No. 35742 - The Affiliated Construction Trades Foundation, A Division of the West Virginia State Building and Construction Trades Council, AFL-CIO v. West Virginia Department of Transportation, Division of Highways; and Nicewonder Contracting, Inc.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

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 judgement action underlying this appeal. Therefore, I concur in the Court's decision to reverse and remand this matter for further proceedings. I choose to write separately to clarify the relevant issue in this appeal, and to point out that the majority has unnecessarily created new points of law where none were needed.

From the outset, it should be made perfectly clear that the issue of standing in this case involved an *unincorporated* association. In footnote 11 of the majority opinion, it is suggested that this Court's prior holding in Syllabus point 1 of *Chesapeake & Ohio System Federation, Brotherhood of Maintenance of Way Employees v. Hash*, 170 W. Va. 294, 294 S.E.2d 96 (1982), may be construed to imply that an unincorporated association is not required to show standing. Therefore, the majority opinion purports to modify the *Chesapeake* holding. In my judgment, there was no need to modify *Chesapeake* and its interpretation of the Uniform Declaratory Judgment Act. In fact, this case could have been

disposed of merely by applying this Court's prior holdings in *Chesapeake* and in *Snyder v. Callaghan*, 168 W. Va. 265, 284 S.E.2d 241 (1981).

In *Snyder*, this Court addressed, *inter alia*, the issue of whether a non-profit West Virginia *corporation* had standing to sue solely as the representative of its members. Following precedent from the United States Supreme Court, the *Snyder* Court held:

> An association which has suffered no injury itself, but whose members have been injured as a result of the challenged action, may have standing to sue solely as the representative of its members when: (1) its members would have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Syl. pt. 2, *Snyder*, 168 W. Va. 265, 284 S.E.2d 241. Notably, however, the facts upon which the *Snyder* Court applied this holding involved a *corporation*. Consequently, the *Snyder* opinion was silent as to whether the holding also would apply to an *unincorporated association*.

A little more than six months after the decision in *Snyder* was handed down, this Court was asked to decide whether an *unincorporated association* was authorized to bring a suit in its own name under the Uniform Declaratory Judgments Act, W. Va.

Code § 55-13-1, *et seq.* (hereinafter referred to as "the Act").[1] *See Chesapeake & Ohio Sys. Fed'n, Bhd. of Maint. of Way Emps. v. Hash*, 170 W. Va. 294, 294 S.E.2d 96.[2] The *Chesapeake* Court observed that the Act, in identifying those who are authorized to bring suit under its terms, utilized the phrase "any person." The Court then observed that

> [s]ection 13 of the Act defines the word "person" to mean "any person, partnership, joint-stock company, *unincorporated association or society*, or municipal or other corporation of any character whatsoever." (Emphasis added.) The language of this statute clearly authorizes suits by unincorporated associations in the association name and confers upon any such organization the status of a legal entity for purposes of invoking the jurisdiction of the circuit court in declaratory judgment actions.

170 W. Va. at 297-98, 294 S.E.2d at 100. Accordingly, the *Chesapeake* Court held, at Syllabus point 1, that

> [t]he language of the Uniform Declaratory Judgments Act, W. Va. Code § 55-13-1 *et seq.* (1981 Replacement Vol.),

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[1]Before addressing this issue, the Court recognized that there is a

> common law rule, long recognized in this jurisdiction, that in the absence of statutory authority, an unincorporated association may not sue or be sued as a legal entity in its own name. This rule was recently reiterated by this Court in Syllabus Point 4 of *City of Fairmont v. Retail, Wholesale, and Department Store Union*, 166 W. Va. 1, 283 S.E.2d 589 (1980).

Chesapeake & Ohio Sys. Fed'n, Bhd. of Maint. of Way Emps. v. Hash, 170 W. Va. 294, 297, 294 S.E.2d 96, 99 (1982).

[2]The opinions in *Snyder v. Callaghan*, 168 W. Va. 265, 284 S.E.2d 241 (1981), and *Chesapeake & Ohio System Federation, Brotherhood of Maintenance of Way Employees v. Hash*, 170 W. Va. 294, 294 S.E.2d 96 (1982), were both authored by the same member of this Court: Justice Darrell V. McGraw, Jr.

> clearly authorizes suits by unincorporated associations in the association name and confers upon any such organization the status of a legal entity for purposes of invoking the jurisdiction of the circuit court in declaratory judgment actions.

170 W. Va. 294, 294 S.E.2d 96.

Because the foregoing holding in *Chesapeake* established that the Uniform Declaratory Judgments Act authorized ACT, as an unincorporated association, to bring a suit in its own name, the majority opinion should merely have made clear that, when the standing of an *unincorporated* association is challenged by a party to a declaratory judgment action, the proper analysis is an application of the factors set out in Syllabus point 2 of *Snyder*. There simply was no need to redraft the *Snyder* syllabus point or to call the *Chesapeake* holding into question. Therefore, for the reasons set out above, I respectfully concur.