order at ¶¶ 34 – 48 (ACT Appendix at 18 – 48).

<sup>8</sup> November 9, 2011 Order at ¶¶ 49 – 52 (ACT Appendix at 22 – 24).

<sup>9</sup> November 9, 2011 Order at ¶ 11 (ACT Appendix at 9).

<sup>10</sup> *Affiliated Constr. Trades Found. v. W. Va. Dept. of Transportation*, 713 S.E. 2d 809, 818 (W. Va. 2011).

least one of ACT's members "who [was] interested in bidding for the Red Jacket project[.]" 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.

18. ACT's evidence to support its standing for the prevailing wage claim is also based on the two affidavits submitted by Mr. White. ACT submitted the most recent affidavit, executed on March 28, 2010, as an exhibit to ACT's brief in opposition to NCI's summary judgment motion. In those affidavits, Mr. White posits that ACT's members – the construction workers who are members of local unions – have suffered harm from the absence of prevailing wage provisions in the agreement for the Red Jacket Project in the form of depression of wages, lost wages, lost overtime, lost employment opportunities, and lost future pension and insurance benefits.

19. In addressing ACT's alleged harms in support of the prevailing wage claim, the West Virginia Supreme Court observed that "[r]eason suggests the strong likelihood that a project of that size and duration would eventually depress the local prevailing wage and affect ACT's members."<sup>11</sup> The Court did not, however, make a finding that anyone's wages were actually depressed during the time period the Red Jacket project has been underway, much less the wages of ACT's members, or that the Red Jacket project proximately caused such wage depression. Moreover, neither the West Virginia Supreme Court nor ACT identified at least one specific member who has suffered these alleged harms. This Court is unable to identify any such member in the existing record. This alone makes summary judgment inappropriate.

Even assuming, *arguendo*, that the record did identify one or more ACT members who have allegedly suffered the harms that purport to give rise to ACT's standing, Judge Stucky found that a genuine issue of material fact existed as to whether these harms were proximately caused by the Red Jacket project as opposed to a host of other economic factors.<sup>12</sup>

Lastly, Judge Stucky correctly observed that neither NCI nor any of the other defendants had been given an opportunity to conduct discovery on the affidavits submitted by Mr. White. ACT submitted the March 23, 2010 affidavit with its response brief in opposition to NCI's summary judgment motion. Judge Stucky later awarded summary judgment to NCI by order

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<sup>11</sup> *Affiliated Constr. Trades Found. v. W. Va. Dept. of Transportation*, 713 S.E. 2d 809, 819 (W. Va. 2011).

<sup>12</sup> November 9, 2011 Order at ¶ 20 (ACT Appendix at 12 – 13).

entered May 7, 2010. In his November 9, 2011 order, Judge Stucky concluded that “[i]t would be fundamentally unfair to award summary judgment to ACT without affording NCI an opportunity to conduct discovery on the allegations set forth in Mr. White’s affidavits.”<sup>13</sup>

NCI served ACT with a set of discovery requests on November 7, 2011 – two days before entry of the order denying ACT’s summary judgment motion. This discovery seeks basic information such as the identity of “each ACT member that would have been interested in submitting a bid for the Red Jacket Project had bids been solicited” and “each ACT member who has suffered ‘lost wages, lost overtime, lost employment opportunities, lost future pension and insurance benefits’ and depression of wages as a result of the Red Jacket Project” as alleged in Mr. White’s March 23, 2010 affidavit.<sup>14</sup> This information is relevant not only to ACT’s standing, but also to whether ACT’s members have suffered “irreparable harm” that would warrant issuance of the permanent injunction ACT has requested.

In response to these discovery requests, ACT asserted, without explanation, a boilerplate objection that the requests are “overly broad, unduly burdensome, not limited in time or scope, and not reasonably calculated to lead to the discovery of relevant, admissible evidence at trial.”<sup>15</sup> ACT also objected to the requests on the grounds that the issue of standing had been determined by *Affiliated* and no further inquiry on that issue was permitted.<sup>16</sup> ACT had not received the November 9, 2011 Order at the time it served these responses on November 29, 2011.<sup>17</sup> After receiving the November 9, 2011 Order on December 1, 2011, ACT petitioned this Court for a writ of prohibition.

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<sup>13</sup> November 9, 2011 Order at ¶¶ 25 – 27 (ACT Appendix at 14 – 15).

<sup>14</sup> See Interrogatory Nos. 1 and 4 in ACT’s responses to NCI’s discovery requests (ACT Appendix at 324 – 326). Mr. White’s March 23, 2010 affidavit appears at ACT Appendix 202 – 204.

<sup>15</sup> See ACT’s responses to NCI’s discovery requests (ACT Appendix at 322 – 344).

<sup>16</sup> See ACT’s response to NCI’s discovery requests (ACT Appendix at 322 – 344).

<sup>17</sup> Petition at 2, n. 1.

### **III. Summary of Argument**

ACT's Petition with respect to standing issue should be denied for at least three reasons. First and foremost, the circuit court's determination that standing is an open issue for discovery and ultimately for a decision on the merits is wholly consistent with this Court's decision in *Affiliated*. To deny defendants the right to discovery and the ability to challenge ACT's evidence at trial would deprive them of the most fundamental due process rights. Second, ACT will suffer no damage or unfair prejudice by engaging in discovery that is relevant not only to standing, but also whether a permanent injunction is an appropriate remedy should ACT prevail on the merits of its claims. Third, ACT did not move for a protective order or other relief from the discovery requests it finds objectionable and this Court has long held that a writ of prohibition will not be issued to address discovery matters not involving potential disclosure of privileged or otherwise confidential information.

ACT's request to prohibit enforcement of the order to the extent it requires FHWA to be added as an indispensable party should likewise be rejected. ACT fails to cite any applicable law governing the determination for whether an absent party is indispensable. A review of that law demonstrates that FHWA clearly qualifies as an indispensable party.

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

NCI believes ACT's petition raises issues worthy of oral argument under Rule 20. ACT's position with respect to the effect of this Court's decision in *Affiliated* raises serious constitutional due process concerns. ACT contends that the defendants are not only prohibited from conducting discovery on ACT's standing, but also challenging ACT's standing at trial on the merits of ACT's claim by virtue of this Court's decision to reverse an award of summary judgment in NCI's favor on the issue of standing. ACT's petition also raises an issue of first

impression under West Virginia law with regard to standing: whether, as the United States Supreme Court has held, each standing element “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.”<sup>18</sup> This would include whether a litigant seeking a declaratory judgment must prove its standing by a preponderance of evidence at trial in order to prevail on the merits of its claims. NCI believes the Court would benefit from oral argument on these important issues.

## **V. Argument**

### **A. Standard for Awarding Extraordinary Writs**

A litigant must satisfy a high burden to justify issuance of a writ of prohibition. “Traditionally, we have held that a writ of prohibition is an extraordinary remedy and should be granted in only the most extraordinary cases.”<sup>19</sup> ““Only exceptional circumstances amounting to a judicial ‘usurpation of power’ will justify the invocation of this extraordinary remedy.””<sup>20</sup> “To justify the execution of a writ of prohibition, a petitioner ‘has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy.’”<sup>21</sup>

Prohibition is only appropriate in two extreme circumstances: 1) when a lower tribunal seeks to proceed in a matter over which it lacks jurisdiction; and 2) when a lower tribunal exceeds its legitimate powers. “We have stated that ‘prohibition lies only to restrain inferior

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<sup>18</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

<sup>19</sup> *State ex rel. Rose L. v. Pancake*, 544 S.E.2d 403, 405 (W. Va. 2001); *State ex rel. West Virginia Div. Of Natural Resources v. Cline*, 488 S.E.2d 376, 380 (W. Va. 1997); *State ex rel. Paul and Chris B. v. Hill*, 496 S.E.2d 198, 204 (W. Va. 1997).

<sup>20</sup> *Allen v. Bedell*, 454 S.E.2d 77, 82 (W. Va. 1994).

<sup>21</sup> *State ex rel. Rose L. v. Pancake*, 544 S.E.2d 403, 406 (W. Va. 2001)

courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.”<sup>22</sup> ACT does not allege that the Circuit Court of Kanawha County lacks jurisdiction over this matter. Rather, ACT argues that the circuit court has “exceeded its legitimate powers” in allowing discovery on an issue that has not yet been the subject of any discovery. The Court applies a five factor test in evaluating whether a lower court has exceeded its legitimate powers:

“[I]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.”<sup>23</sup>

This Court has also recognized that “[d]iscovery orders generally are not reviewable in mandamus or prohibition.”<sup>24</sup> Only when “a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rules 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure” does a writ of prohibition become an appropriate means for redress.<sup>25</sup>

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<sup>22</sup> Pancake, 544 S.E.2d at 405.

<sup>23</sup> Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

<sup>24</sup> State ex rel. Bennett v. Keadle, 334 S.E.2d 643, 647 (W. Va. 1985).

<sup>25</sup> Syl. pt. 2, State ex rel. United Hosp. Ctr., Inc. v. Bedell, 199 W. Va. 316, 484 S.E.2d 199 (1997).

## B. Absence of Clear Cut Legal Error

ACT does not contend that the circuit court lacks jurisdiction over the underlying matter. Rather, ACT focuses almost exclusively on the third factor – clear error as a matter of law. ACT contends that this Court’s conclusion in *Affiliated* that “ACT has representational standing to seek the declarations contained in its petition”<sup>26</sup> forecloses the ability of any defendant to even inquire into the allegations supporting standing, obviates the need for ACT to prove its standing in order to ultimately prevail on the merits, and prohibits defendants from challenging ACT’s standing evidence at trial. According to ACT, the circuit court committed clear error by not finding as a matter of law that ACT has proven its standing so that ACT is entitled to summary judgment in its favor on the issue of standing. ACT reads too much into this Court’s opinion. A holding that “ACT has representational standing to *seek* the declarations contained in its petition,” is not a finding that ACT has representational standing to *prevail* on the merits of its claims. In other words, ACT may have presented sufficient evidence to survive a motion for summary judgment on the issue of standing so that it may *seek* the declarations contained in its petition, but that does not perforce mean that ACT has established, by a preponderance of the evidence, its standing to *prevail* on merits. The applicable standard for surviving a summary judgment motion is far different than the burden of proof required to prevail on the merits. As noted in the November 9, 2011 order:

In order for ACT to ultimately prevail, rather than merely surviving a summary judgment motion, it must prove by affirmative evidence that it has standing to maintain both the competitive bidding claim and the prevailing wage claim. That is because the standing elements “are not mere pleading requirements but rather an indispensable part of the plaintiff’s case[.]” As such, “each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the

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<sup>26</sup> *Affiliated*, 713 S.E. 2d at 820.

successive stages of the litigation.” “[A]t the final stage, those facts (if controverted) must be ‘supported adequately by the evidence adduced at trial.’”<sup>27</sup>

When this matter was before the Court in *Affiliated*, the issue was whether the circuit court erred by granting summary judgment to NCI on the issue of standing – i.e. whether ACT established sufficient evidence to create a genuine issue of material fact on each of the requisite standing elements. This Court concluded that ACT satisfied that standard and accordingly remanded the case for further proceedings before the circuit court. As the language in *Affiliated* indicates, this Court did not make preclusive factual findings that at least one ACT member suffered an injury as a result of the Red Jacket project.

With regard to the competitive bidding claim, this Court observed that “ACT’s members who were interested in bidding for the Red Jacket project were ostensibly denied a claimed legal right[,]” which is the alleged “injury-in-fact” suffered by ACT’s members.<sup>28</sup> This Court did not, however, make any factual findings regarding which, if any, of ACT’s members “were interested in bidding for the Red Jacket project[.]” The record before the Court then and now does not identify one or more ACT members who were interested in bidding on the Red Jacket project.

As for the prevailing wage claim, this Court noted that “[r]eason suggests the strong likelihood that a project of that size and duration would eventually depress the local prevailing wage and affect ACT’s members.”<sup>29</sup> The opinion does not, however, make a finding that anyone’s wages were actually depressed during the time period the Red Jacket project has been underway, much less the wages of ACT’s members, or that the Red Jacket project proximately caused such wage depression. The record before the Court then and now does not identify one or

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<sup>27</sup> November 9, 2011 Order at Conclusion of Law ¶ 6 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

<sup>28</sup> *Affiliated*, 713 S.E. 2d at 818.

<sup>29</sup> *Affiliated*, 713 S.E.2d at 819.

more ACT members who claim that their wages were depressed as a result of the Red Jacket project.

The practical implications of ACT's argument expose its fallacy. Assume, *arguendo*, that ACT is correct and *Affiliated* "permits no further review of issues surrounding ACT's standing[.]"<sup>30</sup> The existing record supporting ACT's standing is comprised of the two affidavits submitted by ACT's director, Steve White, the latest of which was submitted on March 23, 2010 as an exhibit in response to NCI's motion for summary judgment. No discovery was undertaken with respect those affidavits. None. Had the circuit court denied NCI's summary judgment motion as this Court concluded it should have done in *Affiliated*, the case would have proceeded in the normal course, which would have included discovery directed towards Mr. White's affidavits. ACT would hardly have grounds to object to such discovery in that procedural posture. Only because ACT successfully appealed NCI's award of summary judgment to this Court can it now assert that the issue of standing has been resolved once and for all.

Consider also the effects of ACT's position on the defendants. It is undisputed that the defendants were not afforded an opportunity for discovery with respect to at least Mr. White's March 23, 2010 affidavit that provides the basis for ACT's purported standing. If ACT is correct and *Affiliated* forecloses any further inquiry into the standing issue, then defendants will have been denied an opportunity for discovery with respect to ACT's standing. This Court has often repeated that summary judgment should not be awarded before an opportunity for discovery has been provided. "[A] decision for summary judgment before discovery has been completed must be viewed as precipitous."<sup>31</sup> "Summary judgment is not appropriate until after the non-moving

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<sup>30</sup> Petition at 6.

<sup>31</sup> Board of Educ. v. Van Buren & Firestone, Architects, 165 W. Va. 140, 144 (W. Va. 1980).

party has had sufficient opportunity for discovery.”<sup>32</sup> “Appellate courts . . . have consistently reversed summary judgment dispositions when the nonmovant has not had sufficient opportunities for discovery.”<sup>33</sup> For this very reason, Judge Stucky found that “[i]t would be fundamentally unfair to award summary judgment to ACT without affording NCI an opportunity to conduct discovery on the allegations set forth in Mr. White’s affidavits.”<sup>34</sup>

More troubling, however, is the effect of ACT’s position on the defendant’s due process rights. If ACT is correct and *Affiliated* forecloses any further inquiry into the standing issue, then defendants will have been denied an opportunity to challenge ACT’s evidence and mount a defense to that evidence at trial. According to ACT, the circuit court is bound to accept ACT’s allegations at face value and deny the defendants an opportunity to challenge those allegations at trial simply because this Court found NCI’s award of summary judgment to have been improvidently granted. It stretches the bounds of credulity to believe that this Court intended to deny defendants both their right to discovery and their ability to challenge ACT’s evidence at trial by finding that summary judgment should not have been granted to NCI. To find otherwise would be to deny the defendants the most fundamental due process protection – the right to challenge an adversary’s evidence at trial and present their own evidence in their defense.<sup>35</sup>

In light of the above, Judge Stucky did not commit “clear cut legal error” or fail to comply with the “spirit and mandate” of this Court’s decision in *Affiliated*. Rather, the exact opposite is true. Judge Stucky correctly afforded defendants their right to discovery and an opportunity to refute ACT’s evidence at trial.

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<sup>32</sup> *Gilbert v. Penn-Wheeling Closure Corp.*, 917 F. Supp. 1119 (N.D. W. Va. 1996).

<sup>33</sup> *Oksanen v. Page Memorial Hosp.*, 912 F.2d 73, 78 (4<sup>th</sup> Cir. 1990).

<sup>34</sup> November 9, 2011 Order at Conclusion of Law ¶ 27.

<sup>35</sup> *See North v. West Va. Bd. of Regents*, 160 W. Va. 248, 257 (W. Va. 1977) (procedural due process guarantees right to confront accusers and present own evidence before an impartial tribunal).

### C. Damage and Prejudice to ACT

ACT only touches briefly on the second prong of the five factor test – “whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal[.]”<sup>36</sup> ACT claims, without explanation, that the service of discovery requests “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>37</sup> As noted above, NCI’s discovery seeks rudimentary information about ACT’s purported members who have allegedly suffered the harms that give rise to ACT’s standing and presumably the grounds for a permanent injunction. ACT describes those requests as “irrelevant, extensive, intrusive and burdensome discovery requests[.]”

ACT will suffer no damage or unfair prejudice from being subjected to discovery on the alleged harms suffered by its members. ACT has done nothing more than merely repeat the language of the second factor this Court examines when reviewing writ petitions – “whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal[.]”<sup>38</sup> Parroting this language proves nothing. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>39</sup> ACT offers no explanation for why it will suffer such unfair prejudice by having to substantively respond to the discovery requests. ACT cannot possibly be unfairly harmed by being subjected to discovery on the very allegations it puts forth in support of its claims.

NCI’s discovery requests are all the more proper because they are also relevant to ACT’s request for a permanent injunction to prohibit any further work on the Red Jacket project. The

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<sup>36</sup> Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

<sup>37</sup> Petition at 7.

<sup>38</sup> Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

<sup>39</sup> Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

type and degree of harm, if any, suffered by ACT's members allegedly as a result of the Red Jacket project is directly relevant to all of the four factors weighed with respect to a request for a permanent injunction: 1) whether ACT or its members have "suffered an irreparable injury" as a result of the Red Jacket project; 2) whether monetary damages are adequate to compensate for any such injury; 3) a consideration of the balance of hardships between ACT and the defendants if a permanent injunction were issued; and 4) whether the public interest would be served by an injunction.<sup>40</sup>

If ACT cannot demonstrate an "irreparable injury" suffered by one or more of its members as a result of the Red Jacket project, a permanent injunction would not be necessary. If an ACT member can manage to demonstrate such an injury, but that injury may be adequately redressed by monetary damages, then a permanent injunction would not be proper. If the hardships that would befall defendants greatly outweigh any harm to ACT's members, that would militate against issuance of an injunction. All of this information is relevant to whether an injunction would be in the public interest.

In the "conclusion" section of its Petition, ACT accuses the defendants of attempting to further delay this matter in an effort to moot ACT's claims.<sup>41</sup> Although ACT does not explain its relevance, it is arguably germane to whether any alleged harm is not correctable on appeal of a final judgment. If ACT's claims may be rendered moot by completion of the project, that is no fault of the defendants, but rather evidence that ACT has suffered no real harm from the project and will gain no benefit if it is halted. Were ACT's members actually suffering harm on an ongoing basis as a result of the continued construction of the Red Jacket project, one would expect ACT to have eagerly come forward with real examples of such harm. Likewise, if ACT's

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<sup>40</sup> November 9, 2011 Order at Conclusion of Law ¶ 35 (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006); *Christopher Phelps & Assoc., LLC v. Galloway*, 492 F.3d 532, 543 (4<sup>th</sup> Cir. 2007)).

<sup>41</sup> Petition at 9.

members have suffered actual past injuries that were proximately caused by the Red Jacket project, ACT has failed to provide real examples of such harm, much less offered any explanation of why completion of the project would moot their claims. ACT not only refuses to produce this information, but seeks a writ from this Court prohibiting defendants, and even the circuit court, from inquiring into this issue. Moreover, ACT requested, and the circuit court granted, a stay of the underlying proceedings pending resolution of its Petition – a stay that NCI opposed.<sup>42</sup> It is ACT, not the defendants, that is causing further delay in reaching a conclusion of this matter by refusing to produce evidence of the purported irreparable harm to its members, which is a necessary element of its request for permanent injunction.

**D. ACT’s Petition is Premature and Involves a Discovery Issue**

This Court should deny ACT’s Petition because it essentially seeks a ruling from this Court on the propriety of NCI’s discovery requests. “Discovery orders generally are not reviewable in mandamus or prohibition”<sup>43</sup> unless they involve “the probable invasion of confidential materials that are exempted from discovery under Rules 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure[.]”<sup>44</sup> This Court affords substantial discretion to circuit courts in the management of discovery issues. As stated in syllabus point 1 of *B.F. Specialty Co. v. Charles M. Sledd Co.*:

A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court, and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.<sup>45</sup>

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<sup>42</sup> See ACT’s Motion for Expedited Relief and NCI’s response in opposition.

<sup>43</sup> State ex rel. Bennett v. Keadle, 334 S.E.2d 643, 647 (W. Va. 1985).

<sup>44</sup> Syl. pt. 2, State ex rel. United Hosp. Ctr., Inc. v. Bedell, 199 W. Va. 316, 484 S.E.2d 199 (1997).

<sup>45</sup> Syl. Pt. 1, B.F. Specialty Co. v. Charles M. Sledd Co., 197 W. Va. 463 (W. Va. 1996).

NCI's discovery requests do not seek privileged or otherwise confidential materials, and ACT does not maintain otherwise. A writ or prohibition to enjoin discovery on these topics is therefore inappropriate.

**E. FHWA as an Indispensable Party**

ACT devotes a mere paragraph, barely half a page, to its argument for why the FHWA should not be joined as an indispensable party. This alone speaks volumes to the strength of ACT's position. ACT does not challenge the circuit court's findings that FHWA provides 80% of the funding for the Red Jacket project or that once complete, the entire KCH will be designated as a federal highway. ACT does not challenge defendants assertion that over \$100,000,000 has been spent so far in constructing the Red Jacket Project. ACT does not discuss the applicable law for evaluating whether an absent party is indispensable and should be joined in an action. Instead, ACT meekly asserts that FHWA was dismissed as a party upon resolution of the federal claims and Defendants did not oppose FHWA's dismissal. This has absolutely no bearing on whether FHWA is an indispensable party. A review of the applicable law pellucidly illustrates why FHWA is indeed an indispensable party.

Under Rule 19, a person should be joined as a party to a lawsuit if "the person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest[.]" If such a person has not been joined, "the court shall order that person be made a party." "It is fundamental that an indispensable party's presence is required in an action so that a trial court may make an adjudication equitable to all persons involved."<sup>46</sup> In *State ex rel. One-Gateway Assocs. v. Johnson*, this Court recognized that all persons who have a

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<sup>46</sup> *Bane v. Whitman Land Resources*, 180 W. Va. 257, 260 (W. Va. 1988).

direct interest in the subject matter of a case and will be impacted by its ultimate disposition should be joined as parties:

Generally, all persons who are materially interested in the subject-matter involved in a suit, and who will be affected by the result of the proceedings, should be made parties thereto, and when the attention of the court is called to the absence of any of such interested persons, it should see that they are made parties before entering a decree affecting their interests.<sup>47</sup>

The circuit court concluded that “FHWA is undoubtedly ‘materially interested in the subject-matter’ of this action and will be directly affected by the outcome” given that it provides the vast majority of the funding necessary for construction of what will become a federal highway. Since ACT seeks to enjoin completion of the Red Jacket project, which impacts the KCH as a whole and places FHWA’s investment in jeopardy, the circuit court rightly found that FHWA should be joined as party to protect its interests before the court considers whether to issue a permanent injunction.<sup>48</sup>

## **VI. Conclusion**

For all the reasons stated above, ACT’s Petition should be denied. The circuit court’s determination that standing is an open issue for discovery and ultimately for a decision on the merits is wholly consistent with this Court’s decision in *Affiliated*. To find otherwise would be to deny defendants their due process rights to discovery and the ability to challenge ACT’s evidence at trial. ACT will suffer no damage or unfair prejudice by engaging in discovery that is relevant not only to standing, but also whether the permanent injunction ACT is seeking is an appropriate remedy should ACT prevail on the merits of its claims. Discovery matters not involving privileged or confidential information are not properly addressed via petition for writ of prohibition. With respect to FWHA, ACT’s request for a permanent injunction against any

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<sup>47</sup> State ex rel. One-Gateway Assocs. v. Johnson, 208 W. Va. 731, 735 (W. Va. 2000).

<sup>48</sup> Conclusion of Law ¶ 52.

further work on the Red Jacket project threatens FHWA's substantial interest in the Red Jacket project. The circuit court was therefore correct that FHWA should be joined as a party.

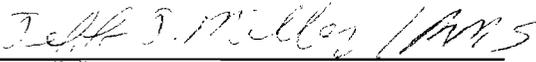
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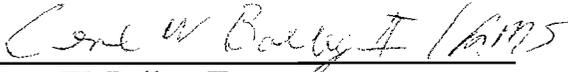
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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**No. 11-1690**

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**AFFILIATED CONSTRUCTION TRADES FOUNDATION,  
PETITIONER**

**v.**

**THE HONORABLE JAMES C. STUCKY, WEST VIRGINIA DEPARTMENT OF  
TRANSPORTATION, DIVISION OF HIGHWAYS; WEST VIRGINIA BOARD OF  
EDUCATION; MINGO COUNTY REDEVELOPMENT AUTHORITY; and  
NICEWONDER CONTRACTING, INC.**

**RESPONDENTS.**

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**CERTIFICATE OF SERVICE**

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I, Robert M. Stonestreet, do hereby certify that the foregoing **RESPONSE BRIEF ON BEHALF OF NICEWONDER CONTRACTING, INC., WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, AND MINGO COUNTY REDEVELOPMENT AUTHORITY IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION** has been served upon counsel of record by depositing a true and exact copy thereof, via United States mail, postage prepaid and properly addressed on the 17<sup>th</sup> day of January, 2012, as follows:

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