

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Hon. R. Ferrell Cothran, Jr., Judge

---

Case No.: 2009-CP-32-00973

---

Crouch Construction Company, Inc.....Appellant

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC.....Respondents

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.....Third Party Defendants

---

AMENDED RECORD ON APPEAL

---

Jean P. Derrick  
Attorney for Appellant  
P.O. Box 929  
Lexington, SC 29072  
Phone: (803) 359-6189  
Fax: (803) 808-1657

Stephen V. Futeral  
Attorney for Respondent  
P.O. Box 1543  
Mount Pleasant, SC 29465  
Phone: (843) 284-5500  
Fax: (843) 284-5501

Gary A. Pickren  
Attorney for Respondent  
220 Executive Center Dr.  
Columbia, SC 29210  
Phone: (803) 771-7900  
Fax: (803) 343-7009

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Hon. R. Ferrell Cothran, Jr., Judge

---

Case No.: 2009-CP-32-00973

---

Crouch Construction Company, Inc.....Appellant

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC.....Respondents

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.....Third Party Defendants

---

AMENDED RECORD ON APPEAL

---

Jean P. Derrick  
Attorney for Appellant  
P.O. Box 929  
Lexington, SC 29072  
Phone: (803) 359-6189  
Fax: (803) 808-1657

Stephen V. Futeral  
Attorney for Respondent  
P.O. Box 1543  
Mount Pleasant, SC 29465  
Phone: (843) 284-5500  
Fax: (843) 284-5501

Gary A. Pickren  
Attorney for Respondent  
220 Executive Center Dr.  
Columbia, SC 29210  
Phone: (803) 771-7900  
Fax: (803) 343-7009

## INDEX

### Orders

|                                                                                       |    |
|---------------------------------------------------------------------------------------|----|
| Order Vacating Arbitration Award filed May 19, 2011.....                              | 3  |
| Order Denying Plaintiff's Motion to Alter or Amend<br>filed July 1, 2011.....         | 19 |
| Order regarding Plaintiff's Motion to Compel Arbitration<br>filed March 17, 2011..... | 22 |
| Arbitration Award filed November 15, 2010.....                                        | 24 |
| Modified and Amended Arbitration Award filed January 6,<br>2011.....                  | 25 |

### Pleadings

|                                                                                                                                                   |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Lis Pendens filed February 3, 2009.....                                                                                                           | 43 |
| Complaint filed March 10, 2009.....                                                                                                               | 45 |
| Answer and Counterclaim filed April 1, 2009.....                                                                                                  | 48 |
| Amended Answer and Counterclaim of Defendants<br>Causey, celebrations of Columbia, LLC, and Causey<br>Consulting, LLC filed October 20, 2010..... | 59 |
| Reply filed May 7, 2009.....                                                                                                                      | 71 |

### Motions

|                                                                                                                                                                                     |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Motion to Compel Arbitration and To Stay litigation<br>dated July 2, 2009.....                                                                                                      | 74  |
| Motion to Compel Choice of Arbitrator filed June 4, 2010,<br>with attachments.....                                                                                                  | 76  |
| Defendants' 3rd Party Plaintiff's Notice of Motion<br>and Motion to Change and/or Clarify the Arbitration<br>award dated November 15, 2011.....                                     | 87  |
| Notice of Motion and Motion to Confirm Award in<br>Arbitration filed November 16, 2010.....                                                                                         | 90  |
| Defendants' 3rd Party Plaintiff's Motion to Vacate<br>Both the Arbitration Award and the Amended arbitration<br>award dated February 3, 2011.....                                   | 93  |
| Defendants' 3rd Party Plaintiffs' Supplemental Motion<br>to Vacate the Arbitration Award and Motion for Relief from<br>Order Pursuant to Rule 60, SCRCIVP filed March 20, 2011..... | 95  |
| Motion to Alter or Amend filed June 2, 2011.....                                                                                                                                    | 119 |
| Reply to Plaintiff's Motion to Alter or Amend dated<br>June 13, 2011.....                                                                                                           | 127 |

### Transcript

|                                                                    |     |
|--------------------------------------------------------------------|-----|
| Partial Arbitration Transcript<br>November 3, 2010 pages 1-10..... | 134 |
|--------------------------------------------------------------------|-----|

|                                                                                                                                                                                                                     |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Partial Arbitration Transcript                                                                                                                                                                                      |     |
| November 3, 2010 pages 1-2.....                                                                                                                                                                                     | 144 |
| <u>Exhibits and Other Materials</u>                                                                                                                                                                                 |     |
| Affidavit of James L. Bruner dated March 18, 2011<br>with cover letter and all attachments.....                                                                                                                     | 148 |
| Affidavit of Roger R. Crouch dated March 17, 2011.....                                                                                                                                                              | 156 |
| Affidavit of George A. Sembos dated March 17, 2011.....                                                                                                                                                             | 158 |
| Email from Stephen V. Futeral to Frank Smith sent<br>April 29, 2010 at 2:57 p.m.....                                                                                                                                | 160 |
| Email from Stephen V. Futeral to Jim Bruner sent<br>October 25, 2010 at 3:19 p.m.....                                                                                                                               | 161 |
| Email from Stephen V. Futeral to Jean Derrick sent<br>June 15, 2010 at 12:11 p.m.....                                                                                                                               | 162 |
| Email from Jim Bruner to Futeral and Derrick dated<br>March 3, 2011 10:09 a.m.....                                                                                                                                  | 163 |
| Email from Derrick to Futeral dated March 3, 2011.....                                                                                                                                                              | 163 |
| Email from Futeral to Bruner dated March 3, 2011<br>11:45 a.m.....                                                                                                                                                  | 164 |
| Email from Bruner to Futeral dated March 3, 2011<br>1:09 p.m.....                                                                                                                                                   | 165 |
| Email Bruner to Futeral dated March 3, 2011 6:30 p.m....                                                                                                                                                            | 167 |
| Agreement for Services dated February 20, 2008.....                                                                                                                                                                 | 168 |
| Agreement for Services dated July 9, 2008.....                                                                                                                                                                      | 170 |
| Appellant's witness list.....                                                                                                                                                                                       | 171 |
| Respondents' updated witness list with cover letter<br>October 14, 2010.....                                                                                                                                        | 173 |
| Defendants'/3rd Party Plaintiffs' Supplemental Memorandum<br>in support of the Motion to Vacate the Arbitration Award<br>and Motion For Relief from Order Pursuant to Rule 60,<br>SCRCivP dated March 16, 2011..... | 176 |
| Defendants'/3rd Party Plaintiffs' Supplemental Memorandum<br>in support of Motion to Vacate the Arbitration award<br>and Motion for Relief from Order Pursuant to Rule 60,<br>SCrCivP dated March 18, 2011.....     | 179 |
| Defendants'/3rd Party Plaintiffs' 2nd Supplemental<br>Memorandum in Support of Motion to Vacate the<br>Arbitration Award and Motion for Relief from Order<br>Pursuant to Rule 60, SCRCivP dated March 21, 2011..... | 181 |
| Certificate of Counsel.....                                                                                                                                                                                         | 187 |

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,

3<sup>rd</sup> Party Defendant.

**COPY**

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

**ORDER VACATING  
ARBITRATION AWARD**

DETHA CAMPBELL  
CLERK OF COURT  
LEXINGTON, SC

APR 19 AM 11:53

FILED

This matter came before this court regarding Defendants' Supplemental Motion to Vacate an Arbitration Award pursuant to S.C. Code Ann. § 15-48-130. Present at the hearing was Jean Derrick, counsel for Plaintiff, and Stephan V. Futeral, counsel for Defendants. After reviewing the pleadings and the affidavits, and hearing the arguments of counsel, this court grants Defendants' motion.

**BACKGROUND**

This case involves a commercial building that was constructed in Lexington County by Plaintiff, is owned by Defendant Causey Consulting, LLC [hereinafter Owner], and is occupied by Defendant Celebrations of Columbia, LLC [hereinafter Tenant]. Plaintiff seeks to foreclose a mechanic's lien against the property. Owner seeks, among other things, damages against Plaintiff for costs to repair the building's foundation. Owner claims that Plaintiff's

subcontractor, 3<sup>rd</sup> Party Defendant GS2 Engineering, Inc. [hereinafter GS2], failed to properly monitor the amount and condition of sandy materials that were used to fill and replace unsuitable soils excavated by Plaintiff, and therefore the foundation is failing.

By prior court order, the aforementioned claims were submitted to arbitration. The parties to the arbitration were Plaintiff, Owner, and Tenant. The parties chose their arbitrator after the arbitrator disclosed any relationships that created a potential for partiality. Initially, the parties selected Frank Smith, Esq. as their arbitrator. Mr. Smith disclosed the following, "I currently have a matter representing a client on an issue that is adverse to GS2, Inc. The matter is not in litigation and is relatively minor. This relationship will not prevent me from being fair and impartial in this matter." Despite Mr. Smith's assurance of impartiality, Plaintiff rejected Mr. Smith. Thereafter, the parties agreed to use Jim Bruner, Esq., as their arbitrator.

Before and during arbitration, the parties made the new arbitrator, Jim Bruner, aware of GS2's multifaceted role in this case as a 3<sup>rd</sup> Party Defendant in the lawsuit, as a fact witness, and as a expert witness designated by Plaintiff. For purposes of conflicts checking and disclosure, the parties provided the arbitrator with copies of the pleadings identifying GS2 as a party to the underlying litigation and with witness lists identifying various representatives of GS2. GS2 was also a source of contention prior to the arbitration hearing itself. Over Owner's objection, the arbitrator ordered that both GS2 and its attorney be permitted to inspect Owner's property. During the arbitration, representatives of GS2's Columbia office testified as Plaintiff's experts and as fact witnesses. At no time before or during arbitration did the arbitrator disclose any potential for partiality regarding GS2.

On November 10, 2010, the arbitrator submitted to the parties an award in favor of Plaintiff. On November 15, 2010, Defendants made a motion to clarify or modify the arbitration

award. On December 9, 2010, the arbitrator submitted to the parties a Modified and Amended Arbitration Award. Plaintiff filed a Motion to Confirm the Arbitration Award, and on February 3, 2011, within ninety (90) days of the delivery of both the original arbitration award and the modified arbitration award, Defendants filed a Motion to Vacate the arbitration award. This court heard Defendant's motion on February 14, 2011 and later instructed Plaintiff's counsel to prepare a written order confirming the arbitration award.

Thereafter, on February 23, 2011, Defendants discovered by happenstance that the arbitrator failed to disclose that a member of his law firm, Joey R. Floyd, Esq, [hereinafter the Partner] is the brother of Jason Floyd, P.E., [hereinafter the Brother] who was a geotechnical engineer for and the Operations Manager of GS2 prior to and during arbitration. On March 18, 2011, Defendants filed a supplemental motion to vacate the arbitration award and to vacate any order pursuant to Rule 60(b), SCRCivP.<sup>1</sup>

### **LAW/ANALYSIS**

S.C. Code Ann. § 15-48-130 provides that the court shall vacate an award where there was "evident partiality by an arbitrator appointed as a neutral . . . ." Initially, this court holds that Defendants' supplemental motion to vacate is timely under S.C. Code Ann. § 15-48-130(b) because Defendants had ninety days to make their motion after the grounds for this motion were discovered on February 23, 2011. During the hearing, Plaintiff conceded the timeliness of Defendants' motion. *See also American Guaranty Co. v. Caldwell*, 72 F.2d 209 (9th Cir. 1934) (wherein the court held that the lower court had discretion to hear the parties' motion to vacate, filed more than three months after the award, and to vacate the award on the grounds that it was discovered that one of the arbitrator's had a business connection to one of the parties.)

<sup>1</sup> This court need not address Defendants' Rule 60(b) motion because this court did not sign and file a written order confirming the arbitration award. *See Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) (until an order is entered by the clerk of court, it is not final, and the judge retains control of the case).

Plaintiff refers to the recent case of C-Sculptures v. Brown, 2011 S.C. App. Lexis 110, for the proposition that our appellate courts have never upheld a lower court's decision to modify or to vacate an arbitration award. Plaintiff's argument overlooks two points. First, where grounds exist, our appellate courts have indeed vacated an arbitration award. For example, in Pittman Mortg. Co. v. Edwards, 327 S.C. 72, 488 S.E.2d 335 (1997) our Supreme Court vacated an award, in part, on the basis that the arbitration panel exceeded its powers. Second, none of the cases cited by Plaintiff, including C-Sculptures, address the impact of non-disclosure in an arbitration proceeding. In fact, our appellate courts have yet to address this issue.<sup>2</sup>

Defendants argue that this court should vacate the award because there is evident partiality by the arbitrator based upon, among other things, the arbitrator's failure to investigate and to disclose the familial relationship between the Partner and the Brother. Before determining whether there was evident partiality under § 15-48-130, this court must first determine whether the arbitrator had a duty to investigate and to disclose the familial relationship in issue. This court holds that based upon the Canons of the South Carolina Alternative Dispute Resolution Rules and also based upon R-19(a) of the American Arbitration Association (AAA) Construction Industry Arbitration Rules, the arbitrator had a duty to investigate and to disclose to the parties the familial relationship.

Pursuant to Rule 17(b), SCADRR, any person serving as an arbitrator, whether certified, must comply with the South Carolina Code of Ethics for Arbitrators. Under Canon II A(2) of the South Carolina Code of Ethics for Arbitrators, before accepting to serve, an arbitrator has a duty to disclose "any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of

<sup>2</sup> In C-Sculptures, the basis of the appellant's argument was that the appellant "simply disagrees with [the arbitrator's] decision." Id. at \*4.

partiality or bias." (emphasis added). Canon II A(2) also provides that an arbitrator should "disclose any such relationships involving members of their families or their current employers, partners or business associates." Canon II A includes witnesses in the arbitration. Furthermore, under Canon II B, an arbitrator has a duty to investigate by making "a reasonable effort to inform [himself] of any interests or relationships" which might reasonably create an appearance of partiality or bias. As set forth in Footnote 2 to the Introductory Note of Canon II, arbitrators "should err on the side of disclosure" because "it is better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship." Finally, under Canon II C, the arbitrator's duties to disclose continue throughout the arbitration.

In addition to the disclosure requirements as set forth in the South Carolina Code of Ethics for Arbitrators, the arbitrator had a duty to disclose the familial relationship under the Construction Industry Arbitration Rules of the AAA.<sup>3</sup> Under the AAA rules,

Any person appointed or to be appointed as an arbitrator as well as the parties and their representatives shall disclose . . . , as promptly as practicable, any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.

R-19(a), AAA Construction Industry Arbitration Rules (emphasis added).

Here, the arbitrator had a duty to investigate and to disclose to the parties, either before or during arbitration, the familial relationship between the Partner and the Brother. This court finds that the familial relationship between the arbitrator's law partner and the operations manager was clearly the type of relationship "which might reasonably create an appearance of partiality or

<sup>3</sup> Article 13.2 of the parties' construction contract provides that any claims or disputes shall be decided "by arbitration in accordance with Construction Industry Arbitration Rules of the American Arbitration . . . ."

bias.” However, it was only after Defendants discovered the familial relationship that the arbitrator wrote an email, on March 3, 2011, confirming the familial relationship.

Having determined that the arbitrator had a duty to investigate and to disclose the familial relationship, this court must next determine whether the arbitrator’s failure to investigate and to disclose was tantamount to “evident partiality.” Although our appellate courts have yet to address the impact of non-disclosure in an arbitration proceeding, other state and federal courts have addressed the issue of an arbitrator’s non-disclosure.

In Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968), the Supreme Court issued the seminal decision involving an undisclosed conflict of interest in arbitration. In Commonwealth, the Court vacated an arbitration award based on the arbitrator’s failure to disclose that he had served as an engineering consultant for the victorious party and had been paid about \$12,000 over several years. Writing for the majority, Justice Black held:

[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Commonwealth, 393 U.S. at 150; 89 S. Ct. at 340; 21 L. Ed. 2d at 305. In a concurring opinion, Justice White wrote that the “judiciary should minimize its role in arbitration as judge of the arbitrator’s impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.” Id. at 151; 89 S. Ct. at 340; 21 L. Ed. 2d at 306. Additionally, Justice White wrote:

In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party. But if the law requires the disclosure, no such imputation can arise. And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration . . . .

Id.

Justice White's concurrence and Justice Black's opinion did not define a clear standard as to the specific types of relationships that will generally constitute evident partiality if undisclosed by an arbitrator. Many courts have attempted to reconcile the application of Commonwealth because of Justice White's concurrence in which he purported to join the majority opinion while delimiting its application. Some courts have adopted Justice White's concurrence because those courts consider Commonwealth to be a "plurality" opinion. See, e.g., Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 n.19 (6th Cir. 1989); Int'l Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551 (2d Cir. 1981). However, several other jurisdictions have expressed that Commonwealth is not a "plurality" opinion.

In Schmitz v. Zilveti, 20 F.3d 1043 (9th Cir. 1994), after an arbitration award was issued, one of the parties discovered that the law firm of one of their arbitrators in a three arbitrator panel had represented Prudential Insurance that was the parent company of a party to the arbitration, Pru-Bache. Although the arbitrator ran a conflicts check regarding Pru-Bache, he failed to run a conflict's check regarding Prudential and he did not disclose this relationship. The court held that although lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality when the arbitrator has a duty to investigate independent of the arbitrator's duty to disclose. Id. at 1048. The court in Schmitz also explained why Commonwealth is not a plurality opinion:

Because three other justices dissented, the vote of either Justice White or Justice Marshall was necessary to the formation of a majority voting for reversal. Justice White's concurrence has therefore been given particular weight. Commonwealth Coatings is not a plurality opinion, however. Justice White said he joined in the "majority opinion" but wrote to make "additional remarks."

Schmitz, 20 F.3d at 1045 (citation omitted). The court further held:

In a nondisclosure case, the integrity of the process by which arbitrators are chosen is at issue. Showing a "reasonable impression of partiality" is sufficient in a nondisclosure case because the policy of [arbitration] instructs that the parties should choose their arbitrators intelligently. The parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed. Whether the arbitrators' decision itself is faulty is not necessarily relevant.

Id. at 1047.

In Positive Software Solutions, Inc. v. New Century Mortg. Corp., 436 F.3d 495 (5th Cir. Tex. 2006), an arbitrator failed to disclose that seven years before the arbitration, he and his former law firm were co-counsel in a lengthy litigation matter with one of the law firms and counsel in the arbitration. The court held that the arbitrator was required to disclose the relationship because it might have created an impression of possible bias. Like the court in Schmitz, the court in Positive explained why Commonwealth is not a plurality opinion:

We add that Justice White's concurring opinion is not irreconcilable with Justice Black's opinion. Notably, Justice White never mentions the "appearance of bias" standard or suggests that it is inappropriate. Rather than rejecting the "appearance of bias" standard, Justice White embraces it and attempts to more precisely define its parameters. See Commonwealth Coatings, 393 U.S. at 151, 89 S. Ct. at 340 ("arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial"). In fact, Justice White's concurring opinion complements the Court's opinion by encouraging "frankness at the outset." Id. Thus, both opinions share the same goal--full disclosure at the outset.

Positive Software Solutions, Inc., 436 F.3d at 500.

Notably, many courts hold that in a nondisclosure case a party need not show proof of actual bias to establish evident partiality. "If the parties are to be judges of the arbitrators'

partiality, duties to investigate and disclose conflicts must be enforced, even if later a court finds that no actual bias was present.” Schmitz, 20 F.3d at 1049. In Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Ben. Funds, 748 F.2d 79 (2d Cir. N.Y. 1984), a party sought to vacate an arbitrator's award on the grounds that the arbitrator did not disclose that his father was the president of one of the parties in arbitration. The court held that an arbitration award may be vacated even if there was no showing of actual bias:

Bias is always difficult, and indeed often impossible, to “prove.” Unless an arbitrator publicly announces his partiality, or is overheard in a moment of private admission, it is difficult to imagine how “proof” would be obtained. Such a standard, we fear, occasionally would require that we enforce awards in situations that are clearly repugnant to our sense of fairness, yet do not yield “proof” of anything.

Morelite, 748 F.2d at 84.

Based on cases such as Commonwealth, Schmitz, and Positive, it appears that in nondisclosure cases, vacatur is appropriate where the arbitrator's failure to investigate and to disclose gives the impression of bias in favor of one party. Moreover, a reasonable impression of bias sufficiently establishes evident partiality because the integrity of the process by which arbitrators are chosen is at issue in nondisclosure cases. Whether the arbitrator's decision itself is faulty is not necessarily relevant.

Plaintiff argues that this court should deny Defendants' motion because GS2 was not a party to the arbitration, and, therefore, the arbitrator was not required to investigate and to disclose the relationship between his law partner and the operations manager for GS2. This court is not persuaded by Plaintiff's argument for two reasons.

First, although GS2 was not a party to the arbitration, there is a considerable connection between Plaintiff and GS2. The gravamen of Defendants' claims in arbitration against Plaintiff, the general contractor, center upon the actions of GS2, Plaintiff's subcontractor. Plaintiff's

liability, if any, for the building's foundation arises out of the failure of GS2, if any, to provide competent services. Notably, after this court announced its initial decision to confirm the award but before this court signed and filed an order, GS2 moved for summary judgment against Defendants on the grounds that Defendants "unsuccessfully asserted the same issues previously against [Plaintiff] in arbitration that they now bring against GS2. Thus, under South Carolina law, and the doctrine of nonmutual collateral estoppel, they are precluded from relitigating the same issues." Albeit this court expresses no opinion regarding the merits of GS2's motion, GS2 ostensibly perceives a legally significant connection between the arbitration and the underlying litigation and GS2 would endeavor to convince the court of the same. Additionally, during the arbitration, representatives of GS2 served as key fact and expert witnesses for Plaintiff.

Second, Plaintiff's argument overlooks the arbitrator's requirements under the Canons of Ethics for Arbitrators and the AAA rules as they relate to investigating and disclosing relationships which might reasonably create an appearance of partiality or bias. As previously discussed herein, the arbitrator had a duty to disclose the familial relationship between his law partner and GS2's Operations Manager. To be sure, in his emails to the parties, the arbitrator conceded the relationship was subject to disclosure when he wrote to the parties that if he had known of the relationship, he would have "disclosed that fact to both parties when I reviewed the witness list."

 Plaintiff argues that pursuant to Consolidation Co. v. United Mine Workers of America, 48 F.3d 125 (4th Cir. 1995) and Hobet Mining, Inc. v. Int'l Union, 877 F.Supp. 1011 (S.D.W.Va. 1994), Defendants must provide to this court clear and convincing evidence of partiality or corruption. Plaintiff's reliance on Consolidation Co. and Hobet is misplaced for several reasons.

First, neither Consolidation nor Hobet set forth a “clear and convincing” standard of proof. Second, Consolidation and Hobet are distinguishable from this case.

In Consolidation and Hobet, the same arbitrator in both cases failed to disclose that his brother worked in another state for International Union of the United Mine Workers of America. In Consolidation and Hobet, the parties did not select their arbitrators. Consolidation and Hobet involve arbitration under a collective bargaining agreement known as the National Bituminous Coal Wage Agreement Act of 1988 [hereinafter the Wage Agreement]. Arbitrations under the Wage Agreement are conducted before “district arbitrators” who are selected by the president of the International Union of the United Mine Workers of America and the president of the Bituminous Coal Operators’ Association. Hobet, 877 F.Supp. at 1014.

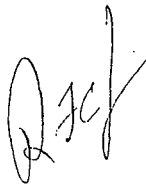
Unlike the parties in Consolidation and Hobet, the parties in the present case selected their arbitrators, and although Plaintiff rejected the first arbitrator based on his disclosures, Defendants were denied that same opportunity based on the current arbitrator’s failure to make the same disclosures. Additionally, in Consolidation and Hobet, the arbitrators were not bound by the codes of the AAA or any other similar organization. Consolidation, 48 F.3d at 128. Moreover, under the Wage Agreement, “[r]ecusal, disclosure, and other ethical issues are left to the discretion of each arbitrator.” Id. As previously discussed, the parties’ arbitrator did not have the same discretion the arbitrators had in Consolidation and Hobet, and he was bound to investigate and make various disclosures pursuant to the South Carolina Code of Ethics for Arbitrators and the Construction Industry Arbitration Rules of the AAA.

Lastly, Plaintiff argues that this court should deny Defendants’ motion pursuant to ANR Coal Co. v. Cogentrix, 173 F.3d 493 (4th Cir. N.C. 1999) wherein the court held that an

arbitrator's failure to disclose, in and of itself, provided no basis to vacate an award. Plaintiff's reliance on ANR is misplaced.

In ANR, one of three arbitrators in a panel disclosed that his law firm represented a company that sold electric power to one of the parties. Further, the arbitrator disclosed that nine years before the arbitration, the arbitrator's law firm merged for a one-year period with the firm that was representing a party to the arbitration. However, during the time of the short merger, the arbitrator was ill with leukemia and he had not been actively practicing law or involved with his firm or the merged firm. As set forth by the court in ANR, "if an arbitrator fails to investigate facts that come to light after the award, and those facts are not trivial, the aggrieved party may use this information to demonstrate evident partiality. . . ." ANR, 173 F.3d at 499 fn. 4. (citation omitted).

ANR is distinguishable, and likewise inapplicable, from the present case because the arbitrator's disclosure requirements under the applicable AAA rule in ANR were less demanding than those of the arbitrator in the instant action. In ANR, the AAA rule required the arbitrator to disclose "any circumstance likely to affect impartiality." Id. at 497 (emphasis added). The court concluded that the arbitrator was not required to "disclose every interest or relationship with a party that could conceivably be regarded as a basis for bias. Rather, [the applicable rule] only requires disclosure of an interest or relationship 'likely to affect impartiality.'" Id. at 498.

 Here, however, the arbitrator was required to disclose any circumstance "likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence." R-19(a). Therefore, Defendants need not show circumstances likely to affect impartiality, but need only show circumstances likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence. Further, in ANR, the court did not apply Canon II that requires the arbitrator to

discover conflicts, to examine familial relationships between his business partners and witnesses, and to disclose the same to the parties.

Even if this court should apply the four-factor analysis as set forth in ANR, this court concludes that Defendants met their burden of proffering facts that, taken together, would permit a reasonable person to assume that the arbitrator was partial to Plaintiff. In ANR, the court examined the following four factors to determine whether the party demonstrated evident partiality:

(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.

Id. at 500. The court further held that “a party seeking vacatur must put forward facts that objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives,” but that the party need not prove actual improper motives. Id. at 500 – 501 (citation omitted).

Regarding the first three factors, the arbitrator in this case shares direct economic and professional interests with his law partner. The Partner and the Brother have a direct relationship; they are children of the same family and of the same blood. Both brothers work in Columbia, South Carolina as noted on their respective organizations' websites. Both brothers are involved in the construction industry as noted on their respective organizations' websites, and both brothers share a common professional interest in engineering and construction. Therefore, there is a direct connection between the partnership, the familial relationship, and the arbitration because an award against Plaintiff would be predicated upon a finding that GS2, managed by the Brother, failed professionally. Also, the challenged relationship is tightly connected to the

arbitration proceedings because of the importance of GS2's actions as a basis for Defendants' claims against Plaintiff. Accordingly, the arbitrator had a personal interest in avoiding an award that impugned the professional integrity of the company managed by his law partner's brother.

As for the fourth factor, there was a close proximity in time between the relationships in issue and the arbitration. From August 2009, prior to and during this construction project, and throughout the arbitration hearing in 2010, the Brother managed operations for GS2's office associated with this construction project.

Besides the arbitrator's nondisclosure of the familial relationship in issue, Defendants point to additional facts that support a finding of evident partiality and that objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives. First, Defendants assert that the arbitrator refused to consider evidence material to Defendants' claims. During his visit to the subject property, the arbitrator declined to view evidence of the foundation's failure vis-à-vis its deflection. According to Defendants, this first-hand view of the foundation's deflection was significant proof of Defendants' claims against Plaintiff and GS2. Second, Defendants assert that over Defendants' objections, the arbitrator permitted GS2 and its counsel to view the subject property despite the fact that Defendants had a motion pending in the underlying litigation seeking sanctions that may have prohibited GS2 from returning to the property. Third, Defendants claim that the arbitrator perpetuated his impartiality by submitting an affidavit to this court. Pursuant to Canon VI C of the South Carolina Code of Ethics for Arbitrators, "[a]fter an arbitration award has been made, it is not proper for an arbitrator to assist in postarbitral proceedings, except as required by law."

Here, this court did not direct the arbitrator to provide the court with an affidavit or to assist in these proceedings. Moreover, on March 3, 2011, Defendants wrote to the arbitrator that they did

*RJF*

not believe it was appropriate for him to submit anything to the court unless requested by the court. Nevertheless, on March 18, 2011, the arbitrator submitted a letter and an affidavit to this court in an apparent attempt to persuade this court to confirm the arbitration award.

Additionally, as a basis for demonstrating evident partiality and improper motives, Defendants call into question the veracity of the arbitrator's assertions. Defendants point out that in the exhibits filed with the court and the arbitrator's affidavit, the arbitrator gave contradictory explanations regarding his failure to disclose. Initially, the arbitrator wrote that he ran a conflicts check on GS2 but that his "conflicts system did not reveal a hit for GS2" despite the fact that the arbitrator's law firm had previously been involved in litigation regarding GS2 in the matter of Carolina Custom Const. v. Circle Bar T Demolition, et al., 2008-CP-28-0516. However, in a subsequent email and in his affidavit, the arbitrator asserted that he did not include GS2 in his conflicts check because it was not a party to the arbitration. Additionally, in his affidavit the arbitrator writes that he did not recall a lawsuit wherein he was involved with Margaret Morrison, the president of Terratec, Inc., who testified at the arbitration hearing. Yet, an examination of the partial transcript of the arbitration hearing reveals that the arbitrator recognized Margaret Morrison when he stated to her, "It is nice to see you again Margaret" and added "How have you been?" (emphasis added). Nevertheless, the arbitrator made no mention of his prior association with Ms. Morrison.

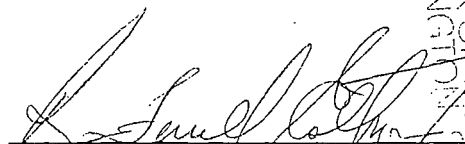
As set forth in Defendants' supporting affidavit, if the arbitrator had disclosed the relationship between his law partner and GS2's Operations Manager, Defendants would never have agreed to the arbitrator in issue. The full disclosure rule of Commonwealth reinforces the parties' expectations that arbitrators will abide by the rules applicable to them and the proceedings, such as the South Carolina Alternative Dispute Resolution Rules and Canons and

the Construction Industry Arbitration Rules of the AAA. Plaintiff took advantage of full disclosure by the parties' initial proposed arbitrator; however, Defendants were denied the same opportunity. Like the court in Schmitz, this court is compelled to enforce the arbitrator's duties to investigate and disclose conflicts regardless of whether this court finds that no actual bias was present. To rule otherwise would supplant Defendants as the architect of their own arbitration process and to deny Defendants their role as the judges of their arbitrator's impartiality. A simple disclosure requirement minimizes the role of the courts in weighing arbitrators' potential conflicts, and at the same time, minimizes the discretion of the arbitrators in determining what to reveal.

Based on the entirety of the aforementioned circumstances and the facts, including the failure to disclose, the arbitrator's assistance in post arbitration proceedings, the arbitrator's differing accounts regarding his conflicts checking, and issues regarding the arbitrator's consideration of evidence, this court holds that Defendants have made a sufficient showing of evident partiality by the arbitrator who was chosen as a neutral. This court also finds that Defendants put forward facts that, taken together, objectively demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.

Therefore, it is ordered, adjudged, and decreed that the arbitration award, consisting of the November 10, 2010 award and the December 9, 2010 amended award, is hereby vacated in its entirety.

**AND IT IS SO ORDERED!**

  
The Honorable R. Ferrell Cothran, Jr.  
Presiding Judge, 11<sup>th</sup> Judicial Circuit

May 16, 2011

COPY

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

Crouch Construction Company, Inc.,  
Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.,

3<sup>rd</sup> Party Defendants.

**ORDER DENYING  
PLAINTIFF'S MOTION  
TO ALTER OR AMEND**

NE

RECEIVED  
CLERK OF COURT  
LEXINGTON  
JUL 11 2011

JUL 11 2011 - 1 PM 1:16

FILED

This matter came before this court regarding Plaintiff's Motion to Alter or Amend filed June 2, 2011. Pursuant to Rule 59(f), SCRCivP, this court decides Plaintiff's motion on the parties' briefs filed without oral argument. After reviewing the parties' briefs and the attachments thereto, this court denies Plaintiff's motion:

**LAW/ANALYSIS**

Regarding Plaintiff's assertion that there is no evidence that Plaintiff rejected Frank Smith, this court initially holds that Plaintiff cannot now use Rule 59(e) to present to the court an issue it could have raised prior to this court's order. Under Rule 59, SCRCivP, a party cannot use a motion to alter or amend a judgment to present to the court an issue the party could have raised prior to the judgment but did not. Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009); Poch v. Bayshore Concrete Products/South Carolina, Inc., 386 S.C. 13, 686 S.E.2d

689 (Ct. App. 2009); S.C. Conservation League v. S.C. DHEC, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990).

Prior to and during the hearing, Defendants presented that Plaintiff rejected Frank Smith as an arbitrator, yet at no time did Plaintiff argue otherwise. Even if Plaintiff's argument is timely, this court holds that the record contains evidence that Plaintiff rejected Mr. Smith. This court has reviewed the emails between counsel and Mr. Smith regarding his services as an arbitrator wherein Mr. Smith wrote that he had "a matter representing a client on an issue that is adverse to GS2, Inc. the matter is not in litigation and is relatively minor. This relationship will not prevent me from being fair and impartial in this matter." This court reviewed Plaintiff's responsive email dated May 5, 2010 that states, "Crouch Construction see no conflict either." Finally, this court has reviewed the affidavit from Gary Pickren, Esq. and attachment that shows that as of May 6, 2010, Plaintiff rejected Frank Smith as the parties' arbitrator.

Regarding Plaintiff's assertion that this court erred in failing to issue and file an order confirming the arbitration award, Plaintiff overlooks that this court could change its decision at any time until it entered an order with the clerk of court. Bowman v. Richland Mem'l Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999). Accordingly, this court's order, filed May 19, 2011, resolves all issues raised and all prior motions made by either party regarding the arbitration award.

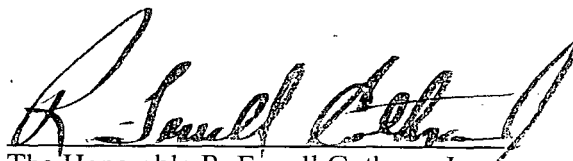
Regarding Plaintiff's assertion that this court erred in vacating the arbitration award pursuant to Rule 60(b), SCRCivP, Plaintiff overlooks that this court did not base its decision upon Rule 60(b). As set forth in Footnote 1 on page 3 of the order, this court did not address "Defendants' Rule 60(b) motion because this court did not sign and file a written order confirming the arbitration award." Bowman, 335 S.C. at 91, 515 S.E.2d at 260.

Regarding Plaintiff's argument that Defendants are prohibited from making a supplemental motion to vacate, Plaintiff overlooks that it specifically waived any argument as to whether Defendants were entitled to make a supplemental motion. During the hearing, Plaintiff conceded on the record that Defendants' supplemental motion was timely under S.C. Code Ann. § 15-48-130(b) and also asked this court to proceed with the hearing on the merits. Assuming, *arguendo*, that Plaintiff did not waive this argument, there is nothing in Rule § 15-48-130 limiting Defendants from supplementing their motion to vacate in light of the arbitrator's undisclosed conflict which was not known to Defendants at the time of the parties' first hearing to vacate the arbitration award.

Regarding Plaintiff's remaining arguments, this court has thoroughly considered and ruled upon every issue previously raised by Plaintiff. Indeed, this court's order also addresses arguments made by Plaintiff via several emails sent to this court after the hearing.

Therefore, it is ordered, adjudged, and decreed that Plaintiff's Motion to Alter or Amend filed June 2, 2011 is denied.

**AND IT IS SO ORDERED!**

  
The Honorable R. Ferrell Cothran, Jr.  
Presiding Judge, 11<sup>th</sup> Judicial Circuit

6-28-, 2011

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, Causey Consulting, LLC, and  
Appletree, Inc.,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.,

3<sup>rd</sup> Party Defendants.

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

**COPY**

**ORDER REGARDING  
PLAINTIFF'S MOTION  
TO COMPEL ARBITRATION**

FILED  
2010 MAR 17 A 10:28  
BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

This matter originally came before the court on September 8, 2009. By order dated September 8, 2009, and filed September 11, 2009, this court continued Plaintiff's motion and gave Plaintiff ten (10) days from the date of mailing, which was September 16, 2009, within which to submit affidavits in support of its Motion. On September 25, 2009, Plaintiff submitted its affidavit in support of its Motion to Compel Arbitration. Thereafter, this court heard Plaintiff's motion on March 2, 2010.

The contract in issue contains an arbitration clause. The arbitration clause does not comply with the requirements of South Carolina law, S.C. Code Ann. §15-48-10, that mandates prominent display of arbitration provisions. The question is whether the liberal construction required by federal law for contracts that involve interstate commerce would be binding in the evaluation.

The entire file of this case was reviewed along with the affidavits submitted by the parties. It is clear to this court that interstate commerce is involved inasmuch as materials, equipment, and supplies from outside this State were used.

Only those parties to the contract can be compelled to arbitrate their disputes. *Cf. Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983) (wherein the Supreme Court noted that because there was no arbitration agreement between the hospital and an architect, the hospital's indemnity claim against the architect was not subject to arbitration). Here, the contract was made between Plaintiff and Defendant Celebrations of Columbia, LLC. Therefore, only Celebrations of Columbia, LLC is bound by the arbitration clause of the contract under federal law, and whereas the other defendants or third-party defendants are not subject to Plaintiff's claims for arbitration.

Accordingly, Plaintiff's Motion to Compel Arbitration is granted solely as against Celebrations of Columbia, LLC. Plaintiff's action in foreclosure is stayed pending the arbitration between Plaintiff and Celebrations of Columbia, LLC.

AND IT IS SO ORDERED.

Dated: MARCH 16 2010

15/ William P. Keesley  
The Honorable William P. Keesley  
Presiding Judge, 11<sup>th</sup> Judicial Circuit

BETH A. CAMPBELL  
CLERK OF COURT  
ALEXANDRIA, SC

2010 MAR 17 A 10:29

FILED

COPY

STATE OF SOUTH CAROLINA

FILED

IN ARBITRATION

COUNTY OF LEXINGTON

2010 NOV 15 2 4:10

Crouch Construction Company, Inc., )

Case No. 09-CP-32-00973

Plaintiff, )

vs. )

ARBITRATION AWARD

Bryan Causey, Celebrations of )

Columbia, LLC and Causey )

Consulting, LLC, )

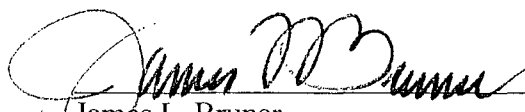
Defendants. )

The undersigned James L. Bruner, the duly appointed arbitrator in the above-captioned action, having received the evidence presented by the parties and considered the argument of counsel for each party, hereby makes the award set forth below with respect to all issues framed by the pleadings and in accordance with South Carolina Uniform Arbitration Act.

The Defendants Celebrations of Columbia, LLC and Causey Consulting, LLC shall pay to the Plaintiff Crouch Construction Company, Inc. the following sums:

|                             |                 |
|-----------------------------|-----------------|
| Contract Balance & interest | \$84,428.54     |
| Attorney's fees & costs     | 39,937.08       |
| Cost of arbitration         | <u>5,940.25</u> |
| Total Award                 | \$130,305.87    |

This award is made in full settlement of all claims and counterclaims alleged in the case and presented at arbitration. The Plaintiff made a statutory offer of settlement of \$100,000. The Defendants did not make a statutory offer of settlement but asserted a counterclaim of \$288,641.82. By reason of the Plaintiff's offer of settlement and the Defendants' counterclaim, the Plaintiff is the prevailing party and is entitled to an award of reasonable attorney's fees and costs. In considering that award, I reviewed Plaintiff's counsel's Attorney's Fee Affidavit and considered (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained, and (6) customary legal fees for similar services.

  
James L. Bruner  
Arbitrator

November 10, 2010  
Columbia, SC

STATE OF SOUTH CAROLINA )

FILED

COUNTY OF LEXINGTON )

IN ARBITRATION

Crouch Construction Company, Inc., ) Case No. 09-CP-32-00973

Plaintiff, )

vs. )

**MODIFIED AND AMENDED  
ARBITRATION AWARD**

Bryan Causey, Celebrations of  
Columbia, LLC and Causey,  
Consulting, LLC, )

Defendants. )

This is a dispute over the construction of a building in West Columbia, South Carolina. The dispute is among Crouch Construction Company, Inc., ("Crouch", the general contractor which is seeking the balance due under its contract), Celebrations of Columbia, Inc. ("Celebrations", the party which contracted with Crouch to build the building), Causey Consulting, LLC ("Causey Consulting", the owner of the land upon which the building was built) and Bryan Causey ("Causey", the individual who owns Causey Consulting, is a member of Celebrations and who dealt with Crouch during construction). Causey Consulting and Celebrations may be jointly referred to hereinafter as "the Defendants".

I held hearings in this matter on November 2-4, 2010 and rendered my written Award on November 10, 2010. On November 15, 2010, the Defendants made a Motion to Change and/or Clarify the Award on the grounds that a.) the Award is imperfect in a matter of form because it did not provide a concise financial breakdown of the monetary award in accordance with Rule 44 of the Commercial Construction Arbitration Rules, and b.) the Award warrants clarification to explain the amount of damages, attorney's fees and costs awarded to each party for each of the claims raised by

them at arbitration and to elucidate the computation of interest on the Award. The Plaintiff has consented to this motion.

Crouch entered into a written agreement with Celebrations as of March 4, 2008. Plaintiff's Exhibit 1. That agreement contained an arbitration clause requiring the resolution of "all claims or disputes ... arising out of, or relating to, the Contract Documents or the Breach thereof ..." by arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association. See Article 13.2, Plaintiff's Exhibit 1. Rule 44 of the Construction Industry Arbitration Rules provides:

R-44. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.

(b) In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim

(c) The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R-44 (b) of these Rules the arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award. After the conclusion of the Preliminary Management Hearing, the parties may not change the form of the award without the arbitrator's express consent. In such event, the arbitrator shall confirm the nature of the change to the form of award.

At the hearings, both parties consented to an award in the form of a general verdict and that was the form in which the Award was rendered. Crouch was determined to be the prevailing party. Now, the Defendants have moved for, and Crouch has consented to, an award in a different form. In response to a question from the arbitrator, the Defendants have requested an award in the form of

findings of fact and conclusions of law with a detailed breakdown of the mathematical calculation of the Award. This Modified and Amended Award is the result of that motion.

The hearings before me lasted three days during which Crouch presented ten witnesses and the Defendants presented four witnesses. After the conclusion of the witnesses' testimony, I visited the building and reviewed the conditions reported in the testimony. Many exhibits were submitted by each party. In rendering this Award, I have carefully considered the testimony of all witnesses, the exhibits and my own observations of the building in question. I have complimented all counsel on their respective preparation for the hearings and the professional manner in which they conducted themselves during the hearings.

From the evidence presented, I make the following findings of fact and conclusions of law:

1. Crouch entered into a contract with Celebrations to build a new 10,000 square foot Varco Pruden pre-engineered metal building in West Columbia, South Carolina.
2. The contract sum was \$616,538.00.
3. The contract documents included the written agreement (Plaintiff's Exhibit 1), Crouch's proposal letter dated March 4, 2008 (Defendants' Exhibit 1), general specifications dated March 4, 2008 (Plaintiff's Exhibit 2) and preliminary drawings dated March 4, 2008 (Defendants' Exhibit 2).
4. Because he knew that the land upon which the building was to be built had received fill material in the past, Causey hired GS2 Engineering & Environmental Consultants, Inc. ("GS2") to perform a subsurface investigation. (Plaintiff's Exhibit 3).
5. GS2 reported its findings in a report dated March 18, 2008. (Plaintiff's Exhibit 4) GS2 found that fill materials were indeed present and that they were between 12 and 18 feet deep at the location where the new building was to be built. (Plaintiff's Exhibit 4, Appendix B)

6. Site work was an allowance item in the contract for \$25,000. (Section 2100, page 2, Plaintiff's Exhibit 2) In response to the GS2 report, Crouch got an estimate for sitework from Gist on May 6, 2008 (Plaintiff's Exhibit 6) and two other subcontractors. Crouch prepared a summary sheet of those estimates (Plaintiff's Exhibit 5) and reviewed it with Causey. After reviewing the estimates, Causey gave Crouch permission to proceed with construction.

7. Causey closed on the property on May 28, 2008 (Plaintiff's Exhibit 19) with full knowledge of the subsurface conditions present. He bought the property in the name of Causey Consulting.

8. Crouch pulled the building permit on June 25, 2008. (Defendant's Exhibit 4) Crouch and its subcontractor Gist began excavating unsuitable material from the site in early July, 2008.

9. This dispute began over the amount of unsuitable material excavated by Gist for Crouch from the building site. Gist was charging Crouch \$15 for each cubic yard of unsuitable material removed from the site. For that price, Gist was also bringing in suitable fill material and compacting it as directed by GS2. Gist measured the amount of unsuitable material removed by the truckload. GS2 had a representative at the site to determine which material was unsuitable and had to be removed and whether the fill material was suitable and properly placed and compacted.

10. The GS2 subsurface condition report recommended removal of unsuitable fill materials 10 feet beyond the building pad perimeters. The building pad was approximately 100 x 100 feet. The depth of excavation was sufficient to remove unsuitable material in that area down to a depth of between 12 and 16 feet or possibly deeper.

11. The GS2 report also recommended that fill material be placed in no more than 8-inch thick lifts, within  $\pm$  2% of optimum moisture content and compacted to a minimum 95% density as determined by the laboratory Standard Proctor maximum dry density (ASTM D698). (Plaintiff's

Exhibit 4, pages 11-12)

12. During the excavation activities in July, Crouch communicated with Causey periodically by email reporting on the progress of those activities. Causey was out of town on vacation from July 6 through July 14. A review of those emails (Plaintiff's Exhibit 10) indicates that more unsuitable material had to be removed than anticipated. On July 14, 2008, Crouch told Causey they may exceed the budget of \$47,700 for the undercut but that they were close to getting it all out. Two days later, on July 16, Crouch reported they were up to 315 loads, or \$70,875. By July 18, the load count was at 376 for \$84,600. Water was encountered at the bottom of the cut and GS2 made recommendations on how to deal with that water. A change order from Gist for the work to deal with the water was approved by Causey on July 21, 2008. Causey acknowledged seeing the emails cited above at the time and not being concerned.

13. On July 24, Crouch reported that 8,160 cubic yards of unsuitable soil had been removed through July 23<sup>rd</sup> at a cost of \$122,400. Causey denies having seen this email at the time.

14. On July 28<sup>th</sup>, Crouch and Causey met to discuss the undercut issue. They both admit that a heated discussion took place about why a cost estimate of \$47,700 had grown to more than \$130,000 in costs. Causey testified that he told Crouch that he was not going to pay for work he did not authorize.

15. After the dispute over the undercut issue in the late summer of 2008, the work on the building progressed without further material incident to substantial completion in December 2008.

16. Crouch's final application for payment and retainage was not paid in full.

17. Crouch filed a Notice of Mechanic's Lien on February 3, 2009 and a suit to foreclose that lien on March 10, 2009. Crouch claimed a balance due of \$114,154.38.

18. In the lawsuit, Crouch alleged a claim to foreclose its mechanic's lien in order to collect the money it claimed was due. In response, the Defendants counterclaimed alleging a number of different theories of recovery. The Defendants did not allege that any specific amount was due to them but alleged entitlement to a setoff of any sums due to Crouch and unspecified damages against Crouch.

19. The parties agreed to arbitrate as required by the contract and agreed that the undersigned would be the arbitrator.

20. Prior to the hearings, an issue arose over who were to be the parties to the arbitration. Counsel for Crouch took the position that Celebrations, the contracting party, and Causey Consulting, the owner of the property, had both agreed to be parties to arbitration. Counsel for Causey took the position that the agreement for Causey Consulting to be a party was conditioned upon other agreements made at a time when another individual was to be the arbitrator. Thus, only Celebrations was a party to the arbitration.

21. I convened a telephone conference with counsel to discuss this issue. As a result of this conference, counsel for Causey stipulated that Causey Consulting agreed to be a party to the arbitration and confirmed that in writing to me on October 25, 2010.

#### The Contract Balance

22. Based upon the evidence presented to me, I find that the contract balance due Crouch is \$68,160.68. I determined that amount as shown on the spreadsheet attached to this Award.

23. The parties agreed upon the contract amount (\$616,538) and all change orders ("CO's") except CO# 3, 4, 6 and 10.

### The Change Orders

24. CO#3 was for removing unsuitable fill from underneath the building pad and replacing it with suitable fill. The Defendants claimed that CO#3 should be in the amount of \$64,950, which was the amount the Defendants contended had been the estimated cost of that task before the work was performed. Crouch contended that CO#3 should be in the amount of \$133,200, which was the cost of removing 8,880 cubic yards of this material at \$15.00 per cubic yard. The parties had agreed upon a price of \$15.00 per cubic yard but the amount of material removed was disputed. I find that it is reasonable for Crouch's subcontractor to have removed 7,170 cubic yards of material (or 110 feet x 110 feet x 16 feet deep) under the building pad. At \$15.00 per cubic yard, that yields \$107,555 as a reasonable amount for CO#3.

25. CO#4 was for stone fill at the bottom of the undercut area. Crouch submitted a change order for \$13,900. The Defendants submitted no change order was due. I find that a reasonable amount for the stone placed at the bottom of the undercut is \$11,424.00.

26. CO#6 was for the services testing, observation and reports of GS2 related to the undercut and fill operation. Crouch submitted the actual costs incurred by it to GS2 of \$7,326.50. The Defendants submitted that it should not have to pay for GS2's services. The contract between Crouch and Celebrations specified that engineer's inspection fees were not included in the contract. Therefore, it was proper for Crouch to pass these costs through as a change order. I find that the amount of \$7,326.50 is a reasonable amount for this change order.

27. CO#10 was for 6 inches of stone base at the loading dock. Although this material was provided, I believe that Crouch should have included the cost in its original bid. I find that CO#10 should be zero.

28. With these four change orders, the adjusted contract sum is \$786,131.81, of which \$702,058.18 has been paid, leaving a contract balance of \$84,073.18 before adjustments.

Contract Adjustments

29. Costs to Cure Alleged Defective/Missing Work

A. The Defendants claimed several items of defective/missing work which require substantial sums to repair or accomplish. They are set forth on Defendants' Exhibit 18, an estimate prepared by Ron Weathers of Weathers Contracting. I have carefully reviewed the evidence presented as to each of the issues listed on Exhibit 18 and make the following findings:

(1) Concrete paving: Crouch should have included the reasonable cost of concrete paving at the loading dock in its original contract amount. I find that a reasonable and fair amount to have been included for this concrete paving is \$6,325;

(2) Painting: Crouch was to have painted the interior block walls of the building. It did not. Crouch tendered a credit of \$1,300 for that work. The Defendants demanded \$18,175. I find that a credit of \$2,000 for that work is reasonable and fair;

(3) Hose bibs: Crouch omitted providing two hose bibbs. It offered a credit of \$400 for them. The Defendants demanded \$1,650 for the missing bibs. I find that a credit of \$400 is reasonable and fair for the missing hose bibs; and

(4) Roof penetrations: The Defendants claimed that the roof was penetrated in two locations which caused leaks. It requested a credit of \$800 for that work. I find that request to be reasonable and fair and find a credit in that amount should be awarded.

B. As to those items listed on Exhibit 18 for which I have not allowed a credit or award in Paragraphs 29.A.(1) through (4) above, I find no credit or award is due the Defendants for

those items.

30. Foundation Settlement.

A. The Defendants sought a setoff/counterclaim of \$211,996 to install helical piers under the concrete slab. (See Defendants' Exhibit 15) The piers are required to stabilize the concrete slab from settling and cracking. The slab is settling, the Defendants say, because the fill material placed by Crouch under the slab was not within  $\pm 2$  % of optimum moisture content when it was compacted.

B. GS2 had recommended that fill be placed within  $\pm 2$ % of optimum moisture content and compacted to a minimum 95% density as determined by the laboratory Standard Proctor. The evidence showed that all of the fill material was placed at 95% or greater density but that little if any of the fill met the  $\pm 2$  % of OMC requirement.

C. The Defendants' expert, Ross Travis of Dennis Corporation, opined that the failure to place the fill within  $\pm 2$  % of OMC requirement was a mistake that is now causing the slab to settle. He opined that settlement has evidenced itself through various cracks in the slab shown in photographs and visible upon inspection.

D. Crouch's experts (Kenpeth W. Timmerman, PE, Margaret Morrison and George Sembos) testified that the slab was not settling and that the cracks observed are typical of concrete shrinkage. They each opined that it was not necessary to spend money to install helical piers underneath the slab to keep it from settling. Mr. Sembos testified that density, not OMC, was the most important factor in compaction.

E. From the greater weight of the evidence presented, I find that the slab is not settling due to differential settlement and does not require the installation of helical piers. From the

test reports presented, I question whether 95% or greater compaction could have been achieved at the low moisture contents reflected in the test results without extraordinary compaction efforts. However, the subsequent penetrometer tests conducted by Mr. Travis generally confirmed that 95% compaction had been achieved. That leaves open the possibility that the moisture tests results were either inaccurate or not reflective of the moisture content when the fill was placed or that the effort required to achieve compaction was not accurately revealed by the evidence.

F. From my personal observation of the building and the slab, I do not see persuasive evidence of settlement. There are a few cracks present but not to the extent I would expect to see cracks if the slab were, indeed, settling.

F. I find and conclude that the installation of helical piers underneath the slab is not required and make no award for that setoff or counterclaim.

31. The Northeast Corner. The Defendants claimed that the northeast corner of the building was being undermined by water coming from an adjacent property. Two helical piers were required to stabilize that corner and then the exterior erosion had to be corrected and stabilized at a total cost of \$19,713. I find that Crouch left this corner in good repair with rip rap in place to control erosion. Over time, the water concentrated from the property next door and cast upon this property have caused erosion. I find that this is a maintenance problem for the building's owner or occupant and that if the problem had been addressed much sooner, it would not require the installation of helical piers now, if, in fact, it does now so require. I make no award to the Defendant for this setoff or counterclaim.

32. In my original award, I deducted the \$1,960.00 charge for stone base at the loading dock

(CO#10) as a credit against the contract price. I did this in part based upon a compilation of damages presented by the Defendants. However, since I did not award any compensation for CO#10, it was an error to deduct that cost as a credit. That being so, I have recalculated my award on the attached spreadsheet to correct for that error.

33. The Defendants sought to recover their out-of-pocket costs paid to the Dennis Corporation in connection its work at the loading dock and the missing sewer collar. After reviewing the evidence concerning these two items, I find that a setoff or credit against the contract balance of \$2,932.50 for the loading dock work and \$3,155.00 for the sewer collar work is fair and reasonable.

34. The Prevailing Party.

A. Crouch claimed entitlement to a contract balance of \$112,154.38.

B. The Defendants claimed that the contract balance, after setoff/counterclaims, was zero and that Crouch owed the Defendants (they did not specify which one) were entitled to an affirmative award (by my calculations) of \$296,018.82. Crouch's claims and the Defendants' setoffs and/or counterclaims are shown the attached spreadsheet.

C. I find and conclude that the correct contract balance should be, and is, \$68,160.68.

D. *S.C. Code Ann.* §29-5-10 and 20 each provide for an award of reasonable attorneys' fees to the prevailing party. A lien under Section 10 arises when the contractor has an agreement with the owner of the real property. A lien under Section 20 arises when the contractor does not have an agreement with the owner of the real property but rather when the owner has authorized the improvement for which the lien is asserted. Here, the evidence was conclusive that the owner of the property, Causey Consulting, specifically authorized and was aware of the improvements being made to the property. Therefore, I conclude that a

lien under §29-5-20 arose in favor of Crouch.

E. I further find and conclude that §29-5-20 authorizes and requires an award of reasonable attorneys' fees to the prevailing party. To determine which party is the prevailing party, that section provides, in part:

"For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer of settlement is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees. If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.

If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero."

F. I find and conclude that Crouch served and filed a statutory offer of settlement in the amount of \$100,000 on May 18, 2010. The Defendants made no statutory offer. Therefore, for purposes of determining the prevailing party, Crouch's offer is \$100,000 (in its favor) and the Defendants' offer is \$296,018.82 (in their favor). The Defendants calculated their counterclaim to be \$288,641.82 (in their favor) so even though my calculations yielded a different number, for these purposes I will use the Defendants' number of \$288,641.82 (in their favor). Since my award is based upon a determination that Crouch has a contract balance due of \$ 68,160.68, I find and conclude that Crouch is the prevailing party.

G. The contract between the parties provided for interest on the outstanding and unpaid

H. The contract also provided for a 1% late fee. I find that provision ambiguous and unenforceable as a penalty and make no award for a late fee.

A. Crouch's attorney has submitted an affidavit supporting an award of fees and other costs of:

Attorney's fees 137.50 hours @ \$300 = \$42,227.95

|                    |           |
|--------------------|-----------|
| Additional charges | \$ 412.18 |
|--------------------|-----------|

|               |           |
|---------------|-----------|
| Copying costs | \$ 779.58 |
|---------------|-----------|

## Expert witnesses

|           |             |
|-----------|-------------|
| Timmerman | \$ 2,625.00 |
|-----------|-------------|

|          |             |
|----------|-------------|
| Roberson | \$ 1,532.50 |
|----------|-------------|

|     |                    |
|-----|--------------------|
| GS2 | <u>\$17,250.00</u> |
|-----|--------------------|

|          |  |                     |
|----------|--|---------------------|
| Subtotal |  | <u>\$ 21,407.50</u> |
|----------|--|---------------------|

|                               |              |
|-------------------------------|--------------|
| Total fees, costs and experts | \$ 64,827.21 |
|-------------------------------|--------------|

B. In considering the amount of attorney's fees to award, I have taken into consideration the following factors:

- (1) the nature, extent, and difficulty of the case;
- (2) the time necessarily devoted to the case;
- (3) professional standing of counsel;
- (4) contingency of compensation;
- (5) beneficial results obtained; and
- (6) customary legal fees for similar services.

C. Considering these factors, I find and conclude that this matter was a complicated and hotly contested construction dispute. Crouch's counsel claims to have devoted 137.50 hours to the case while Mr. Futeral has submitted an affidavit claiming to have devoted 178.3 hours to this matter and Mr. Pickren has submitted an affidavit claiming to have devoted 149.75 hours to this matter. Some portion of each counsel's efforts was devoted to prosecution and defense of counterclaims. I recognize the professional standing of counsel as being among the highest of this bar. That standing was evident in their preparation for and conduct during the hearings. There was no evidence as to whether counsel's fees were contingent or not but the beneficial results were apparent. Counsel's fees are customary for this work in this area and are the same hourly rates as those charged by the arbitrator and by opposing counsel, Mr. Futeral.

D. Having considered the factors set forth above, I find and conclude that 100 hours was a reasonable amount of time to have spent prosecuting Crouch's claim in this matter and at an hourly rate of \$300 per hour, a total award of attorney's fees of \$30,000 is fair and reasonable. Such award is reflected on my attached spreadsheet.

36. Costs and Experts' fees.

A. I find and conclude that copying costs of \$779.58 are fair and reasonable and award them to Crouch.

B. I find and conclude that the following expert's fees are fair and reasonable:

|           |             |
|-----------|-------------|
| Timmerman | \$ 2,625.00 |
|-----------|-------------|

|          |                    |
|----------|--------------------|
| Roberson | \$ 1,532.50        |
| GS2      | <u>\$ 5,000.00</u> |
| Total    | \$ 9,157.50        |

C. I award \$ 9,157.50 in expert witness fees to Crouch.

37. Arbitrator's fees. All parties requested an award of the arbitrator's fees of \$5,940.25 for each side of the controversy. Consistent with that request, Crouch is also awarded its costs of arbitration in the amount of \$5,940.25.

38. Total Award Consistent with my findings of fact and conclusions of law, I make the following award in full settlement of all claims and counterclaims presented in arbitration:

|                                 |                 |
|---------------------------------|-----------------|
| Contract Balance & interest     | \$86,928.21     |
| Attorney's fees & copying costs | 30,000.00       |
| Copying costs                   | 779.58          |
| Expert witness fees             | 9,157.50        |
| Arbitrator's fees               | <u>5,940.25</u> |
| Total Award                     | \$132,805.54    |

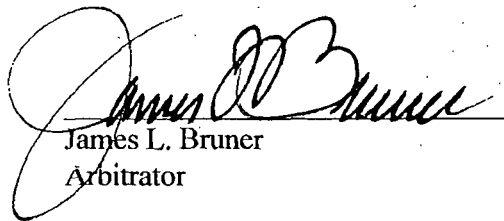
I incorporate the attached spreadsheet into my findings of fact by attaching it to this award.

39. Since Crouch contracted with Celebrations, I find and conclude that Celebrations is liable to pay Crouch this award in the amount of \$132,805.54.

40. Since Causey Consulting was a party to and voluntarily participated in this arbitration, I find that it is bound by this award. Moreover, as the owner of the real property upon which the improvement was made and of which improvement Causey Consulting was specifically aware, I

and conclude that this award of \$132,805.54 should and does constitute a lien upon the property of Causey Consulting described in Crouch's complaint pursuant to *S.C. Code Ann.*

§29-5-20.

  
James L. Bruner  
Arbitrator

December 7, 2010  
Columbia, SC

BETH A. CARRIG  
CLERK OF COURT  
LEXINGTON SC

2011 JAN -6 P 3:52

FILED

**Crouch Construction**  
v.  
**Celebrations and Causey Consulting**

|                                      | <b><u>Crouch</u></b><br><b><u>Claims</u></b> | <b><u>Defendants'</u></b><br><b><u>Counterclaims</u></b> | <b><u>Arbitrator's</u></b><br><b><u>Award</u></b> |
|--------------------------------------|----------------------------------------------|----------------------------------------------------------|---------------------------------------------------|
| Contract Sum                         | \$ 616,538.00                                | \$ 616,538.00                                            | \$ 616,538.00                                     |
| CO#1                                 | \$ 11,000.00                                 | \$ 11,000.00                                             | \$ 11,000.00                                      |
| CO#2                                 | \$ 16,850.00                                 | \$ 16,850.00                                             | \$ 16,850.00                                      |
| CO#3                                 | \$ 133,200.00                                | \$ 64,950.00                                             | \$ 107,555.00                                     |
| CO#4                                 | \$ 13,900.00                                 |                                                          | \$ 11,424.00                                      |
| CO#5                                 | \$ 30,000.00                                 | \$ 30,000.00                                             | \$ 30,000.00                                      |
| CO#6                                 | \$ 7,326.50                                  |                                                          | \$ 7,326.50                                       |
| CO#7                                 | \$ -                                         | \$ -                                                     | \$ -                                              |
| CO#8                                 | \$ (16,850.00)                               | \$ (16,850.00)                                           | \$ (16,850.00)                                    |
| CO#9                                 | \$ 7,262.75                                  | \$ 7,262.75                                              | \$ 7,262.75                                       |
| CO#10                                | \$ 1,960.20                                  |                                                          | \$ -                                              |
| CO#11                                | \$ (16,222.50)                               | \$ (16,222.50)                                           | \$ (16,222.50)                                    |
| CO#12                                | \$ 3,265.00                                  | \$ 3,265.00                                              | \$ 3,265.00                                       |
| CO#13                                | \$ 6,391.00                                  | \$ 6,391.00                                              | \$ 6,391.00                                       |
| CO#14                                | \$ 3,141.23                                  | \$ 3,141.23                                              | \$ 3,141.23                                       |
| CO#15                                | \$ 1,200.00                                  | \$ 1,200.00                                              | \$ 1,200.00                                       |
| CO#16                                | \$ 515.83                                    | \$ 515.83                                                | \$ 515.83                                         |
| CO#17                                | \$ (3,265.00)                                | \$ (3,265.00)                                            | \$ (3,265.00)                                     |
| Adjusted Contract Sum                | \$ 816,213.01                                | \$ 724,776.31                                            | \$ 786,131.81                                     |
| Payments                             | \$ 702,058.63                                | \$ 702,058.63                                            | \$ 702,058.63                                     |
| Due                                  | \$ 114,154.38                                | \$ 22,717.68                                             | \$ 84,073.18                                      |
| <b><u>Credits</u></b>                |                                              |                                                          |                                                   |
| Missing/Defective work               |                                              |                                                          |                                                   |
| Asphalt paving                       |                                              | \$ (15,538.00)                                           |                                                   |
| Concrete paving                      |                                              | \$ (12,524.00)                                           | \$ (6,325.00)                                     |
| Storefront window                    |                                              | \$ (7,870.00)                                            |                                                   |
| Acoustical ceiling                   |                                              | \$ (4,565.00)                                            |                                                   |
| Painting                             | \$ (1,300.00)                                | \$ (18,175.00)                                           | \$ (2,000.00)                                     |
| Plumbing (hot water heater)          |                                              | \$ (1,375.00)                                            |                                                   |
| Plumbing (2 hose bibbs)              | \$ (400.00)                                  | \$ (1,650.00)                                            | \$ (400.00)                                       |
| HVAC                                 |                                              | \$ (2,782.00)                                            |                                                   |
| Electrical                           | \$ (300.00)                                  | \$ (6,971.00)                                            | \$ (300.00)                                       |
| Helical piers-NE corner              |                                              | \$ (19,713.00)                                           |                                                   |
| Seal roof penetrations               |                                              | \$ (800.00)                                              | \$ (800.00)                                       |
| Repair 20'x20' void                  |                                              | \$ (6,730.00)                                            |                                                   |
| <b><u>Out of Pocket expenses</u></b> |                                              |                                                          |                                                   |
| Dennis Corp.                         |                                              |                                                          |                                                   |
| Loading dock                         |                                              | \$ (2,932.50)                                            | \$ (2,932.50)                                     |
| Sewer collar                         |                                              | \$ (3,155.00)                                            | \$ (3,155.00)                                     |
| <b><u>Foundation repair</u></b>      |                                              |                                                          |                                                   |
| Repair foundation                    |                                              | \$ (211,996.00)                                          |                                                   |
| CO# 10                               |                                              | \$ (1,960.00)                                            |                                                   |
| Balance Due                          | \$ 112,154.38                                | \$ (296,018.82)                                          | \$ 68,160.68                                      |
| Late fee                             | \$ 24,739.88                                 |                                                          |                                                   |
| Interest                             | \$ 30,960.70                                 |                                                          | \$ 18,767.53                                      |
| Claim Amount                         | \$ 167,854.96                                |                                                          | \$ 86,928.21                                      |

|                        |           |              |                      |
|------------------------|-----------|--------------|----------------------|
| Balance due + interest |           |              | \$ 86,928.21         |
| Attorney's fees        |           | \$ 30,000.00 |                      |
| Costs                  |           | \$ 779.58    |                      |
| Experts                | Timmerman | \$ 2,625.00  |                      |
|                        | Roberson  | \$ 1,532.50  |                      |
|                        | GS2       | \$ 5,000.00  |                      |
|                        | Total     | \$ 9,157.50  |                      |
| Arbitrator's fees      |           | \$ 5,940.25  |                      |
| Total                  |           |              | <u>\$ 45,877.33</u>  |
| TOTAL AWARD            |           |              | <u>\$ 132,805.54</u> |

COPY

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

FILED

Crouch Construction Co.,  
Inc.,

Case No.

2009 FEB -3 3:19

Plaintiff,

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC  
LIS PENDENS

vs.

Bryan Causey, Celebrations  
of Columbia, LLC, and Causey  
Consulting, LLC,

Defendants.

2009-LP-32-00202

YOU WILL TAKE NOTICE that the undersigned, as attorney for Crouch Construction Company, Inc., is filing contemporaneously herewith a Mechanic's lien, and will file subsequent litigation to foreclose a mechanic's lien against Bryan Causey, Celebrations of Columbia, LLC, and Causey Consulting, LLC, in the principal amount of \$114,154.38, together with interest and attorneys fees, in connection with improvements furnished and labor performed upon the following described real estate:

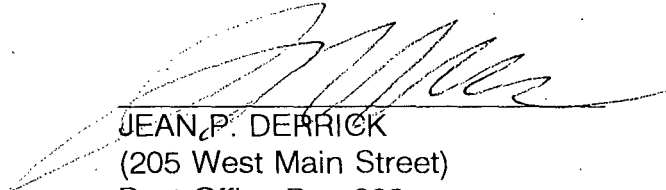
All that certain piece, parcel, or lot of land, together with improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Parcel "A", containing 1.80 acres, more or less, on a plat prepared for The Estate of J. D. Harman by Associated Engineers and Surveyors, Inc. dated May 10, 1996 and recorded in the office of the Register of Deeds for Lexington County in Plat Slide 205 at page 10. LESS AND EXCEPTING: All that certain piece, parcel or lot of land, together with improvements thereon, situate, lying and being in the City of West Columbia, County of Lexington, State of South Carolina, being shown and delineated as Parcel "A", containing .55 acres, more or less, on a plat prepared for Cameron & Barkley by J. Henry Walker, III, PLS #14532, dated December 30, 1998, last revised May 4, 1999 and recorded in the office of the Register of Deeds for Lexington County in Plat Book 12925 at Page 143. Reference to said

plat is made for a more complete and accurate description. Be all measurements a little more or less.

Derivation: This being the same property conveyed to Causey Consulting, LLC by deed of Harman Family Real Estate Company, LLC, by deed dated May 29, 2008, recorded in the office of the Register of Deeds for Lexington County in Book 12965 Page 223.

TMS#: 004661-02-014

Property Address: 830 Sunset Boulevard, West Columbia, SC 29169



JEAN P. DERRICK  
(205 West Main Street)  
Post Office Box 929  
Lexington, SC 29072  
Phone: (803) 359-6189  
Fax: (803) 808-1657

Attorney for Plaintiff

February 28, 2009  
Lexington, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Crouch Construction Co.,  
Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations  
of Columbia, LLC, and Causey  
Consulting, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS  
FILED ELEVENTH JUDICIAL CIRCUIT  
)

2009 MAR 10 Case No.

PETITION FOR  
CIVIL COURT  
LEXINGTON, SC

COMPLAINT

2009CP3200973

Plaintiff above captioned appears and alleges as follows:

1. It is a duly incorporated company, with its principal place of business in Lexington County, South Carolina, and doing business therein.
2. Defendant individual Bryan Causey is, upon information, a citizen and resident of the State of South Carolina, County of Richland; upon further information and belief, he is the sole shareholder or member of Celebrations of Columbia, LLC and Causey Consulting, LLC, which are duly incorporated limited liability corporations, existing under the laws of the State of South Carolina, and doing business in Lexington County.
3. On or about March 4, 2008, Plaintiff contracted with Defendants to construct improvements upon real estate titled in the name of Defendant Causey Consulting, LLC, which real estate is more completely described as follows:

All that certain piece, parcel, or lot of land, together with improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Parcel "A", containing

1.80 acres, more or less, on a plat prepared for The Estate of J. D. Harman by Associated Engineers and Surveyors, Inc. dated May 10, 1996 and recorded in the office of the Register of Deeds for Lexington County in Plat Slide 205 at page 10. LESS AND EXCEPTING: All that certain piece, parcel or lot of land, together with improvements thereon, situate, lying and being in the City of West Columbia, County of Lexington, State of South Carolina, being shown and delineated as Parcel "A", containing .55 acres, more or less, on a plat prepared for Cameron & Barkley by J. Henry Walker, III, PLS #14532, dated December 30, 1998, last revised May 4, 1999 and recorded in the office of the Register of Deeds for Lexington County in Plat Book 12925 at Page 143. Reference to said plat is made for a more complete and accurate description. Be all measurements a little more or less.

This being the same property conveyed to Causey Consulting, LLC by deed of Harman Family Real Estate Company, LLC, by deed dated May 29, 2008, recorded in the office of the Register of Deeds for Lexington County in Book 12965 Page 223.

TMS#: 004661-02-014

Property Address: 830 Sunset Boulevard  
W. Columbia, SC 29169

4. Plaintiff fully performed under its contract, and work was completed on or about December 10, 2008. At that time, Plaintiff was owed the sum of \$114,154.38 pursuant to the terms of the written contract for materials, supplies and labor furnished through December 10, 2008 for the benefit of Defendants, and for the improvement of the above described real estate.

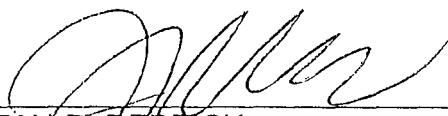
5. Defendants have thus far failed and refused to pay the sums due Plaintiff pursuant to the written contract, as well as interest and late fees accruing thereon.

6. Plaintiff filed and served a mechanic's lien and lis pendens on February 3, 2009, which contains a verified statement of account attesting that Plaintiff is owed by Defendant's \$114,154.38; the mechanic's lien and lis pendens have been duly served

upon all Defendants, but no payment has been forthcoming.

7. Plaintiff is informed and believes therefore that it has established a valid mechanic's lien upon the above described real estate, and it is entitled to foreclose said mechanic's lien, selling the real estate pursuant to judicial sale, and being reimbursed at that time for all sums of principle and interest, due pursuant to the terms of the written contract; Plaintiff is also informed and believes that it is entitled to an award of attorney's fees and costs pursuant to the mechanic's lien statutes of the State of South Carolina, Sections 29-5-10 et.seq., South Carolina Code of Laws, 1976.

WHEREFORE, Plaintiff would pray that this Court foreclose its mechanic's lien, order a judicial sale of the property, and award Plaintiff all principle and interest, including statutory interest due on its contract with Defendants, as well as all attorney's fees and costs of this action, together with such other and further relief as this Court deems meet and proper.



---

JEAN P. DERRICK  
Attorney for Plaintiff  
(205 West Main Street)  
Post Office Box 929  
Lexington, SC 29072  
Phone: (803) 359-6189  
Fax: (803) 808-1657  
jderrick@alltel.net

March 10, 2009  
Lexington, SC

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants/3<sup>rd</sup> Party  
Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.,

3<sup>rd</sup> Party Defendants.

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

**ANSWER, COUNTERCLAIM,  
& 3<sup>rd</sup> PARTY COMPLAINT OF  
DEFENDANTS CAUSEY,  
CELEBRATIONS OF  
COLUMBIA, LLC, and CAUSEY  
CONSULTING, LLC**

**(Jury Trial Requested)**

2009 APR - 1 P 1:05

FILED

COPY

Defendants, by and through their undersigned attorneys, and in Answer to the Complaint and by way of Counterclaims and 3<sup>rd</sup> Party Complaint, herein respectfully alleges as follows:

1. Each and every allegation of each and every paragraph of the Complaint not hereinafter admitted, explained, or qualified is denied and strict proof is demanded thereof.
2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph one (1) and demand strict proof thereof.
3. Defendants admit the allegations in paragraph two (2).
4. Defendants deny the allegations in paragraph three (3) insofar as Plaintiff alleges Defendants Bryan Causey and Causey Construction, LLC contracted with Plaintiff and demand strict proof thereof.

5. Defendants deny the allegations contained in paragraph four (4) and demand strict proof thereof.

6. Defendants deny the allegations contained in paragraphs five (5) and six (6) insofar as Plaintiff alleges it is entitled to payments from Defendants and demand strict proof thereof.

7. Defendants deny the allegations contained in paragraph seven (7) and demand strict proof thereof.

**FOR A FIRST DEFENSE**

**(Rule 12(b)(6), SCRPC)**

8. Plaintiff fails to state a cause of action against Defendants Bryan Causey, Causey Consulting, LLC, and Celebrations of Columbia, LLC upon which relief may be granted, and, therefore Plaintiff's claims should be dismissed pursuant to Rule 12(b)(6), SCRPC.

**FOR A SECOND DEFENSE**

**(Statute of Frauds)**

9. Plaintiff's claims are barred by the Statute of Frauds.

**FOR A THIRD DEFENSE**

**(Set-Off)**

10. Defendants are informed and believe they are entitled to actual, consequential, incidental, and special damages in the appropriate amount as further alleged herein and to set-off the aforementioned damages, charges, and costs against sums due to Plaintiff, if any.

**FOR A THIRD DEFENSE**

**& BY WAY OF COUNTERCLAIM & 3<sup>rd</sup> PARTY COMPLAINT**

**(Negligent Construction as to Plaintiff & 3<sup>rd</sup> Party Defendants)**

11. All prior allegations not inconsistent with this defense, counterclaim, and 3<sup>rd</sup> party complaint are realleged and incorporated by reference herein.

12. Plaintiff and 3<sup>rd</sup> Party Defendants are corporations organized in South Carolina and doing business in the County of Lexington, State of South Carolina.

13. Plaintiff and 3<sup>rd</sup> Party Defendants were negligent, careless, reckless, willful, and wanton in the excavation of the property and in the construction of the commercial building in the following particulars, including, but not limited to:

- a) Installing and utilizing materials and items which do not meet industry and/or manufacturer's specifications;
- b) Failing to install and utilize materials and items conforming with or as required by local codes and ordinances;
- c) Defective workmanship in the construction of the dock area;
- d) Failing to properly supervise its workers and subcontractors;
- e) Failing to adhere to applicable building codes and ordinances;
- f) Failing to conform with accepted construction and industry standards; and
- g) Improper and unnecessary excavating and improper compaction of the subject property's soil.

14. As a direct and proximate cause of the negligent, careless, reckless, willful and wanton acts of Plaintiff and 3<sup>rd</sup> Party Defendants, there are defects and deficiencies to the

property and structure, which will need to be corrected, repaired, remedied, and/or replaced, causing degradation of the property and structure.

15. The property and structure have lost the possibility of appreciation value that they normally would have gained, and Owner will incur substantial costs and expenses related to the defective conditions.

16. Owner is informed and believes it is entitled to actual, consequential, incidental, and special damages in the appropriate amount, costs, and such other further relief as the court deems just and proper.

#### **FOR A FOURTH DEFENSE & BY WAY OF COUNTERCLAIM**

##### **(Breach of Contract as to Plaintiff)**

17. All prior allegations not inconsistent with this defense and counterclaim are realleged and incorporated by reference herein.

18. Plaintiff entered into a contract with Owner regarding property located at 830 Sunset Boulevard in West Columbia, South Carolina to provide such services including preparing the sub-grade, grading, site investigating, excavating, backfilling, compacting, asphalt paving, landscaping, installing concrete reinforcements, concrete and masonry work, metal work, carpentry, constructing and finishing a metal building, installing plumbing, installing HVAC, and electrical work, for which Owner agreed to pay Plaintiff, and has paid Plaintiff, for its services.

19. Among other items, Plaintiff contracted to provide Owner with a commercial building built in a timely and workmanlike manner in accordance with certain architectural renderings and plans.

20. Owner complied with all conditions precedent to this contract.
21. Plaintiff, its servants, employees, or persons or entities acting directly on behalf of the Plaintiff developed the property in question.
22. Plaintiff breached the parties' contract in one or more of the following particulars:
- a) Plaintiff failed to build the commercial structure in accordance with architectural renderings and plans;
  - b) Plaintiff failed to construct the commercial structure in a workmanlike manner;
  - c) Plaintiff failed to provide certain labor and materials as set forth in the contract and to provide Owner with credit toward any items not provided by Defendant, including, but not limited to:
    - i. Several heating units;
    - ii. Concrete paving around the dock;
    - iii. Approximately 500 square feet of asphalt paving;
    - iv. 3 dock levelers;
    - v. Double paned windows; and
    - vi. A seventy-five gallon water heater.
  - d) Plaintiff used substandard materials in the construction of the commercial building;
  - e) Plaintiff charged Owner for items not furnished or installed by Plaintiff.
23. Owner has notified Plaintiff about certain construction defects and substandard workmanship; however, Plaintiff has refused to correct said defects in a satisfactory manner.

24. Owner is informed and believes it is entitled to actual, consequential, incidental, and special damages against Plaintiff in the appropriate amount, attorneys fees and costs, and such other further relief as the court deems just and proper.

**FOR A FIFTH DEFENSE & BY WAY OF COUNTERCLAIM**

**(Breach of Implied Warranty of Workmanlike Service**

**as to Plaintiff and 3<sup>rd</sup> Party Defendants)**

25. All prior allegations not inconsistent with this defense, counterclaim, and 3<sup>rd</sup> Party Complaint are realleged and incorporated by reference herein.

26. Plaintiff and 3<sup>rd</sup> Party Defendants impliedly warranted that it would perform, and make sure any subcontractor performed, all of the contemplated work in a good, sound, and workmanlike manner.

27. Plaintiff and 3<sup>rd</sup> Party Defendants performed their work, and allowed its subcontractors to perform their work, in a manner below ordinary workmanship standards.

28. As a direct and proximate result of the Plaintiff's and 3<sup>rd</sup> Party Defendants' breach of warranty of workmanlike service, Defendants have been injured and have suffered damages including loss of use of the subject property and structure, loss of marketability of the property and structure, diminution in value of the property and structure, and costs to repair, remedy, or replace the defects as alleged herein.

29. Defendants are informed and believe they are entitled to actual, consequential, incidental, and special damages against Plaintiff and 3<sup>rd</sup> Party Defendants in the appropriate amount, attorneys fees and costs, and such other further relief as the court deems just and proper.

## **FOR A SIXTH DEFENSE & BY WAY OF COUNTERCLAIM**

### **(Negligent Misrepresentation as to Plaintiff)**

30. All prior allegations not inconsistent with this defense and counterclaim are realleged and incorporated by reference herein.

31. Plaintiff made numerous representations to Owner including, but not limited to, the quality of its product and/or service and the effectiveness and reliability of its services.

32. The representations made by Plaintiff were untrue and were negligent misrepresentations of material facts.

33. Plaintiff made the above-described representations in a business or commercial capacity and had a pecuniary interest in making such representations.

34. In the exercise of reasonable and ordinary care, Plaintiff should have known that its representations were false, and Plaintiff knew or should have known that reasonably foreseeable purchasers and users of their services would rely on its representations regarding its services.

35. Owner relied on the representations made by Plaintiff in selecting and purchasing Plaintiff's services for the excavation and preparation of the property and in the construction of the commercial building, which Owner would not have done had it known the truth.

36. Such reliance by Owner was reasonable and justifiable based on the knowledge available to them and the circumstances at the time.

37. Plaintiff breached its duties to Owner by failing to exercise due care when making said representations.

38. As a direct, foreseeable, and proximate result of Plaintiff's negligent, grossly negligent, willful, wanton, and reckless misrepresentations, Owner has suffered physical damage to its property as well as loss of use and diminution in the property's value and the costs to repair or replace Plaintiff's defective work.

39. Owner is informed and believes it is entitled to actual, consequential, incidental, special, and punitive damages against Plaintiff in the appropriate amount, attorneys fees and costs, and such other further relief as the court deems just and proper.

**FOR A SEVENTH DEFENSE & BY WAY OF COUNTERCLAIM**

**(Breach of Contract Accompanied by Fraudulent Act as to Plaintiff)**

40. All prior allegations not inconsistent with this defense and counterclaim are realleged and incorporated by reference herein.

41. Plaintiff breached its contract with Owner as alleged herein.

42. Plaintiff breached its contract with fraudulent intent.

43. Plaintiff was dishonest and unfair in its dealings with Owner in that Plaintiff's breach was accompanied by fraudulent acts such as excavating the property in an unnecessary manner, knowingly and intentionally failing to install materials and items as specified in the parties' agreement, and knowingly and intentionally failing to perform services for which Owner which Plaintiff represented as performed or completed.

44. As a direct, foreseeable, and proximate result of Plaintiff's negligent, grossly negligent, willful, wanton, and reckless misrepresentations, Owner has suffered physical damage to its property as well as loss of use and diminution in the property's value and the costs to repair or replace Plaintiff's defective work.

45. Owner is informed and believes it is entitled to actual, consequential, incidental, special, and punitive damages against Plaintiff in the appropriate amount, attorneys fees and costs, and such other further relief as the court deems just and proper.

**FOR AN EIGHTH DEFENSE**

**& BY WAY OF COUNTERCLAIM & 3<sup>rd</sup> PARTY COMPLAINT**

**(S.C. Unfair Trade Practices as to Plaintiff & 3<sup>rd</sup> Party Defendants)**

46. All prior allegations not inconsistent with this defense, counterclaim, and 3<sup>rd</sup> party complaint are realleged and incorporated by reference herein.

47. Plaintiff and 3<sup>rd</sup> Party Defendants, GS2 and Gist, Inc., are “persons” within the meaning of S. C. Code Ann. § 39-5-10(a).

48. By designing, formulating, constructing, specifying, selecting, approving and installing all of the materials for use in Owner’s building and for development of Owner’s real property, Plaintiff and 3<sup>rd</sup> Party Defendants were engaged in commerce within the meaning of S. C. Code Ann. § 39-5-10(b).

49. The actions of Plaintiff and 3<sup>rd</sup> Party Defendants, as described above and including, but not limited to, willfully billing for labor and materials which were not provided, or, in the alternative, providing unnecessary labor and materials, constitute unfair and deceptive trade practices within the meaning of S.C. Code Ann. Ann. § 39-5-20(a).

50. The actions of Plaintiff and 3<sup>rd</sup> Party Defendants are capable of repetition, and, upon information and belief, have been repeated.

51. The conduct of Plaintiff and 3<sup>rd</sup> Party Defendants affects the public interest of South Carolina by virtue of their capability of repetition.

52. As a direct foreseeable and proximate result of the unfair and deceptive trade practices of Plaintiff and 3<sup>rd</sup> Party Defendants, Defendants have suffered an ascertainable loss of money and property.

53. Defendants are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees and costs as contemplated by the South Carolina Unfair Trade Practices Act.

**FOR A NINTH DEFENSE**

**& BY WAY OF COUNTERCLAIM & 3<sup>rd</sup> PARTY COMPLAINT**

**(Civil Conspiracy as to Plaintiff and 3<sup>rd</sup> Party Defendants)**

54. All prior allegations not inconsistent with this defense, counterclaim, and 3<sup>rd</sup> party complaint are realleged and incorporated by reference herein.

55. Plaintiff and 3<sup>rd</sup> Party Defendants conspired together and acted in combination for the purpose of injuring Defendants by, among other things, overcharging Owner for materials, labor, and services regarding the excavation of the subject property, charging for material, labor, and services without providing the same, and/or charging Owner for unnecessary materials, labor, and services.

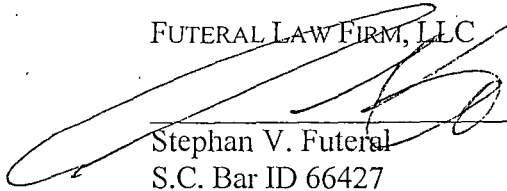
56. The civil conspiracy of Plaintiff and 3<sup>rd</sup> Party Defendants has directly and proximately caused Defendants to sustain special damages, including but not limited to Owner's inability to develop the remaining property due to lack of capital and/or financial credit, and all other special damages that the evidence may show.

57. Defendants are informed and believe they are entitled to actual, consequential, incidental, special, and punitive damages against Plaintiff and 3<sup>rd</sup> Party Defendants in the

appropriate amount, attorneys fees and costs, and such other further relief as the court deems just and proper.

WHEREFORE, Defendants pray that Plaintiff take nothing by way of the Complaint, that Defendants be dismissed with its cost of suit and attorney fees incurred herein, that Defendants be granted a set-off against sums, if any, awarded to Plaintiff, that this Court issue an Order granting judgment against Plaintiff and 3<sup>rd</sup> Party Defendants, jointly and severally, for actual, consequential, incidental, special, and punitive damages, attorney's fees and costs incurred herein, and for such other and further relief as the Court may deem just and proper.

FUTERAL LAW FIRM, LLC



Stephan V. Futeral

S.C. Bar ID 66427

Post Office Box 1543

Mt. Pleasant, South Carolina 29465-1543

Telephone (843) 284-5500

Facsimile (843) 284-5501

email to: [sfuteral@charlestonlaw.net](mailto:sfuteral@charlestonlaw.net)

HARVEY, CASTERLINE & VALLINI, LLC

Gary Allen Pickren

S.C. Bar ID

900 Elmwood Ave., Suite 200

Columbia, South Carolina 29201

Telephone (803) 212-1010

Facsimile (803) 779-5220

email to: [garyp@hcvlaw.com](mailto:garyp@hcvlaw.com)

Attorneys for Defendants Bryan Causey,  
Celebrations of Columbia, LLC, and  
Causey Consulting, LLC

Dated: 4/1/09

**ORIGINAL**

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and 3<sup>rd</sup> Party  
Plaintiffs

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,  
3<sup>rd</sup> Party Defendant.

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

**FILED**

2010 OCT 20 A 8:57

LETHA A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

**AMENDED ANSWER, AND  
COUNTERCLAIM OF DEFENDANTS  
CAUSEY, CELEBRATIONS OF  
COLUMBIA, LLC, and CAUSEY  
CONSULTING, LLC**

Defendants, by and through their undersigned attorneys, and in Answer to the Complaint,  
herein respectfully alleges as follows:

1. That each and every allegation of each and every paragraph of the Complaint not hereinafter admitted, explained, or qualified is denied and strict proof is demanded thereof.
2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph one (1) and demand strict proof thereof.
3. Defendants admit the allegations in paragraph two (2).
4. Defendants deny the allegations in paragraph three (3) insofar as Plaintiff alleges Defendants Bryan Causey and Causey Construction, LLC contracted with Plaintiff and demand strict proof thereof.

5. Defendants deny the allegations contained in paragraph four (4) and demand strict proof thereof.

6. Defendants deny the allegations contained in paragraphs five (5) and six (6) insofar as Plaintiff alleges it is entitled to payments from Defendants and demand strict proof thereof.

7. Defendants deny the allegations contained in paragraph seven (7) and demand strict proof thereof.

**FOR A FIRST DEFENSE  
(Rule 12(b)(6), SCRCF)**

8. Plaintiff fails to state a cause of action against Defendants Bryan Causey and Celebrations of Columbia, LLC upon which relief may be granted, and, therefore, should be dismissed pursuant to Rule 12(b)(6), SCRCF.

**FOR A SECOND DEFENSE  
(Statute of Frauds)**

9. Plaintiff's claims are barred by the Statute of Frauds.

**FOR A THIRD DEFENSE  
(Set-Off)**

10. Defendants are informed and believe they are entitled to actual, consequential, incidental, and special damages in the appropriate amount as further alleged herein and to set-off the aforementioned damages, charges, and costs against sums due to Plaintiff, if any.

**FOR A FOURTH DEFENSE  
(Duress)**

11. All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein.

12. Defendant Celebrations of Columbia, by and through Defendant Causey, signed several change orders due to improper external pressure and influence by Plaintiff inasmuch as Plaintiff informed Defendant Causey that if he did not sign the change orders, Plaintiff would cease working on the project.

13. The improper external pressure and influence exerted by Plaintiff on Defendant Causey destroyed Defendants' free agency.

14. The improper external pressure and influence exerted by Plaintiff on Defendant Celebrations of Columbia caused it to sign, by and through its agent Defendant Causey, various change orders not of its own volition as evidenced by Defendant Causey's writing 'in dispute' on the change orders.

**FOR A FIFTH DEFENSE  
& BY WAY OF COUNTERCLAIM & 3<sup>rd</sup> PARTY COMPLAINT  
(Negligent Construction – Plaintiff & 3<sup>rd</sup> Party Defendant)**

15. All prior allegations not inconsistent with this defense, counterclaim, and 3<sup>rd</sup> party complaint are realleged and incorporated by reference herein.

16. Plaintiff & 3<sup>rd</sup> Party Defendant were negligent, careless, reckless, willful and wanton in the excavation of the property and in the building, constructing, and supervising the work to the subject property and structure in accordance with the applicable building codes and in conformance with accepted construction and industry standards, including, but not limited to:

- a) Installation and utilization of materials and items which do not meet industry and/or manufacturer's specifications;
- b) Failure to install and utilize materials and items conforming with or as required by local codes and ordinances;

- b) Defective workmanship in the construction of the dock area; and
- c) Improper and unnecessary excavation and improper compaction of the subject property's soil.

17. As a direct and proximate cause of the negligent, careless, reckless, willful and wanton acts of Plaintiff & 3<sup>rd</sup> Party Defendant, there are defects and deficiencies in and to the property and structure, which will need to be corrected, repaired, remedied and/or replaced, causing degradation of the property and structure, the property and structure has lost the possibility of appreciation value that it normally would have gained, and Owner will incur substantial costs and expenses related to the defective conditions.

18. Owner is informed and believes it is entitled to actual, consequential, incidental, and special damages in the appropriate amount, costs, and such other further relief as the court deems just and proper.

**FOR A SIXTH DEFENSE & BY WAY OF COUNTERCLAIM  
(Breach of Contract - Plaintiff)**

19. Plaintiff entered into a contract with Defendant Causey Consulting, LLC [hereinafter Owner] to prepare property located at 830 Sunset Boulevard in West Columbia, South Carolina for development with such services including preparation of sub-grade, grading, site investigation, excavation, backfill, compaction, asphalt paving, landscaping, installation of concrete reinforcement, concrete and masonry work, metal work, carpentry, metal building construction and finishing, installation of plumbing, installation of HVAC, and electrical work, for which Owner agreed to pay Plaintiff, and has paid Plaintiff, for its services.

20. Among other items, Plaintiff contracted to provide Owner with a commercial building built in a timely manner, built in accordance to certain architectural renderings and plans, built in a workmanlike manner.

21. Owner complied with all conditions precedent to this contract.

22. Plaintiff, its servants, employees, or persons or entities acting directly on behalf of the Plaintiff developed the property in question.

23. Plaintiff breached the parties' contract in one or more of the following particulars:

- a) Plaintiff failed to build the commercial structure in accordance with architectural renderings and plans;
- b) Plaintiff failed to construct the commercial structure in a workmanlike manner;
- c) Plaintiff failed to provide certain labor and materials as set forth in the contract or failed to provide Owner with credit toward any items not provided by Defendant, including, but not limited to:
  - i. Missing electrical items;
  - ii. Missing HVAC louver;
  - iii. Missing 75 gallon water heater and hose bibs;
  - iv. Missing ceiling tiles in the offices;
  - v. Missing painting on interior walls;
  - vi. Missing concrete paving around the dock;
  - vii. Missing approximately 500 square feet of asphalt paving;
  - viii. Missing 3 dock levelers;

- ix. Missing double paned windows in store's front;
  - x. Missing site preparation including but not limited to excavation and replacement of unsuitable soil; and
  - xi. Improper compaction of the soil.
- d) Plaintiff used substandard materials in the construction of the commercial building; and
  - e) Plaintiff charged Owner for items not furnished or installed by Plaintiff.

24. Owner has notified Plaintiff about certain construction defects and substandard workmanship; however, Plaintiff has failed to correct said defects in a satisfactory manner.

25. Owner is informed and believes it is entitled to actual, consequential, incidental, and special damages against Plaintiff in the appropriate amount, attorneys fees and costs, and such other further relief as the court deems just and proper.

**FOR A SEVENTH DEFENSE & BY WAY OF COUNTERCLAIM  
(Breach of Implied Warranty of Workmanlike Service - Plaintiff)**

26. All prior allegations not inconsistent with this defense and counterclaim are realleged and incorporated by reference herein.

27. Plaintiff impliedly warranted that it would perform, and make sure any subcontractor perform, all of the contemplated work in a good, sound, and workmanlike manner.

28. Plaintiff performed its work, and allowed its subcontractors to perform their work, in a manner below ordinary workmanship standards.

29. As a direct and proximate result of the Plaintiff's breach of warranty of workmanlike service, Defendants have been injured and suffered damages including loss of use of the subject property and structure, loss of marketability of the property and structure,

diminution in value of the property and structure, and costs to repair, remedy, or replace the defects as alleged herein.

30. Defendants are informed and believe they are entitled to actual, consequential, incidental, and special damages against Plaintiff in the appropriate amount, attorneys fees and costs, and such other further relief as the court deems just and proper.

**FOR A EIGHTH DEFENSE & BY WAY OF COUNTERCLAIM  
(Misrepresentation - Plaintiff)**

31. All prior allegations not inconsistent with this defense and counterclaim are realleged and incorporated by reference herein.

32. Plaintiff made numerous representations to Defendant Owner including, but not limited to, the quality of its product and/or service and the effectiveness and reliability of its services.

33. The representations made by Plaintiff were untrue and were negligent misrepresentations of material facts.

34. Plaintiff made the above-described representations in a business or commercial capacity and had a pecuniary interest in making such representations.

35. In the exercise of reasonable and ordinary care, Plaintiff should have known that its representations were false, and Plaintiff knew or should have known that reasonably foreseeable purchasers and users of their services would rely on its representations regarding its services.

36. Defendant Owner relied on the false information supplied by Plaintiff in selecting and purchasing Plaintiff's services for the excavation and preparation of the property and in the

construction of the commercial building, which Owner would not have done had it known the truth.

37. Such reliance by the Owner was reasonable and justifiable based on the knowledge available to them and the circumstances at the time.

38. Plaintiff breached its duties to Defendant Owner by failing to exercise due care when making said representations.

39. Defendant Owner reasonably and justifiably relied on Plaintiff's representations, to Defendant Owner's detriment.

40. As a direct, foreseeable, and proximate result of Plaintiff's negligent, grossly negligent, willful, wanton, and reckless misrepresentations, Defendant Owner has suffered physical damage to its property as well as loss of use and diminution in its value.

**FOR A NINTH DEFENSE & BY WAY OF COUNTERCLAIM & 3<sup>rd</sup> PARTY  
COMPLAINT  
(S.C. Unfair Trade Practices – Plaintiff & 3<sup>rd</sup> Party Defendant)**

41. All prior allegations not inconsistent with this defense and counterclaim are realleged and incorporated by reference herein.

42. Plaintiff and 3<sup>rd</sup> Party Defendant GS2 are "persons" within the meaning of S. C. Code Ann. § 39-5-10(a).

43. By designing, formulating, constructing, specifying, selecting, approving and installing all of the materials for use in the Defendant Owner's building and for development of Defendant Owner's real property, Plaintiff and 3<sup>rd</sup> Party Defendant were engaged in commerce within the meaning of S. C. Code Ann. § 39-5-10(b).

44. The actions of Plaintiff and 3<sup>rd</sup> Party Defendant, as described above, and including but not limited to willfully billing for labor and materials which were not provided, or, in the alternative, providing unnecessary labor and materials, constitute unfair and deceptive trade practices within the meaning of S. C. Code Ann. § 39-5-20(a).

45. The actions of Plaintiff and 3<sup>rd</sup> Party Defendant are capable of repetition, and, upon information and belief, have been repeated.

46. The conduct of Plaintiff and 3<sup>rd</sup> Party Defendant affects the public interest of South Carolina by virtue of their capability of repetition.

47. As a direct foreseeable and proximate result of the unfair and deceptive trade practices of Plaintiff and 3<sup>rd</sup> Party Defendant, Plaintiffs have suffered an ascertainable loss of money and property.

48. Defendants are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney fees as contemplated by the South Carolina Unfair Trade Practices Act.

**FOR AN TENTH DEFENSE & BY WAY OF COUNTERCLAIM & 3<sup>rd</sup> PARTY  
COMPLAINT  
(Civil Conspiracy)**

49. All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein.

50. Plaintiff and 3<sup>rd</sup> Party Defendant conspired together and acting in combination for the purpose of injuring Defendants by, among other things, overcharging Defendant Owner for materials, labor, and services regarding the excavation of the subject property, charging for

material, labor, and services without providing the same, or charging Defendant Owner for unnecessary materials, labor, and services.

51. The civil conspiracy of Plaintiff and 3<sup>rd</sup> Party Defendant has directly and proximately caused Defendants to sustain special damages, including but not limited to Defendant Owner's inability to development the remaining property due to lack of capital and/or financial credit, and all other special damages that the evidence may show.

**FOR A ELEVENTH DEFENSE & BY WAY OF COUNTERCLAIM  
(Fraud)**

52. All prior allegations not inconsistent with this cause of action are realleged and incorporated by reference herein.

53. Defendants are informed and believe that Plaintiff made representations and omissions to Defendants regarding the transaction where Plaintiff contracted to construct a building for Defendant Celebrations of Columbia for \$616,538.00, including but not limited to the following:

- a. misrepresenting the actual cost of the project;
- b. omitting the cost of addressing unsuitable soils;
- c. such other representations and omissions that may be learned through discovery, investigation, or otherwise.

54. Defendants are informed and believe that these representations were false.

55. Defendants are informed and believe that these omissions and representations were material to the subject transactions and affected the decisions of Celebrations of Columbia by and through its agent Causey.

56. Defendants are informed and believe that Plaintiff knew of the falsity of these representations and omissions or had reckless disregard for the truth of the same.

57. Defendants are informed and believe that Plaintiff knew or should have known the substantial charges for excavation and replacement of unsuitable soil upon submitting its bid to Defendant Celebrations of Columbia.

58. Defendants are informed and believe that Plaintiff had intent that the representations and omissions be acted upon by Defendants Causey and Celebrations of Columbia.

59. Defendants Causey and Celebrations of Columbia relied on these representations and omissions in entering into the contract for construction services from Plaintiff.

60. Had Defendant Celebrations of Columbia known of the truth of the matters concerned in the above representations and omissions, it would not have entered into the contract with Plaintiff.

61. Defendant Celebrations of Columbia was ignorant of the statements' falsities at all relevant times.

62. Defendant Celebrations of Columbia had a right to rely on these representations and omissions.

63. Fair dealing required that Plaintiff disclose information regarding all reasonable and probable costs of the construction which Defendant Celebrations of Columbia hired it to perform prior to signing the contract, including the cost to address unsuitable soils.

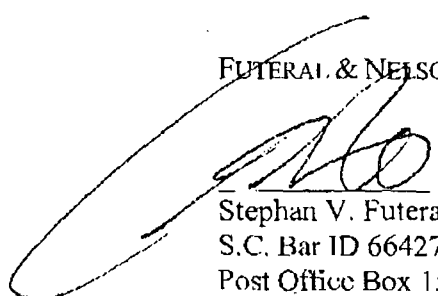
64. Plaintiff was aware of material facts, such as the approximate cost to address the unsuitable soils, which could not reasonably be discovered by Defendants.

65. Plaintiff deliberately concealed the cost to address unsuitable soils.

66. As a direct and proximate result of Plaintiff's fraudulent conduct, Defendant Celebrations of Columbia is entitled to actual damages, punitive damages, and the costs of this action.

WHEREFORE, Defendants pray that Plaintiff take nothing by way of the Complaint, Defendants be dismissed with its cost of suit and attorney fees incurred herein, this Court issue an Order granting judgment against Plaintiff and 3<sup>rd</sup> Party Defendant, jointly and severally, for actual, consequential, incidental, special, and punitive damages, attorneys fees and costs incurred herein, and for such other and further relief as the Court may deem just and proper.

FUTERAL & NELSON, LLC



Stephan V. Futeral  
S.C. Bar ID 66427  
Post Office Box 1543  
Mt. Pleasant, South Carolina 29465-1543  
Telephone (843) 284-5500  
Facsimile (843) 284-5501  
email to: sfuteral@charlestonlaw.net

HARVEY, CASTERLINE, & VALLINI, LLP  
Gary A. Pickren, Esquire  
S.C. Bar ID 8899  
900 Elmwood Ave., Suite 200  
Columbia, South Carolina 29201  
Telephone (803) 409-1115  
Facsimile (803) 779-5220  
email to: garyp@hcvlaw.com

Dated: 10.18.10

Attorneys for Defendants/Third Party Plaintiffs  
Bryan Causey, Celebrations of Columbia, LLC, and  
Causey Construction, LLC

COPY

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Crouch Construction Co.,  
Inc.,

Case No. 09-CP-32-00973

BETH A. CARRIG  
CLERK OF COURT  
LEXINGTON, SC

vs.

REPLY OF PLAINTIFF

Bryan Causey, Celebrations  
of Columbia, LLC, and Causey  
Consulting, LLC,

Defendants.

Plaintiff Crouch Construction Company, Inc., replies to the  
Counterclaims of Defendants as follows:

FOR A FIRST DEFENSE

1. Each and every allegation not hereinafter specifically  
admitted is denied.

2. Plaintiff admits upon information and belief the  
allegations of paragraph twelve. Plaintiff denies the allegations  
of paragraphs thirteen, fourteen, fifteen and sixteen, and  
affirmatively alleges that Plaintiff built in accordance with the  
plans and specifications, and in a workmanlike manner.

3. Plaintiff further denies so much of the paragraphs of  
seventeen, eighteen and nineteen as allege that Defendants have  
paid Plaintiff, although Plaintiff does admit so much of the  
allegations of paragraph eighteen as allege that the parties did  
enter into a building contract.

4. Plaintiff further denies the allegations of twenty,  
twenty-one and twenty-two.

5. Replying to the allegations of paragraph twenty-three,

Plaintiff admits that it has corrected several items in the construction, primarily reinstalling heaters and re-pouring the concrete loading docks, and owner has still failed to pay Plaintiff all the funds due under the contract.

6. The allegations of paragraphs twenty-four and twenty-five are denied.

7. Plaintiff admits the allegations of paragraph twenty-six, but denies the allegations of paragraphs twenty-seven, twenty-eight and twenty-nine.

8. Plaintiff denies the allegations of paragraph thirty.

9. Plaintiff admits so much of the allegations of paragraph thirty-one as allege that Plaintiff's agents told Defendants that they would construct this commercial building in accordance with the plans and specifications and in a good and workmanlike manner.

10. Plaintiff denies the allegations of paragraphs thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight and thirty-nine.

11. Plaintiff further denies the allegations of paragraphs forty, forty-one, forty-two, forty-three, forty-four and forty-five.

12. Plaintiff further denies the allegations of paragraphs forty-six, forty-seven, forty-eight, forty-nine, fifty, fifty-one, fifty-two and fifty-three.

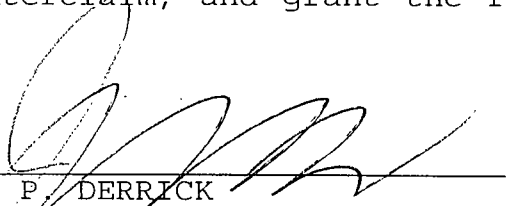
13. Plaintiff further denies the allegations of paragraphs fifty-four, fifty-five, fifty-six and fifty-seven.

#### FOR A SECOND DEFENSE

14. Defendants, in all their counterclaims, fail to state

facts sufficient to constitute a cause of action.

WHEREFORE, having replied, Plaintiff would pray that this Court dismiss the Answer and Counterclaim, and grant the relief prayed for in the Complaint.



---

JEAN P. DERRICK  
Attorney for Plaintiff  
(205 West Main Street)  
Post Office Box 929  
Lexington, SC 29072  
Phone: (803) 359-6189  
Fax: (803) 808-1657  
jderrick@windstream.net

May 6, 2009  
Lexington, SC

|                              |   |                              |
|------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS |
|                              | ) | ELEVENTH JUDICIAL CIRCUIT    |
| COUNTY OF LEXINGTON          | ) |                              |
| Crouch Construction Co.,     | ) | Case No. 09-CP-32-00973      |
| Inc.,                        | ) |                              |
|                              | ) |                              |
| Plaintiff,                   | ) |                              |
|                              | ) |                              |
| vs.                          | ) | MOTION TO COMPEL ARBITRATION |
|                              | ) | AND TO STAY LITIGATION       |
| Bryan Causey, Celebrations   | ) |                              |
| of Columbia, LLC, and Causey | ) |                              |
| Consulting, LLC,             | ) |                              |
|                              | ) |                              |
| Defendants.                  | ) |                              |

---

TO: STEPHAN V. FUTERAL, ESQUIRE, ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for Plaintiff Crouch Construction Co., Inc., will appear before the presiding Judge of the Lexington County Court of Common Pleas, at the Marc H. Westbrook Judicial Center, 205 East Main Street, Lexington, South Carolina, at a date and time to noticed by the Court, and move for an Order granting the following relief:

1. Compelling arbitration of the dispute between the parties, pursuant to the terms of their contract, which provides:

13.1 The Contract shall be governed by the law of the place where to Project is located.

13.2 All Claims or disputes between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the Breach thereof shall be decided by arbitration in accordance with Construction Industry Arbitration Rules of the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrators shall be final, and the judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include by consolidation, joinder or in any other manner, any person or entity not a party to the agreement under which such arbitration arises, unless it is shown at the demand for arbitration is filed that (1) such person or

entity is substantially involved in a common question of fact or law. (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect of any of his employees or consultants. The agreement herein among the parties to the Agreement and any other written to arbitrate referred to herein shall be specifically enforceable under the prevailing arbitration law.

2. Staying the litigation, pending the report of the arbitrator.

3. Reserving for determination by the Circuit Court the issue of attorney's fees and costs to be awarded the prevailing party, pursuant to the mechanic's lien statutes, as well as the contract between the parties.

For: William F. Gorstie, Esq.  
JEAN P. DERRICK  
Attorney for Plaintiff  
205 West Main Street  
P.O. Box 929  
Lexington, SC 29071  
(803) 359-6189  
Fax: (803) 808-1657  
jderrick@windstream.net

July 2, 2009  
Lexington, SC

COPY

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

2010 JUN -4 P 1:02

Crouch Construction Co.,  
Inc.,

2009-CP-32-0973

BETH A. CARRIG  
CLERK OF COURT  
LEXINGTON, SC

Plaintiff,

vs.

NOTICE OF MOTION AND  
MOTION TO COMPEL  
CHOICE OF ARBITRATOR

Bryan Causey, Celebrations  
of Columbia, LLC, and Causey  
Consulting, LLC,

Defendants/Third Party  
Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc. and  
Appletree, Inc.,

Third Party Defendants.

TO: STEPHAN V. FUTERAL, ESQUIRE, AND GARY PICKREN, ESQUIRE,  
ATTORNEYS FOR DEFENDANTS AND THIRD PARTY PLAINTIFFS; AND  
WARD BRADLEY, ESQUIRE, AND ALAN PEACE, ESQUIRE, ATTORNEYS  
FOR THIRD PARTY DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for Plaintiff,  
will appear before the Presiding Judge of the Court of Common Pleas for Lexington County  
on Wednesday, June 16, 2010 at 2:30 p.m., and move for an Order compelling Defendants  
to specify their choice of arbitrator, upon the following grounds:

1. This court previously required the primary dispute between Plaintiff and Defendants to be arbitrated, pursuant to Order filed March 17, 2010.
2. The parties initially agreed upon Franklin J. Smith, Jr., Esquire, as arbitrator,

and further agreed upon scheduling of discovery, pursuant to Exhibit 1, letter of April 30, 2010 from Franklin J. Smith, Jr.;

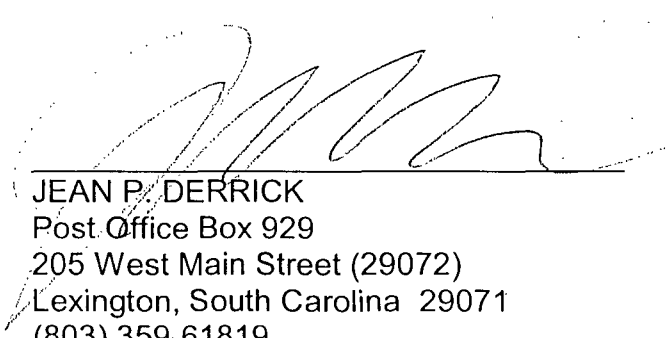
3. Subsequently, in a conflicts check, Franklin J. Smith, Jr. was disqualified from acting as arbitrator;

4. Pursuant to Exhibit 2, an email of May 11, 2010, counsel for Plaintiff suggested five alternate candidates for arbitrator, and requested Defendant pick one;

5. Defendants, per emails listed as Exhibit 3, have failed to move the arbitration process forward by selection of an arbitrator;

Plaintiff would therefore pray that this court compel Defendants to select an arbitrator, or in the alternative, designate an arbitrator so that this matter may proceed.

YOU WILL TAKE FURTHER NOTICE that at that same time and place that Plaintiff will move for an award of attorney's fees and costs of this action.



JEAN P. DERRICK  
Post Office Box 929  
205 West Main Street (29072)  
Lexington, South Carolina 29071  
(803) 359-61819  
Fax: (803) 808-1657  
Attorney for Plaintiff

Lexington, South Carolina

June 4, 2010

# EXHIBIT 1

April 30, 2010

Columbia  
fsmith@RichardsonPlowden.com  
Direct Dial: (803) 576-3724

Jean P. Derrick, Esquire  
P.O. Box 929  
Lexington, SC 29072

Stephan V. Futreal, Esquire  
P.O. Box 1543  
Mount Pleasant, SC 29465

Re: Crouch Construction Co., Inc. vs. Bryan Causey, Celebrations of  
Columbia, LLC, Causey Consulting, LLC, and Appletree, Inc. vs. GS2  
Engineering and Environmental Consultants, Inc., Gist, Inc.  
C/A NO.: 09-CP-32-00973

Dear Jean and Stephan:

Pursuant to our pre-hearing conference on April 29, 2010, the following  
Scheduling Order has been set for the arbitration of this matter.

- The parties shall exchange all documents by May 21, 2010.
- The parties shall answer standard interrogatories by May 21, 2010.
- The parties shall exchange and provide a copy to the arbitrator of their  
arbitration witness and exhibit list on May 31, 2010.
- The hearing shall be held on June 3<sup>rd</sup> and 4<sup>th</sup> at the offices of Richardson  
Plowden & Robinson, P.A. The hearing will begin on June 3<sup>rd</sup> at 10:00  
a.m.

Regarding the parties, Mr. Futreal advised after the hearing that the owner of the  
property, Causey Consulting, LLC, will consent to be a party to the arbitration.  
Therefore, the parties agree that the arbitrator shall decide the mechanic's lien  
attorney's fees issue.

The parties were advised to comply with the statutory requirements regarding  
offers of settlement. If any offers of settlement are filed and served on the other party,  
they should NOT be provided to the arbitrator until after the initial award is issued.

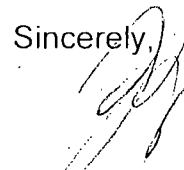
The parties were advised to comply with the statutory requirements regarding offers of settlement. If any offers of settlement are filed and served on the other party, they should NOT be provided to the arbitrator until after the initial award is issued.

The parties agreed that the arbitrator's rate will be \$275 per hour. The arbitrator will forward his invoice upon completion of the award and the award will be issued upon full payment of the invoice.

As the duly appointed arbitrator for this case, I order that the parties comply with the above scheduling deadlines and procedures.

If anyone has any questions, please let me know. With kind regards, I am

Sincerely,

A handwritten signature in black ink, appearing to read 'FJS, Jr.', is written over the word 'Sincerely,'.

Franklin J. Smith, Jr.

FJS,Jr./kcj

# **EXHIBIT 2**

Sandra Shaw

---

To: garyp@hcvlaw.com; sfuteral@charlestonlaw.net  
Cc: rogercrouch@bellsouth.net  
Subject: RE: CROUCH VS. CAUSEY, ET.AL.

LAW OFFICES OF

*Jean Perrin Derrick, LLC*

ATTORNEY AT LAW

205 West Main Street  
P.O. BOX 929  
Lexington, South Carolina 29072

Telephone  
(803) 359-6189  
Fax No.: 808-1657  
Email: [jderrick@windstream.net](mailto:jderrick@windstream.net)

May 11, 2010

Gary Pickren, Esq.  
Stephen Futeral, Esq.

Re: Crouch vs. Causey, et.al.

Gentlemen:

We need to pick another arbitrator. Frank Smith recommended the following individuals, as competent arbitrators who do a lot of work in the construction field:

Hank Wall  
Jim Bruner  
Henry Brown  
Dan Brailsford  
Chuck McDonald

Any of them suit me. Please let me know, and let's try to keep the June 3<sup>rd</sup> and 4<sup>th</sup> dates, and keep to the discovery deadlines to which we have earlier agreed. I will have a witness list shortly, to forward to the new arbitrator.

Sincerely,  
JEAN P. DERRICK

JPD/sss

Cc: Mr. Roger Crouch

# **EXHIBIT 3**

## Jean Derrick

---

**From:** Gary A. Pickren [garyp@hcvlaw.com]  
**Sent:** Tuesday, May 18, 2010 2:20 PM  
**To:** jderrick@windstream.net  
**Cc:** Sandra Shaw; Stephan Futeral  
**Subject:** Arbitrator  
**Attachments:** image001.gif

Ms. Derrick: I continue to receive your voice mails about selecting an arbitrator to replace Frank Smith. As I have emailed you previously, Stephan got married last weekend. There will be no selection of an arbitrator until I speak to Stephan next week. Moreover, until I receive your witness list we will not agree to the selection of another arbitrator. Please provide the witness list then I will discuss the list and a replacement arbitrator with Stephan next week.

Thank you  
Gary



Gary A. Pickren, Special Counsel  
[GaryP@hcvlaw.com](mailto:GaryP@hcvlaw.com)  
P: 803-409-1115  
F: 803-779-5220

Office Locations  
[www.hcvlaw.com](http://www.hcvlaw.com)

**Sandra Shaw**

---

**From:** Gary A. Pickren [garyp@hcvlaw.com]  
**Sent:** Wednesday, May 19, 2010 5:41 PM  
**To:** jderrick@windstream.net; Sandra Shaw  
**Cc:** Stephan Futeral  
**Subject:** Crouch v. Celebrations

Ms. Derrick:

Thank you for sending us your witness list. Stephan has protection until May 28th. After he returns, we will discuss the selection of another arbitrator.

As for discovery, we will still go through with our agreement even though it was conditioned upon using Frank Smith. Stephan was working on those, and we will provide you with our responses sometime after he returns. In the meantime, we will look for your responses this Friday as you have indicated.

Gary Pickren



Gary A. Pickren, Special Counsel  
[GaryP@hcvlaw.com](mailto:GaryP@hcvlaw.com)  
P: 803-409-1115  
F: 803-779-5220

Office Locations  
[www.hcvlaw.com](http://www.hcvlaw.com)

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,

3<sup>rd</sup> Party Defendant.

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

**DEFENDANTS'/3<sup>rd</sup> PARTY  
PLAINTIFFS' NOTICE OF MOTION  
AND MOTION TO CHANGE  
AND/OR CLARIFY THE  
ARBITRATION AWARD**

TO JEAN DERRICK, ESQUIRE, ATTORNEY FOR PLAINTIFF:

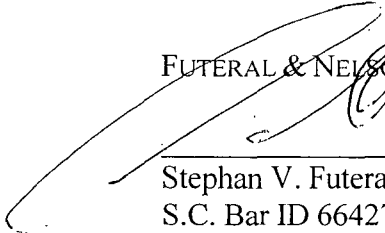
YOU WILL PLEASE TAKE NOTICE that the undersigned hereby moves pursuant to S.C. Code Ann. § 15-48-100 for the arbitrator, James Bruner, Esquire, to correct and/or clarify the arbitration award made by him and delivered to the parties on November 11, 2010, a copy of which is attached hereto as **Exhibit A**. Plaintiff is hereby notified that pursuant to S.C. Code Ann. § 15-48-100, any objections thereto must be served by Plaintiff within ten (10) days from this notice.

The grounds for this Motion are as follows:

- 1) The arbitration award is imperfect in a matter of form, not affecting the merits of the controversy, because the award does not comport with Rule 44 of the Commercial

Construction Arbitration Rules that requires the arbitrator to provide "a concise financial breakdown of any monetary awards . . . ."

- 2) The arbitration award warrants clarification to explain the amount of damages, attorney's fees, and costs awarded, if any, to each party for each of the claims raised by them at arbitration and to elucidate the arbitrator's computation of interest upon the award.

  
FUTERAL & NELSON, LLC

Stephan V. Futeral, Esquire  
S.C. Bar ID 66427  
Post Office Box 1543  
Mt. Pleasant, South Carolina 29465-1543  
Telephone (843) 284-5500 ext. 225  
Facsimile (843) 284-5501 sub. 225  
email to: sfuteral@charlestonlaw.net

Dated: 11/15/10

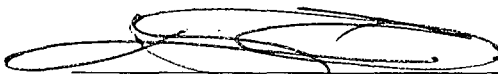
Attorney for Defendants

### CERTIFICATE OF SERVICE

The foregoing document was served on Monday, Nov. 15, 2010, by placing a copy of same in the United States Mail with sufficient first class postage affixed thereto and addressed as follows:

Jim Bruner  
Bruner, Powell, Robbins, Wall & Mullins, LLC  
1735 St. Julian Place, Suite 200  
Columbia South Carolina 29204

Ms. Jean P. Derrick  
205 West Main Street  
Post Office Box 929  
Lexington South Carolina 29702

  
Kelsey J. Gilmore-Futeral  
Law Clerk

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

IN ARBITRATION

Crouch Construction Company, Inc., )  
Plaintiff, )

Case No. 09-CP-32-00973

vs. )

ARBITRATION AWARD

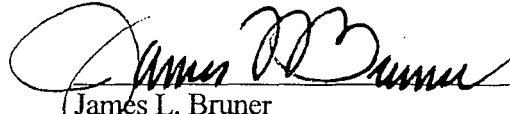
Bryan Causey, Celebrations of )  
Columbia, LLC and Causey )  
Consulting, LLC, )  
Defendants. )

The undersigned James L. Bruner, the duly appointed arbitrator in the above-captioned action, having received the evidence presented by the parties and considered the argument of counsel for each party, hereby makes the award set forth below with respect to all issues framed by the pleadings and in accordance with South Carolina Uniform Arbitration Act.

The Defendants Celebrations of Columbia, LLC and Causey Consulting, LLC shall pay to the Plaintiff Crouch Construction Company, Inc. the following sums:

|                             |                 |
|-----------------------------|-----------------|
| Contract Balance & interest | \$84,428.54     |
| Attorney's fees & costs     | 39,937.08       |
| Cost of arbitration         | <u>5,940.25</u> |
| Total Award                 | \$130,305.87    |

This award is made in full settlement of all claims and counterclaims alleged in the case and presented at arbitration. The Plaintiff made a statutory offer of settlement of \$100,000. The Defendants did not make a statutory offer of settlement but asserted a counterclaim of \$288,641.82. By reason of the Plaintiff's offer of settlement and the Defendants' counterclaim, the Plaintiff is the prevailing party and is entitled to an award of reasonable attorney's fees and costs. In considering that award, I reviewed Plaintiff's counsel's Attorney's Fee Affidavit and considered (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained, and (6) customary legal fees for similar services.

  
James L. Bruner  
Arbitrator

November 10, 2010  
Columbia, SC



STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Crouch Construction Co.,  
Inc.,

2010 NOV 16 3:44

Case No. 09-CP-32-00973

Plaintiff,

vs.

Bryan Causey, Celebrations  
of Columbia, LLC, and Causey  
Consulting, LLC,

Defendants and  
3rd Party Plaintiffs,

vs.

GS2 Engineering and  
Environmental Consultants, Inc.)

3rd Party Defendant.

NOTICE OF MOTION AND MOTION  
TO CONFIRM AWARD IN ARBITRATION,  
ENTER JUDGMENT, REFER FOR SALE,  
AND FOR AN ADDITIONAL AWARD OF  
FEES, INTEREST, COSTS AND  
DISBURSEMENTS

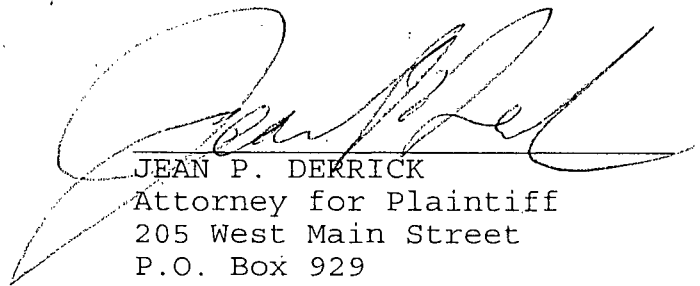
TO: JAMES L. BRUNER, ESQUIRE, ARBITRATOR, STEPHAN V. FUTERAL,  
ESQUIRE, AND GARY PICKREN, ESQUIRE, ATTORNEYS FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney  
for Plaintiff Crouch Construction Co., Inc., hereby moves for  
issuance of an Order confirming the attached award in arbitration  
made by James L. Bruner, Esquire, designated arbitrator, on  
November 11, 2010, and further, hereby moves for confirmation of  
any clarified award which might in the future be issued by the  
arbitrator, and for judgment to be entered thereon, pursuant to  
§15-48-150 and §15-48-160 of the Uniform Arbitration Act, South  
Carolina Code of Laws, Ann.;

YOU WILL TAKE FURTHER NOTICE at that same time and place that  
Plaintiff will move for an Order of Reference with finality to the  
Master In Equity for Lexington County, to foreclose the mechanic's  
lien perfected earlier by Plaintiff, and to sell the subject  
premises, so that the proceeds of sale may be applied to pay and

satisfy the amount of the debt established in this arbitration award, pursuant to §29-5-160 South Carolina Code of Laws, Ann.; and

YOU WILL TAKE FURTHER NOTICE at that same time and place that Plaintiff will move for an additonal award of attorney's fees, interest, late fees, and costs of this application to confirm the award in arbitration as a judgment, and for an Order of reference with finality to foreclose the mechanic's lien, upon the grounds that Plaintiff is the prevailing party and is entitled to an additional award of attorney's fees, interest, late fees and costs under the mechanic's lien statute, as well as the provisions of the contract between the parties.



JEAN P. DERRICK  
Attorney for Plaintiff  
205 West Main Street  
P.O. Box 929  
Lexington, SC 29071  
(803) 359-6189  
Fax: (803) 808-1657  
jderrick@windstream.net

Lexington, SC  
November 12, 2010

COPY

STATE OF SOUTH CAROLINA )

FILED

IN ARBITRATION

COUNTY OF LEXINGTON )

Crouch Construction Company, Inc., )

Case No. 09-CP-32-00973

Plaintiff, )

vs. )

ARBITRATION AWARD

Bryan Causey, Celebrations of )

Columbia, LLC and Causey )

Consulting, LLC. )

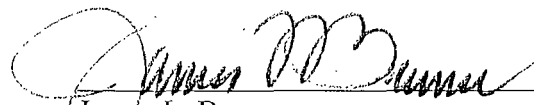
Defendants. )

The undersigned James L. Bruner, the duly appointed arbitrator in the above-captioned action, having received the evidence presented by the parties and considered the argument of counsel for each party, hereby makes the award set forth below with respect to all issues framed by the pleadings and in accordance with South Carolina Uniform Arbitration Act.

The Defendants Celebrations of Columbia, LLC and Causey Consulting, LLC shall pay to the Plaintiff Crouch Construction Company, Inc. the following sums:

|                             |                 |
|-----------------------------|-----------------|
| Contract Balance & interest | \$84,428.54     |
| Attorney's fees & costs     | 39,937.08       |
| Cost of arbitration         | <u>5,940.25</u> |
| Total Award                 | \$130,305.87    |

This award is made in full settlement of all claims and counterclaims alleged in the case and presented at arbitration. The Plaintiff made a statutory offer of settlement of \$100,000. The Defendants did not make a statutory offer of settlement but asserted a counterclaim of \$288,641.82. By reason of the Plaintiff's offer of settlement and the Defendants' counterclaim, the Plaintiff is the prevailing party and is entitled to an award of reasonable attorney's fees and costs. In considering that award, I reviewed Plaintiff's counsel's Attorney's Fee Affidavit and considered (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained, and (6) customary legal fees for similar services.

  
James L. Bruner  
Arbitrator

November 10, 2010  
Columbia, SC

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,  
Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,

3<sup>rd</sup> Party Defendant.

IN THE COURT OF COMMON PLEAS  
11<sup>th</sup> JUDICIAL CIRCUIT  
CASE NO.: 09-CP-32-00973

**DEFENDANTS' 3<sup>rd</sup> PARTY  
PLAINTIFFS' MOTION TO VACATE  
BOTH THE ARBITRATION AWARD  
AND THE AMENDED  
ARBITRATION AWARD**

TO JEAN DERRICK, ESQUIRE, ATTORNEY FOR PLAINTIFF:

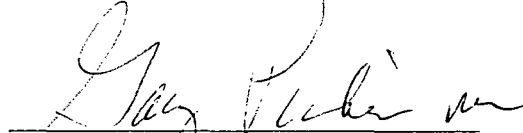
YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the presiding Judge, Court of Common Pleas for Lexington County, within ten (10) days or as soon thereafter as counsel may be heard, for an Order, pursuant to S.C. Code Ann. §15-48-130 to vacate the award and amended award, attached hereto as **Exhibits A and B**, and respectively delivered to Defendants within ninety (90) days of this motion on November 10, 2010 and December 9, 2010, on the grounds that: (1) the arbitrator exceeded his powers by regarding his on-site inspection of the property as evidence in this case; (2) the arbitrator refused to consider evidence regarding the property's failing foundation that was material to the controversy; (3) the arbitrator conducted the hearing as to prejudice substantially the rights of Defendants; and (4) the

arbitrator manifestly disregarded or perversely misconstrued the law applicable to this case by completely ignoring all of Defendants' counterclaims.

**Rule 11 Affirmation**

Counsel for the movant hereby certifies that consultation with opposing counsel regarding this motion would serve no useful purpose.

HARVEY, CASTERLINE & VALLINI, L.L.P.



Gary A. Pickren, Esq.

S.C. Bar # 8899

900 Elmwood Avenue, Suite 200

Columbia, SC 29201

Telephone: (803) 212-1010

Facsimile: (803) 779-5220

Email: gap@hvclaw.com

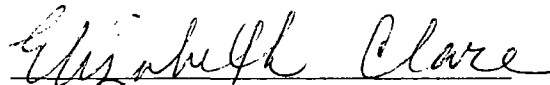
Dated: February 3, 2011

Attorney for the Defendants/3<sup>rd</sup> Party Plaintiffs

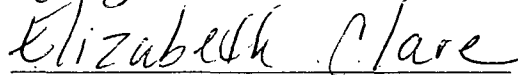
**CERTIFICATE OF SERVICE**

The foregoing document was served on February 3, 2011 via hand delivery to:

Ms. Jean P. Derrick  
205 West Main Street  
Post Office Box 929  
Lexington South Carolina 29702



Signature



Printed Name

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

201 MAR -2 12 3:03

11<sup>th</sup> JUDICIAL CIRCUIT  
CASE NO.: 09-CP-32-00973

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,

3<sup>rd</sup> Party Defendant.

**DEFENDANTS'/3<sup>rd</sup> PARTY  
PLAINTIFFS' SUPPLEMENTAL  
MOTION TO VACATE THE  
ARBITRATION AWARD AND  
MOTION FOR RELIEF FROM  
ORDER PURSUANT TO RULE 60,  
SCRCivP**

TO: JEAN DERRICK, ESQUIRE, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the presiding Judge, Court of Common Pleas for Lexington County, within ten (10) days or as soon thereafter as counsel may be heard, for an Order, pursuant to S.C. Code Ann. § 15-48-130 to vacate the arbitration award and, pursuant to Rule 60(b), SCRCivP, to vacate any order confirming the arbitration award.

**PROCEDURAL BACKGROUND**

This case involves the construction of a commercial building. At the completion of the project, Plaintiff Crouch Construction demanded final payment of over \$100,000.00 beyond the original contract price. Defendant Owner refused to make the final payment because Plaintiff

<sup>1</sup> Defendants incorporate, by reference, all of the previous grounds for vacating the arbitration award as previously set forth in its Motion to Vacate filed with the court on November 15, 2010 and supporting memorandum of law.

failed to install or otherwise give credit for several thousand dollars worth of items as set forth in the parties' contract, Plaintiff failed to obtain consent for change orders totaling over \$100,000.00 above the estimate given for the site's excavation, the building foundation constructed by Plaintiff is failing, and the cost to repair the failing foundation is over \$200,000.00. Thereafter, Plaintiff filed for foreclosure of a mechanic's lien. Defendants counterclaimed and asserted seven (7) causes of action against Plaintiff for negligence, breach of contract, breach of express warranty, breach of implied warranty, violation of the South Carolina Unfair Trade Practices Act, negligent misrepresentation, and fraud. Many of Defendants' causes of action center around the acts and omissions of 3<sup>rd</sup> Party Defendant GS2 Engineering, Inc. that was a subcontractor on this project.

By prior court order, the aforementioned causes of action were submitted to arbitration. Plaintiff called to testify representatives of 3<sup>rd</sup> Party Defendant GS2 Engineering as experts and fact witnesses at arbitration. On November 10, 2010, the arbitrator submitted to the parties an award in favor of Plaintiff. On November 15, 2010, Defendants made a motion to clarify or modify the arbitration award. On December 9, 2010, the arbitrator submitted to the parties a Modified and Amended Arbitration Award that, as previously set forth by Defendants, did not clarify the award regarding Defendants' counterclaims. Plaintiff filed a Motion to Confirm the Arbitration Award. On February 3, 2011, within ninety (90) days of the delivery of both the original arbitration award and modified arbitration award, Defendants' filed a Motion to Vacate the arbitration award. This court heard Defendant's motion and on February 14, 2011, instructed the parties that it would deny Defendant's Motion and instructed Plaintiff's counsel to prepare an order confirming the award. As of the date of this motion, no written entry of judgment has been made.

Thereafter, on February 23, 2011, Defendants discovered that the arbitrator failed to disclose that a member of his law firm, Joey R. Floyd, Esq, is the brother of Jason Floyd, P.E., who is a geotechnical engineer for and the Operations Manager of GS2. On February 24, 2011, Defendants received a Motion for Summary Judgment from Defendant GS2 Engineering, Inc., of which is attached as **Exhibit A**, wherein GS2 is now using the arbitrator's award as the basis for asserting that these Defendants should be collaterally estopped from making their jury trial claims against GS2. This motion followed.

#### LAW/ANALYSIS

**I. THIS COURT SHOULD VACATE THE ARBITRATION AWARD BECAUSE THE INTEGRITY OF THE ARBITRATION HAS BEEN COMPROMISED BY THE ARBITRATOR'S FAILURE TO INVESTIGATE AND DISCLOSE THE FAMILIAL RELATIONSHIP BETWEEN THE ARBITRATOR'S LAW PARTNER AND THE OPERATIONS MANAGER FOR 3<sup>rd</sup> PARTY DEFENDANT GS2 ENGINEERING, INC.**

This court should vacate the arbitration award because the arbitrator failed to disclose the familial relationship between his law partner, Joey R. Floyd, Esq, and GS2's Operations Manager, Jason Floyd, P.E. Like the Federal Arbitration Act, 9 U.S.C. § 10, S.C. Code Ann. § 15-48-130 provides that the court shall vacate an award where there was "evident partiality by an arbitrator appointed as a neutral" or "[t]he award was procured by corruption, fraud or other undue means . . . ."<sup>2</sup> Under § 15-48-130(b), this motion is timely because Defendants have ninety days to make this motion after the grounds for this motion were discovered on February 23, 2011. Additionally, Defendants' motion is timely under federal law that likely preempts § 15-48-130. See American Guaranty Co. v. Caldwell, 72 F.2d 209 (9<sup>th</sup> Cir. 1934) (wherein the

---

<sup>2</sup> Here, although the parties' arbitration agreement was unenforceable under South Carolina law, this court previously ruled that the parties must submit to arbitration under the Federal Arbitration Act, 9 U.S. § 1-14. Therefore, this court may look to federal case law for guidance regarding whether this court should vacate the award based upon the arbitrator's failure to disclose his potential for partiality.

court held that the lower court had discretion to hear the parties' motion to vacate, filed more than three months after the award, and to vacate the award on the grounds that it was discovered that one of the arbitrator's had a business connection to one of the parties.)

As is typical in arbitration, these parties chose their arbitrator after the arbitrator disclosed any relationships that created a potential for partiality. Based upon the arbitrator's disclosures, the parties presumably made intelligent choices regarding the person who served as their arbitrator. Before deciding upon Jim Bruner as the arbitrator, the parties selected Frank Smith, Esq., as their arbitrator. Plaintiff later rejected Frank Smith, Esq. based upon Mr. Smith's disclosures regarding working relationships with Plaintiff's expert GS2 and Defendants' expert, Dennis Corporation, as shown on **Exhibits B and C** attached hereto. Specifically, Mr. Smith disclosed the following, "I currently have a matter representing a client on an issue that is adverse to GS2, Inc. The matter is not in litigation and is relatively minor. This relationship will not prevent me from being fair and impartial in this matter." Despite Mr. Smith's assurance of impartiality, Plaintiff exercised its right to reject Mr. Smith. Thereafter, the parties agreed to use Jim Bruner, Esq., as their arbitrator. However, unlike Mr. Smith, Mr. Bruner failed to make a full disclosure of any relationships that created a potential for partiality.

As set forth in the affidavit of Ross Travis, P.E., attached hereto as **Exhibit D**, on February 23, 2011, Mr. Travis had lunch with Joey Floyd, Esq. who has been working with Mr. Bruner for approximately eleven years and is Mr. Bruner's law partner. During the aforementioned lunch meeting, Attorney Floyd discussed that his brother, Jason Floyd, P.E., is a geotechnical engineer with GS2. Jason Floyd is also the Operations Manager for GS2.

Before and during arbitration, Mr. Bruner was well-aware of GS Engineering's role as a 3<sup>rd</sup> Party Defendant and its participation, through its representatives, as both fact and expert

witnesses for Plaintiff. For purposes of conflicts checking and disclosure, the parties provided Mr. Bruner with copies of the pleadings and with witness lists that identified all persons and they companies for which they worked. Additionally, GS2 was a source of contention prior to the arbitration hearing itself. As indicted in Exhibit E attached hereto, over Defendants' objections, Jim Bruner ordered that both GS2 and its attorney be permitted to inspect Defendants' property. At no time before, during, or after arbitration did Mr. Bruner disclose the aforementioned potential for partiality.

"[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another." Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150; 89 S. Ct. 337, 340; 21 L. Ed. 2d 301, 305 (1968). In Commonwealth, a subcontractor claimed money due for a painting job, and the controversy was submitted to arbitration. The subcontractor and the prime contractor each appointed an arbitrator, and these two arbitrators selected a third arbitrator, who was supposedly neutral. After the arbitration award was made, the subcontractor discovered that the prime contractor and third arbitrator had done business together. The United States District Court refused to set aside the award, and the Court of Appeals for the First Circuit affirmed. The United States Supreme Court reversed and held that the failure to disclose the business dealings between the prime contractor and the third arbitrator constituted a manifest violation of the strict morality and fairness which Congress expected of arbitrators.

Section 10 [of the federal arbitration act] does authorize vacation of an award where it was "procured by corruption, fraud, or undue means" or "where there was evident partiality . . . in the arbitrators." These provisions show a desire of Congress to provide not merely for *any* arbitration but for an impartial one.

Commonwealth, 393 U.S. at 148; 89 S. Ct. at 339; 21 L. Ed. 2d at 304.

Defendants are informed and believe that Mr. Bruner's conflict of interest may very well be the basis for his failure to consider evidence in this case and his failure to rule on all of the claims presented to him. For example, as previously submitted to this court, while viewing the property, Mr. Bruner declined to view first-hand the deflection of the foundation that was irrefutable proof of Defendants' claims against Plaintiff and GS2. However, this court should vacate the award regardless of whether the Defendants show actual bias.

In a nondisclosure case, the integrity of the process by which arbitrators are chosen is at issue. Showing a "reasonable impression of partiality" is sufficient in a nondisclosure case because the policy of [arbitration] instructs that the parties should choose their arbitrators intelligently. The parties can choose their arbitrators intelligently only when facts showing potential partiality are disclosed. Whether the arbitrators' decision itself is faulty is not necessarily relevant.

Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9<sup>th</sup> Cir. 1994) (citation omitted).

In Schmitz, after an arbitration award was issued, one of the parties discovered that the law firm of one of their arbitrators in a three arbitrator panel had represented Prudential Insurance that was the parent company of a party to the arbitration, Pru-Bache. Although the arbitrator ran a conflicts check regarding Pru-Bache, he failed to run a conflict's check regarding Prudential. The arbitrator did not disclose this relationship. The court first held that the arbitrator had a duty to investigate potential conflicts independent of the arbitrator's duty to disclose such conflicts because "*Commonwealth Coatings* establishes that the parties rather than the arbitrators or the courts should be the judges of the partiality of arbitrators." Schmitz v. Zilveti, 20 F.3d at 1048.

Though lack of knowledge may prohibit actual bias, it does not always prohibit a reasonable impression of partiality. As Appellants argue, an arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*.

For instance, the parties can expect a lawyer/arbitrator to investigate and disclose conflicts he has with actual parties to the arbitration. . . . That the lawyer forgot to run a conflict check or had forgotten that he had previously represented the party is not an excuse. . . .

\* \* \*

[I][t is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Schmitz v. Zilveti, 20 F.3d at 1048-1049 (citations omitted) (emphasis added).

Like the arbitrator in Schmitz, Mr. Bruner had not only a duty to disclose any relationships that gave a reasonable impression of partiality, but he also had a duty to investigate such relationships. Actually, under the Commercial Arbitration Rules invoked by the parties' agreement to arbitrate, Mr. Bruner had a duty to disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives." R-19(a), American Arbitration Association Construction Industry Arbitration Rules and Mediation Procedures.

As set forth in the affidavit of Bryan Causey, attached hereto as **Exhibit F**, if Mr. Bruner had disclosed the relationship between his law partner and GS2's Operations Manager, Defendants would never have agreed to Mr. Bruner as their arbitration. Because Mr. Bruner failed to disclose, Defendants were denied their essential right to be the architects of their own arbitration process, i.e., Defendants were deprived of their right to be the judges of Mr. Bruner's partiality.

After holding that an arbitrator, like Mr. Bruner, has a duty to investigate and disclose any relationships that give a reasonable impression of partiality, the court then held that the arbitration award should be vacated regardless of whether the arbitrator knew of the relationship. “If the parties are to be judges of the arbitrators’ partiality, duties to investigate and disclose conflicts must be enforced, even if later a court finds that no actual bias was present.” Schmitz, 20 F.3d at 1049.

Like the court in Schmitz, this court should enforce the arbitrator’s duties to investigate and disclose conflicts regardless of whether this court finds that no actual bias was present. To rule otherwise would supplant Defendants as the architect of their own arbitration process and to deny Defendants their role as the judges of the arbitrator’s impartiality.

**II. THIS COURT SHOULD VACATE ANY ORDER CONFIRMING THE ARBITRATION AWARD BECAUSE THE EVIDENCE OF THE ARBITRATOR’S CONFLICT OF INTEREST COULD NOT HAVE BEEN DISCOVERED IN TIME BEFORE ANY SUCH ORDER WAS ENTERED.**

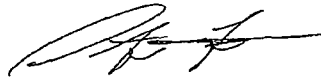
Pursuant to Rule 60(b)(1)-(2), SCRCivP, this court should vacate any order, oral or written, confirming the arbitration award on the grounds of mistake, inadvertence, surprise, and newly discovered evidence. As previously set forth herein, the parties exercised due diligence by informing Mr. Bruner of the witnesses and companies involved in this case including GS2, but Mr. Bruner did not reveal the conflict of interest. Under the aforementioned circumstances, Defendants had no way of knowing of the relationship between Mr. Brunner’s law partner and the Operations Manager for GS2 and only recently learned of the relationship through mere happenstance.

**CONCLUSION**

Defendants respectfully request that this court vacate the arbitration award because the arbitrator failed to disclose his conflict of interest regarding one of the parties to this action

thereby denying Defendants of their essential right to be the architects of their own arbitration process and to be the judges of their arbitrator's impartiality. Further, this court should set aside any order confirming the arbitration award on the grounds stated herein.

FUTERAL & NELSON, LLC



---

Stephan V. Futeral, Esquire  
S.C. Bar ID 66427  
Post Office Box 1543  
Mt. Pleasant, South Carolina 29465-1543  
Telephone (843) 284-5500 ext. 225  
Facsimile (843) 284-5501 sub. 225  
email to: [sfuteral@charlestonlaw.net](mailto:sfuteral@charlestonlaw.net)  
Attorney for Defendants/3<sup>rd</sup> Party Plaintiffs

Dated: February 28, 2011

FILED

2011 MAR -2 3:03

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants/Third Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., and Gist, Inc.,

Third Party Defendant.

FILED

2011 MAR -2

IN THE COURT OF COMMON PLEAS

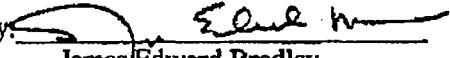
C/A No. 09-CP-32-00973

**THIRD PARTY DEFENDANT GS2  
ENGINEERING & ENVIRONMENTAL  
CONSULTANTS, INC.'S MOTION  
FOR SUMMARY JUDGMENT**

YOU WILL PLEASE TAKE NOTICE that the Third-Party Defendant GS2 Engineering and Environmental Consultants, Inc., hereby moves for summary judgment. As the basis for this motion, the Defendant relies on the doctrine of nonmutual collateral estoppel. Third-Party Plaintiffs unsuccessfully asserted the same issues previously against Crouch Construction Company, LLC, in arbitration that they now bring against GS2. Thus, under South Carolina law, and the doctrine of nonmutual collateral estoppel, they are precluded from relitigating the same issues. For this reason, the Third-Party Defendant moves for summary judgment on the basis that the claims brought by the Plaintiff are precluded as a matter of law.



MOORE, TAYLOR & THOMAS, P.A.

By:   
James Edward Bradley  
1700 Sunset Boulevard  
P.O. Box 5709  
West Columbia, SC 29171  
(803) 796-9160  
Attorney for Third-Party Defendants GS2  
Engineering and Environmental  
Consultants, Inc.

West Columbia, South Carolina

February 22, 2011

## Stephan Futeral

---

**From:** Sandra Shaw [sshaw01@windstream.net]  
**Sent:** Wednesday, May 05, 2010 2:00 PM  
**To:** apeace@tcjps.com; ward@mtlaw.com; garyp@hcvlaw.com  
**Cc:** rogercrouch@bellsouth.net; fsmith@richardsonplowden.com; Stephan Futeral  
**Subject:** FW: Crouch vs. Causey, et.al.

Frank Smith, Esq.  
Gary Pickren, Esq.  
Ward Bradley, Esq.  
Alan Peace, Esq.

Gentlemen: Crouch Construction sees no conflict either, Jean Derrick

---

**From:** Frank Smith [mailto:FSmith@RichardsonPlowden.com]  
**Sent:** Tuesday, May 04, 2010 3:30 PM  
**To:** 'Stephan Futeral'  
**Cc:** jderrick@windstream.net; Gary A. Pickren; Sandra Shaw  
**Subject:** RE: Crouch vs. Causey, et.al.

The only additional disclosure I need to make based on Stephan's list is that I currently have a matter representing a client on an issue that is adverse to GS2, Inc. the matter is not in litigation and is relatively minor. This relationship will not prevent me from being fair and impartial in this matter.

Frank

---

**From:** Stephan Futeral [mailto:sfuteral@charlestonlaw.net]  
**Sent:** Tuesday, May 04, 2010 1:55 PM  
**To:** Frank Smith  
**Cc:** jderrick@windstream.net; Gary A. Pickren; Sandra Shaw  
**Subject:** RE: Crouch vs. Causey, et.al.



Attorneys Serving the Lowcountry

Frank, below is our list so far:

Bryan Causey  
Michael Edwards  
Skeet Crouch  
Roger Crouch  
Ross Travis - Dennis Corp  
Dan Dennis - Dennis Corp  
Jeffery Kremlick - Crouch Construction  
Ryan MacDonald - GS2, Inc.  
David Smith - Staley Company  
Stu Ware - GS2, Inc.  
Mike Epling - Gist, Inc.  
M. Portee - GS2, Inc.  
Len Roberson - Roberson Engineering



Robert Bruorton - GS2, Inc.  
Mark W. King - GS2, Inc.  
Marcus Croswell - NBSC  
Kenny Edward - Crouch Construction  
Janice Pendry

Sincerely,  
Stephan V. Futeral, Esq.  
Certified Civil & Family Court Mediator  
Futeral & Nelson, LLC  
1004 Anna Knapp Blvd., Mt. Pleasant, SC 29464  
Local 843-284-5500 Local | Toll Free 877-913-5500 | Fax 843-284-5501  
[www.charlestonlaw.net](http://www.charlestonlaw.net)

The information contained in this electronic message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both State and Federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication. Thank you.

---

**From:** Frank Smith [mailto:[FSmith@RichardsonPlowden.com](mailto:FSmith@RichardsonPlowden.com)]  
**Sent:** Tuesday, May 04, 2010 10:27 AM  
**To:** [jderrick@windstream.net](mailto:jderrick@windstream.net); 'Gary A. Pickren'; 'Sandra Shaw'  
**Cc:** Stephan Futeral  
**Subject:** RE: Crouch vs. Causey, et.al.

Jean and Steven

As indicated below, please provide a list of witnesses for disclosure purposes. I was advised today by Ross Travis that he is an expert for Celebrations LLC. Mr Travis works for Dennis Corporation who is one of my current clients. Mr. Travis also was the owner of TDA Construction who was one of my clients. TDA Construction is on longer in business. I am confident that I can be fair and impartial to both sides however; if there is any concern I will understand and will agree to withdraw as the arbitrator.

Please let me know how you would like to proceed.

Frank

---

**From:** Frank Smith  
**Sent:** Friday, April 16, 2010 3:38 PM  
**To:** 'Gary A. Pickren'; Sandra Shaw  
**Cc:** [sfuteral@charlestonlaw.net](mailto:sfuteral@charlestonlaw.net)  
**Subject:** RE: Crouch vs. Causey, et.al.

I appreciate y'all agreeing to use me as the arbitrator in this case. I have checked my schedule and I am available June 3 and 4. if the parties agree we can have the arbitration in our office or any other place agreed upon by the parties. Anytime I serve as an arbitrator I make full disclosures regarding any past connections with the attorneys, parties or witnesses. I have run a conflicts check on the parties and our firm had a case in 1988 in which we defended a party that was sued by Crouch. In 2001 we defended a party that was a co-defendant with Crouch. In 1993 I represented a subcontractor in a matter against Crouch relating to payment on a project. That matter was settled. I do not recall any of the details of the cases nor anyone who was involved on Crouch's behalf. These past matters will not prevent me from being fair and impartial in this case.

Typically, the parties provide a list of potential witnesses so that the arbitrator can make disclosures regarding the witnesses. I have practiced in construction litigation for over 25 years so it is likely that I have come across some of the experts or possibly other witnesses. Please provide that list as soon as possible and I will let you know if I have any disclosures.

I am available next week on Monday or Tuesday morning. I will be out of state the rest of the week but I can arrange a time for a conference call later in the week if we can't get something set up on Monday or Tuesday. I suggest Monday at 2pm. Let me know if that suits. If not, let me know when you are available.

In the conference call we will resolve all discovery issues and I will discuss the hearing procedure and make sure that everyone is aware of generally how the hearing will be conducted. The AAA Construction industry rules are available online at [www.adr.org](http://www.adr.org) if you want to review them.

Thanks  
Frank

---

**From:** Gary A. Pickren [mailto:garyp@hcvlaw.com]  
**Sent:** Friday, April 16, 2010 11:29 AM  
**To:** Sandra Shaw  
**Cc:** sfuteral@charlestonlaw.net; Frank Smith  
**Subject:** RE: Crouch vs. Causey, et.al.

Jean, Thank you for resolving the arbitrator issue. I am glad we were able to work it out amicably.

Everyone, I will be in closings the rest of today. Stephan and/or I should be available for a conference call early next week. June 3 and 4 are good with me and I have blocked my calendar for those dates. I will check with Stephan and my client and get back to you ASAP on confirmation of the date if it meets with Ms. Smith's schedule.

Also, as to discovery, we do not consent to depositions or interrogatories. We prefer to follow the AAA rules on discovery that of course requires us to disclose all exhibits and list of witnesses five days prior to the hearing.

Thanks and have a great weekend.

Gary

---

**From:** Sandra Shaw [mailto:sshaw01@windstream.net]  
**Sent:** Friday, April 16, 2010 11:11 AM  
**To:** Gary A. Pickren  
**Cc:** sfuteral@charlestonlaw.net; fsmith@richardsonplowden.com; rogercrouch@bellsouth.net  
**Subject:** Re: Crouch vs. Causey, et.al.

LAW OFFICES OF  
**Jean Perrin Derrick, LLC**  
ATTORNEY AT LAW

205 West Main Street  
P.O. BOX 929  
Lexington, South Carolina 29072

Telephone  
(803) 359-6189  
Fax No.: 808-1657  
Email: [jderrick@windstream.net](mailto:jderrick@windstream.net)

April 16, 2010

Gary Pickren, Esq.

Dear Lawyer Pickren:

Crouch Construction will agree to Frank Smith as the arbitrator in the case. As we discussed in our phone this morning, it would be great to schedule the hearing on Thursday June 3, 2010 and Friday June 4, 2010.

Frank, I would request a conference call about scheduling. I also want to request that the parties exchange answers to simple Interrogatories and Request for Production prior to the hearing, and we need to see what your retainer is and make arrangements to pay you. If you like, my office will be happy to set up the conference call.

With kindest regards,  
JEAN P. DERRICK

JPD/sss

## Stephan Futeral

---

**From:** Jean Derrick [jderrick@windstream.net]  
**Sent:** Tuesday, May 04, 2010 12:09 PM  
**To:** 'Frank Smith'; 'Gary A. Pickren'; 'Sandra Shaw'  
**Cc:** Stephan Futeral  
**Subject:** RE: Crouch vs. Causey, et.al.

Frank: I'm fine with your background connections with Mr. Travis. Will get you our potential witness names shortly, Jean D.

---

**From:** Frank Smith [mailto:FSmith@RichardsonPlowden.com]  
**Sent:** Tuesday, May 04, 2010 10:27 AM  
**To:** jderrick@windstream.net; 'Gary A. Pickren'; 'Sandra Shaw'  
**Cc:** 'sfuteral@charlestonlaw.net'  
**Subject:** RE: Crouch vs. Causey, et.al.

Jean and Steven

As indicated below, please provide a list of witnesses for disclosure purposes. I was advised today by Ross Travis that he is an expert for Celebrations LLC. Mr. Travis works for Dennis Corporation who is one of my current clients. Mr. Travis also was the owner of TDA Construction who was one of my clients. TDA Construction is no longer in business. I am confident that I can be fair and impartial to both sides however; if there is any concern I will understand and will agree to withdraw as the arbitrator.

Please let me know how you would like to proceed.

Frank

---

**From:** Frank Smith  
**Sent:** Friday, April 16, 2010 3:38 PM  
**To:** 'Gary A. Pickren'; Sandra Shaw  
**Cc:** sfuteral@charlestonlaw.net  
**Subject:** RE: Crouch vs. Causey, et.al.

I appreciate y'all agreeing to use me as the arbitrator in this case. I have checked my schedule and I am available June 3 and 4. If the parties agree we can have the arbitration in our office or any other place agreed upon by the parties. Anytime I serve as an arbitrator I make full disclosures regarding any past connections with the attorneys, parties or witnesses. I have run a conflicts check on the parties and our firm had a case in 1988 in which we defended a party that was sued by Crouch. In 2001 we defended a party that was a co-defendant with Crouch. In 1993 I represented a subcontractor in a matter against Crouch relating to payment on a project. That matter was settled. I do not recall any of the details of the cases nor anyone who was involved on Crouch's behalf. These past matters will not prevent me from being fair and impartial in this case.

Typically, the parties provide a list of potential witnesses so that the arbitrator can make disclosures regarding the witnesses. I have practiced in construction litigation for over 25 years so it is likely that I have come across some of the experts or possibly other witnesses. Please provide that list as soon as possible and I will let you know if I have any disclosures.

I am available next week on Monday or Tuesday morning. I will be out of state the rest of the week but I can arrange a time for a conference call later in the week if we can't get something set up on Monday or Tuesday. I suggest Monday at 2pm. Let me know if that suits. If not, let me know when you are available.

In the conference call we will resolve all discovery issues and I will discuss the hearing procedure and make sure that everyone is aware of generally how the hearing will be conducted. The AAA Construction industry rules are available online at [www.adr.org](http://www.adr.org) if you want to review them.



Thanks  
Frank

---

**From:** Gary A. Pickren [mailto:garyp@hcvlaw.com]  
**Sent:** Friday, April 16, 2010 11:29 AM  
**To:** Sandra Shaw  
**Cc:** sfuteral@charlestonlaw.net; Frank Smith  
**Subject:** RE: Crouch vs. Causey, et.al.

Jean, Thank you for resolving the arbitrator issue. I am glad we were able to work it out amicably.

Everyone, I will be in closings the rest of today. Stephan and/or I should be available for a conference call early next week. June 3 and 4 are good with me and I have blocked my calendar for those dates. I will check with Stephan and my client and get back to you ASAP on confirmation of the date if it meets with Ms. Smith's schedule.

Also, as to discovery, we do not consent to depositions or interrogatories. We prefer to follow the AAA rules on discovery that of course requires us to disclose all exhibits and list of witnesses five days prior to the hearing.

Thanks and have a great weekend.

Gary

---

**From:** Sandra Shaw [mailto:sshaw01@windstream.net]  
**Sent:** Friday, April 16, 2010 11:11 AM  
**To:** Gary A. Pickren  
**Cc:** sfuteral@charlestonlaw.net; fsmith@richardsonplowden.com; rogercrouch@bellsouth.net  
**Subject:** Re: Crouch vs. Causey, et.al.

LAW OFFICES OF  
**Jean Perrin Derrick, LLC**  
ATTORNEY AT LAW

205 West Main Street  
P.O. BOX 929  
Lexington, South Carolina 29072

Telephone  
(803) 359-6189  
Fax No.: 808-1657  
Email: [jderrick@windstream.net](mailto:jderrick@windstream.net)

April 16, 2010

Gary Pickren, Esq.

Dear Lawyer Pickren:

Crouch Construction will agree to Frank Smith as the arbitrator in the case. As we discussed in our phone this morning, it would be great

to schedule the hearing on Thursday June 3, 2010 and Friday June 4, 2010.

Frank, I would request a conference call about scheduling. I also want to request that the parties exchange answers to simple Interrogatories and Request for Production prior to the hearing, and we need to see what your retainer is and make arrangements to pay you. If you like, my office will be happy to set up the conference call.

With kindest regards,  
JEAN P. DERRICK

JPD/ss

EXHIBIT "D"

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.,

3<sup>rd</sup> Party Defendants.

FILED  
IN THE COURT OF COMMON PLEAS  
11<sup>th</sup> JUDICIAL CIRCUIT  
CASE NO.: 09-CP-32-00973  
2011 MAR -2 5 3 03  
J. A. CARRIG  
CLERK OF COURT  
LEXINGTON SC

**AFFIDAVIT OF ROSS TRAVIS, P.E.**

PERSONALLY APPEARED BEFORE ME, ROSS TRAVIS, P.E., WHO, BEING  
FIRST DULY SWORN, DEPOSES AND SAYS;

I served as an expert witness for Celebrations of Columbia, LLC, and Causey Consulting, LLC, in a matter that was arbitrated by James Bruner, Esq. My testimony centered on the failure of GS2 Engineering to properly report regarding the excavation of unsuitable soils and GS2's failure to properly supervise the fill placed on site that is now causing the foundation of the building to settle and fail. According to my previous affidavit submitted in this arbitration, it is my professional opinion that GS2 breached its professional duties and fell below the standard of care applicable to civil and professional engineers.

On February 23, 2011, I had lunch with Joey Floyd, Esq., who is a member of Mr. Bruner's law firm. During our lunch, Joey Floyd informed me that his brother, Jason Floyd,

P.E., is a geotechnical expert with GS2 Engineering. On GS2 Engineering's website, Jason Floyd is listed as the Operations Manager for GS2 Engineering.

FURTHER AFFIANT SAYETH NAUGHT.

Ross Travis  
Ross Travis, P.E.

SWORN to and subscribed before me )  
this 1 day of March, 2011. )  
Rachael R. Richardson )  
Notary Public for South Carolina )  
My commission expires: )  
11/22/20 )

NOTARY SEAL

2011 MAR -2 3:03

FILED

## Stephan Futeral

---

**From:** Stephan Futeral  
**Sent:** Thursday, September 23, 2010 10:38 AM  
**To:** 'JBruner@brunerpowell.com'  
**Cc:** 'KWhite@brunerpowell.com'; 'Jean Derrick'; 'Sandra Shaw'; 'Gary A. Pickren'  
**Subject:** Telephone Conference this Morning.

**Importance:** High



Attorneys Serving the Lowcountry

Jim, In anticipation of our telephone conference today, please accept this email as a brief overview of our issues:

My client has a pending motion for sanctions in circuit court against GS2 that includes a request to exclude GS2's experts (which are GS2's employees). Until that motion is resolved, we are not scheduling any inspections by GS2 and its counsel, Ward Bradley.

As of this morning, Ms. Derrick has added Mr. Sembos to this afternoon's inspection party. Mr. Sembos is an owner of GS2. Ms. Derrick previously named Mr. Sembos as an expert, so we believe he may inspect based upon your ruling from Tuesday.

Ms. Derrick also insists that Mr. Sembos should have his lawyer Ward Bradley present. I see no reason why Mr. Sembos needs Mr. Bradley to visually inspect the property. Additionally, I believe that Mr. Bradley's presence is a matter that should be decided by the circuit court pursuant to our motion for sanctions.

While we have you on the telephone today, may we discuss a reasonable time limit on today's inspection?

I look forward to speaking with everyone at 11:00 am.

Sincerely,  
Stephan V. Futeral, Esq.  
Certified Civil & Family Court Mediator  
Futeral & Nelson, LLC  
1004 Anna Knapp Blvd., Mt. Pleasant, SC 29464  
Local 843-284-5500 Local | Toll Free 877-913-5500 | Fax 843-284-5501  
[www.charlestonlaw.net](http://www.charlestonlaw.net)

The information contained in this electronic message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both State and Federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication. Thank you.

Please consider the environment before printing.



STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

AFFIDAVIT OF BRYAN K. CAUSEY

AFTER BEING DULY SWORN AND DISPOSED THE AFFIANT, BRYAN K. CAUSEY

states as follows:

1. I am the managing member of Celebrations of Columbia, LLC, and Causey Consulting, LLC.
2. I recently participated in arbitration in the case "*Crouch Construction Company, Inc. v. Bryan Causey, Celebrations of Columbia, LLC and Causey Consulting, LLC vs. GS2 Engineering and Environmental Consultants, Inc. (Case #09-CP-32-00973)*".
3. The process for selecting an arbitrator was by mutual agreement.
4. Originally, the parties mutually selected Frank Smith, Esq., to serve as the arbitrator.
5. After receiving the parties' witness lists, Frank Smith disclosed that he had participated in a case wherein our expert witness had also served as an expert witness in his case. However, Mr. Smith assured all parties that it in no manner affected his ability to render an unbiased opinion in this arbitration.
6. Despite Mr. Smith's assurances, the Plaintiff demanded that Mr. Smith recuse himself from the case, which he did.
7. Afterwards, the parties agreed to use James L. Bruner of Bruner, Powell, Wall & Mullins, LLC, as the arbitrator.
8. Prior to the arbitration, Mr. Bruner was fully aware that GS2 Engineering is a 3<sup>rd</sup> Party Defendant awaiting a jury trial on claims we have against it as a subcontractor in this case. Mr. Bruner was also aware that GS2 Engineering was a fact witness and identified as an expert witness for the Plaintiff in the case.
9. Over our objections, Mr. Bruner allowed GS2 Engineering to inspect our property and

even to allow GS2 Engineering's attorney to likewise inspect.

10. On February 23, 2011, it came to my attention that Mr. Bruner's law partner has a brother employed as a GEO Technical Engineer and Operations Manager with GS2 Engineering, who is the third-party defendant in my underlying case. GS2 Engineering also served as a fact and expert witness in the arbitration hearing before Mr. Bruner.

11. Mr. Bruner failed to disclose the familial relationship of his law partner and the third-party defendant/expert witness, GS2 Engineering.

12. In the claims pending against GS2 Engineering, the companies I represent seek several hundred thousand dollars in damages from GS2 Engineering for which there is not likely any insurance coverage.

13. The entire matter before Mr. Bruner centered on the testimony of experts including those of GS2 Engineering. Furthermore, the bulk of my counterclaims in the arbitration hearing revolved around the overbilling, faulty construction and falsified construction records of GS2 Engineering.

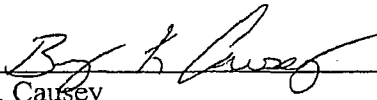
14. I believe that James Bruner as our arbitrator owed a duty to all the parties involved to conduct a conflicts check within his law firm, as I am sure he does with all of his legal work, and disclose to everyone the family relationship between his law partner and a member of GS2 Engineering.

15. Had James Bruner disclosed this relationship at the outset of arbitration, then I would have exercised the same rights Crouch Construction Company did in demanding the recusal of our previous arbitrator, Frank Smith. In other words, I would have rejected James Bruner as our arbitrator because I would not have any faith in his objectivity.

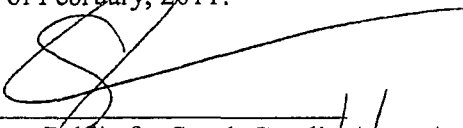
16. As explained by my lawyers in the previous motion to vacate the award, I am convinced by James Bruner's actions, including his refusal to consider evidence at the warehouse

and his failure to consider counterclaims that Mr. Bruner was not objective regarding the case.

Further Affiant sayeth not.

  
Bryan K. Causey

SWORN to before me this 25  
day of February, 2011.

  
Notary Public for South Carolina  
My Commission Expires: 5/1/2016

FILED  
2011 MAR -2 3:03  
JIM A. CAMPBELL  
CLERK OF COURT  
SOUTH CAROLINA

FILED

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

ELEVENTH JUDICIAL CIRCUIT

2011 JUN -2 10 3:24

Crouch Construction Co.  
Inc.,

2009-CP-32-0973

Plaintiff,

vs.

NOTICE OF MOTION AND MOTION  
TO ALTER OR AMEND

Bryan Causey, Celebrations  
of Columbia, LLC, and Causey  
Consulting, LLC,

Defendants and  
3rd Party Plaintiffs

vs.

GS2 Engineering and  
Environmental Consultants, Inc.)

3rd Party Defendant.

TO: STEPHEN FUTERAL, ESQUIRE AND GARY PICKREN, ESQUIRE  
ATTORNEY FOR DEFENDANTS AND THE HONORABLE R. FERRELL  
COTHRAN, JR.:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for Plaintiff Crouch Construction Co., Inc., will appear before the Honorable R. Ferrell Cothran, Jr., presiding Judge of the Lexington County Court of Common Pleas, at the Marc H. Westbrook Judicial Center, 205 East Main Street, Lexington, South Carolina, within 10 days, or at the call of the Court, at a date and time to noticed by the Court, and move for an Order pursuant to Rule 59 SCRPC Rule 59(e) granting the following relief, altering, amending and correcting the specified errors in the attached Order Vacating the Arbitration Award filed May 19, 2011, and served by mail upon the attorney for Crouch Construction Company on May 24, 2011, in the following respects:

1. The Court erred in finding, on page 2 of the Order, that Plaintiff rejected Frank Smith as a potential arbiter because he represented a client adverse to GS2, Inc., on the grounds that there is no evidence in the record to support this statement, and it is in fact inaccurate.

2. The Court has erred thus far in failing to issue and file and serve its Order confirming the arbitration award, in that both Plaintiff and Defendant have moved to confirm and vacate the arbitration award respectively, these motions have been fully argued on the record and that an Order needs to be issued resolving those two motions.

3. The Court erred in granting Defendants' motion to vacate the arbitration award pursuant to Rule 60(b), because Defendant's are entitled to no relief pursuant to any grounds of SCRCF Rule 60(d).

4. The Court erred in vacating the arbitration award pursuant to § 15-48-130, upon the grounds that Defendants are not entitled to make successive motions under the Uniform Arbitration Act.

5. The Court erred in vacating the arbitration award pursuant to § 15-48-130, for "evident partiality", upon the ground that there is absolutely no evidence in the record of any evident partiality.

6. The Court erred in its Order in equating an ethical duty to investigate with any factors which would support a finding of evident partiality.

7. The Court erred in vacating the arbitration award, because there is absolutely no evidence in the record of any evident partiality on the part of the arbitrator.

8. The Court erred in equating a rule of ethics, which required avoidance of an appearance of partiality, with the statutory definition of evident partiality pursuant to § 15-48-130.

9. The Court erred in finding that this is a case of non-disclosure, when in fact the arbitrator knew nothing of any relationship, however tenuous and remote, between the brother of one of his law partners and several expert witnesses in the case.

10. The Court erred, on page 5, in finding that the "familial relationship between the arbitrator's law partner and the operations manager [of GS2] was clearly the type of relationship" creating an appearance of partiality, upon the grounds that this was merely a remote, tenuous relationship only known to the parties and the arbitrator well after the award in arbitration.

11. The Court erred in vacating the arbitration award for evident partiality, when there is absolutely no evidence even of the knowledge of the arbitrator about the remote, tenuous relationship between his law partners' brother and several expert witnesses.

12. The Court erred in finding that the arbitrator failed to investigate and disclose the relationship, because this remote relationship is outside the scope of any even arguable duty to investigate, either under our South Carolina Alternate Dispute Resolution Rules, or The American Arbitration Association's

Construction Industry Rules.

13. The Court erred in vacating the award, because the only duty the arbitrator had was to investigate and disclose conflicts and relationships between the parties and their representatives.

14. The Court erred in equating evident partiality with the arbitrator's alleged failure to investigate and disclose the remote relationship.

15. The Court erred in concluding the arbitrator failed to investigate and disclose a remote relationship, in that all of the evidence in the record shows that the arbitrator did make a reasonable investigation of the parties and their representatives.

16. The Court erred in concluding the arbitrator failed to investigate and disclose a remote relationship, in that all of the evidence in the record shows that the arbitrator did make a reasonable investigation of the named witnesses for the parties, as well as the parties and counsel.

17. The Court erred in holding that this was non-disclosure case, upon the ground that no evidence shows the arbitrator was aware of this remote relationship until well after the issuance of the award, and that therefore he knew nothing to disclose during the entire arbitration process.

18. The Court erred in holding that in a non-disclosure case a party need not show proof of actual bias to establish evident partiality, upon the grounds that evident partiality requires proof of actual bias.

19. The Court erred in holding that the arbitrator had

breached some duty to investigate here, upon the grounds that this standard sets an impossible burden upon arbitrators, to know the remote connections of an infinite number of collateral relatives of numerous business associates of the arbitrator.

20. The Court erred in holding that the arbitrator failed to adequately investigate, upon the grounds that this amorphous duty is endless and infinite, and would have no end with respect to both familial and financial relationships.

21. The Court erred in concluding that the arbitrator had an duty to disclose the familial relationship between his law partner and GS2's operations manager, upon the grounds that this attenuated relationship is beyond the scope of investigation defined by South Carolina's Alternative Dispute Rules and The American Arbitration Association's Construction Industry Rules.

22. The Court in holding on page 12 that "Defendant's need not show circumstances likely to effect partiality, but need only show circumstances likely to give rise to justifiable doubt as the arbitrator's impartiality...", upon the grounds that this is not the standard of proof of evident partiality.

23. The Court erred in holding on page 13 that "Defendants have met their burden of proof in proffering facts that meets the four-factor analysis test set forth in (among other cases) ANR Coal Company vs. Cogentrix, 173 F.3d 493 (4th Cir. N.C. 1999)", upon the grounds that Defendants in fact adduced no evidence to support these four factors.

24. The Court erred in failing to hold that in fact the four-

factors set forth in ANR are the four-factors which define evident partiality.

25. The Court erred failing to find that the complained of connection between the arbitrator, his law partner, the GS2 expert witnesses was remote, attenuated and trivial.

26. The Court erred in finding on page 14 that the arbitrator had a personal interest in avoiding an award that impugned the professional integrity of the company managed by his law partner's brother, upon the grounds that there absolutely no evidence in the record which would support this finding, and it is totally frivolous and speculative.

27. The Court erred in finding on page 13 that the arbitrator had a professional economic interest in the case, upon the grounds that there is absolutely no evidence of that.

28. The Court erred in finding on page 13 that there was any direct relationship between the arbitrator and the Plaintiff, upon the grounds that there is no such evidence in the record. The Court erred in finding on page 13 that there was any connection between the arbitrator's law partner and the arbitration, upon the grounds that there is in fact no evidence of any such connection.

29. The Court erred in finding on page 14 that the relationship between the arbitrator and his law partner had any type of proximity and time with the arbitration proceeding.

30. The Court erred in finding that Defendants presented any facts which would support a finding of evident partiality.

31. The Court erred in finding that Defendants adduced any

evidence which would objectively demonstrate "such a degree of partiality that a reason person could assume that the arbitrator had improper motives." (Page 14 of Order)

32. The Court erred on page 14 of the Order in finding that the arbitrator was partial because he declined to allow testing by Defendants during his view of the premises, upon the grounds that these are same facts Defendants alleged in their earlier motion to vacate, which the Court denied.

33. The Court erred on page 14 of the Order in finding that the arbitrator's allowance of a pre-arbitration hearing inspection of the premises showed evident partiality, upon the grounds that Defendants made this same argument in their earlier motion to vacate, which the Court denied.

34. The Court erred in finding that the arbitrator showed partiality in submitting his affidavit to the Court, upon the grounds this was both proper and required by law.

35. The Court erred in calling into question the veracity of the arbitrator's statement he knew nothing about a brother of his law partner, or for whom that unknown brother worked, upon the grounds that there is absolutely nothing in the record to support an attack on the veracity of the arbitrator.

36. The Court erred in concluding that Defendants had shown evident partiality and objectively demonstrated such a degree of partiality that a reasonable person would assume the arbitrator had improper motives, upon the grounds that absolutely nothing in the record would support this conclusion.

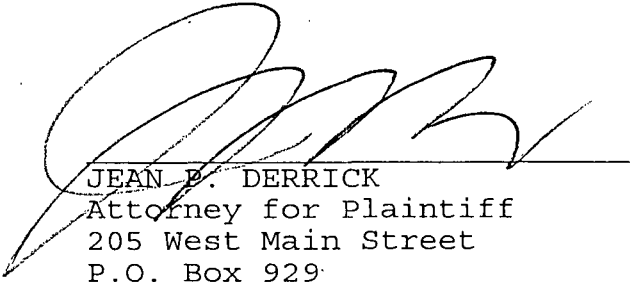
37. The Court erred in vacating the arbitration award, because all of the evidence in the record shows that Defendants are merely dissatisfied with the result.

38. The Court erred in vacating the arbitration award, because arbitration is a favored method of settling disputes and an arbitration award is conclusive except in narrow, limited circumstances.

39. The Court erred in vacating the arbitration award, because proof of evident partiality must be clear and convincing.

40. The Court erred in vacating the arbitration award, because proof of any grounds to vacate must be more than by a mere preponderance of the evidence.

41. The Court erred in vacating the arbitration award upon the grounds of evident partiality, because there isn't even a preponderance of the evidence in the record to support that finding.



JEAN P. DERRICK  
Attorney for Plaintiff  
205 West Main Street  
P.O. Box 929  
Lexington, SC 29071  
(803) 359-6189  
Fax: (803) 808-1657  
jderrick@windstream.net

June 2, 2011  
Lexington, SC

FILED  
JUN -2 P 3:24  
J. A. CARRICE  
CLERK OF COURT  
LEXINGTON, SC

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,  
Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.,

3<sup>rd</sup> Party Defendants.

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

**REPLY TO PLAINTIFF'S MOTION  
TO ALTER OR AMEND**

Defendants respectfully submit this memorandum in reply to Plaintiff's Motion to Alter or Amend filed June 2, 2011:

**STANDARDS**

It is well settled under Rule 59, SCRCivP, that a party cannot use a motion to alter or amend a judgment to present to the court an issue the party could have raised prior to the judgment but did not. Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009); Poch v. Bayshore Concrete Products/South Carolina, Inc., 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009); S.C. Conservation League v. S.C. DHEC, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). Additionally, this court has the discretion to determine Plaintiff's motion without oral argument. Rule 59(f), SCRCivP.

## **LAW/ANALYSIS**

### **I. THIS COURT SHOULD DENY PLAINTIFF'S MOTION BECAUSE, AMONG OTHER REASONS, THIS COURT CORRECTLY FOUND THAT PLAINTIFF REJECTED ARBITRATOR FRANK SMITH, ESQ. AFTER MR. SMITH DISCLOSED A MATTER INVOLVING GS2, INC.**

In Paragraph/Argument No. 1, Plaintiff asserts that there is no evidence that Plaintiff rejected Frank Smith. Plaintiff's argument lacks merit for two reasons. First, the record contains evidence that Plaintiff rejected Frank Smith. Exhibit B, attached to Defendants' Motion to Vacate filed March 2, 2011, shows that on May 4, 2010, Mr. Smith wrote that he had "a matter representing a client on an issue that is adverse to GS2, Inc. the matter is not in litigation and is relatively minor. This relationship will not prevent me from being fair and impartial in this matter." Exhibit B also shows that on May 5, 2010, Plaintiff's counsel initially responded by writing "Crouch Construction see no conflict either." Thereafter, it is undisputed that Plaintiff rejected Frank Smith on or about May 6, 2010.

Second, as previously indicated, Plaintiff cannot now use Rule 59(e) to present to the court an issue it could have raised prior to this court's order. Hickman, 301 S.C. at 456, 392 S.E.2d at 482. Prior to and during the hearing, Defendants presented this issue through their written motions and through oral argument. At no time did Plaintiff argue against the heretofore undisputed procedural history that Plaintiff rejected Frank Smith.

To the extent Plaintiff is now attempting to obfuscate the reason why Frank Smith, Esq. recused himself as the arbitrator in this case, Defendants respectfully submit the affidavit of Gary Pickren, Esq. and Exhibit A thereto. As set forth in Gary Pickren's affidavit, on May 6, 2010, Plaintiff changed its position regarding Frank Smith and insisted that Mr. Smith recuse himself as the parties' arbitrator.

**II. THIS COURT SHOULD DENY PLAINTIFF'S MOTION BECAUSE THIS COURT'S ORDER RESOLVES ALL PRIOR ISSUES AND MOTIONS RAISED BY BOTH PARTIES.**

In Paragraph/Argument No. 2, Plaintiff asserts this court erred in failing to issue and file an order confirming the arbitration award. If Plaintiff is asserting that this court erred in not signing and filing Plaintiff's proposed order from the first hearing, then Plaintiff's argument overlooks that this court could change its decision at any time until it entered an order with the clerk of court. Bowman v. Richland Mem'l Hosp., 335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999). Otherwise, Plaintiff's argument lacks merit because this court's order resolved all issues raised and all prior motions made by either party regarding the arbitration award.

**III. THIS COURT SHOULD DENY PLAINTIFF'S MOTION BECAUSE THIS COURT'S ORDER IS NOT BASED UPON RULE 60(B).**

In Paragraph/Argument No. 3, Plaintiff asserts that this court erred in vacating the arbitration award pursuant to Rule 60(b). Plaintiff's argument again lacks merit because, as clearly set forth in Footnote 1 on page 3 of its order, this court did not address "Defendants' Rule 60(b) motion because this court did not sign and file a written order confirming the arbitration award." Bowman, 335 S.C. at 91, 515 S.E.2d at 260.

**IV. THIS COURT SHOULD DENY PLAINTIFF'S MOTION BECAUSE THE REMAINING ARGUMENTS MADE BY PLAINTIFF ARE THE SAME AS THOSE PREVIOUSLY BRIEFED, ARGUED, AND RULED UPON BY THIS COURT.**

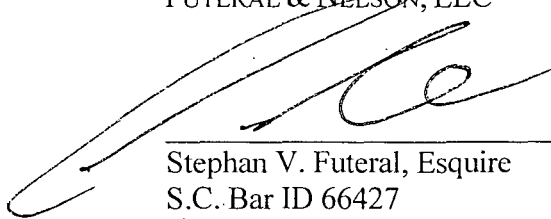
In Paragraphs/Arguments Nos. 4 through 41, Plaintiff makes the same arguments it made to this court through its written reply, its memorandum of law, its affidavits, and in its arguments to this court during the hearing. This court thoroughly considered and ruled upon every issued previously raised by Plaintiff. In fact, this court's order also addresses arguments made by Plaintiff via several emails sent to this court after the hearing.

Additionally, regarding Paragraph/Argument No. 4, Plaintiff ignores that it waived any argument as to whether Defendants were entitled to make a supplemental motion. Specifically, during the hearing, Plaintiff conceded on the record that Defendants' supplemental motion was timely under S.C. Code Ann. § 15-48-130(b) and also asserted to this court that it wanted the court to proceed with the hearing on the merits. Assuming, *arguendo*, that Plaintiff did not waive this argument, there is nothing in Rule § 15-48 130 limiting Defendants from supplementing their motion to vacate in light of the arbitrator's undisclosed conflict which was not known to Defendants at the time of the parties' first hearing to vacate the arbitration award.

### CONCLUSION

For all the reasons set forth herein, Defendants respectfully request this court deny Plaintiff's motion without oral argument pursuant to Rule 59(f), SCRCivP.

FUTERAL & NELSON, LLC



Stephan V. Futeral, Esquire  
S.C. Bar ID 66427  
Post Office Box 1543  
Mt. Pleasant, South Carolina 29465-1543  
Telephone (843) 284-5500 ext. 225  
Facsimile (843) 284-5501 sub. 225  
email to: sfuteral@charlestonlaw.net

Dated: 6/13/11

Attorney for Defendants

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.,

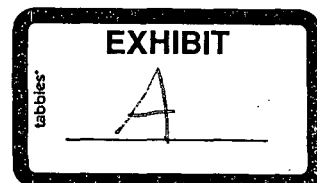
3<sup>rd</sup> Party Defendants.

IN THE COURT OF COMMON PLEAS  
11<sup>th</sup> JUDICIAL CIRCUIT  
CASE NO.: 09-CP-32-00973

AFFIDAVIT OF  
GARY PICKREN, ESQ.

PERSONALLY, appeared before me, Gary Pickren, Esquire, who after being duly sworn,  
deposes and says that:

1. I am the Attorney for the Defendants in the abovementioned action.
2. I am writing this affidavit to clarify any confusion regarding the events surrounding the parties' selection of James Brunner, Esq. as an arbitrator in this case.
3. Initially, the parties chose Frank Smith, Esq. as their arbitrator.
4. On May 5, 2010, Frank Smith, Esq. supplemented his conflicts disclosure by informing the parties that he was representing a client that was adverse to GS2, Inc., but that the matter was not in litigation and that he did not believe the matter would affect his impartiality.
5. On May 5, 2010, counsel for Defendants wrote that Defendants did not see any conflict regarding Frank Smith.

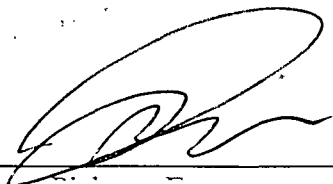


6. On May 5, 2010, counsel for Plaintiff also wrote that Plaintiff did not see any conflict. See **Exhibit B** attached to Defendants Motion to Vacate filed March 2, 2011.

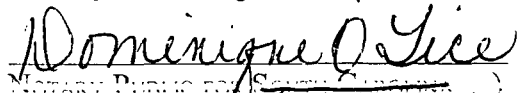
7. On or about May 6, 2010, I received a telephone call from Plaintiff's counsel during which time Plaintiff's counsel informed me that Plaintiff believed Frank Smith, Esq. had a conflict and that Plaintiff insisted Frank Smith recuse himself from serving as the parties' arbitrator.

8. On May 7, 2010, my co-counsel, Stephan Futeral, Esq., wrote Plaintiff's counsel objecting to Plaintiff's change in position regarding Frank Smith as the parties' mediator. See attached **Exhibit A** incorporated herein by reference.

9. Because Plaintiff insisted that Frank Smith recuse himself, Mr. Smith declined to serve as the parties' arbitrator, thereby precipitated the use of James Brunner as the arbitrator in this case.

  
\_\_\_\_\_  
Gary Pickren, Esq.

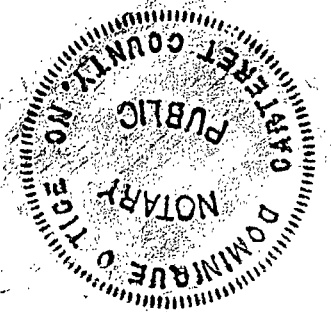
SWORN to and subscribed before me  
this 9 day of June, 2011.

  
\_\_\_\_\_  
Notary Public for North Carolina

my commission expires.

DOT 04-18-2015

NOTARY SEAL



## Stephan Futeral

---

**From:** Stephan Futeral  
**Sent:** Friday, May 07, 2010 1:56 PM  
**To:** jderrick@windstream.net  
**Cc:** Frank Smith; Gary A. Pickren  
**Subject:** Crouch Arbitration

**Importance:** High



Jean:

Gary Pickren informed me that, as of yesterday, your client is asserting that Frank Smith should recuse himself. We withdrew our motion and took certain actions predicated upon your client's agreement to select Mr. Smith. Moreover, in response to Mr. Smith's disclosure of contacts with Dennis Corp and GS2, you wrote that your client was "fine". Therefore, we do not consent to selecting another arbitrator. If your client insists that Mr. Smith recuse himself, then we ask that your client articulate the reasons for its change in position. Also, kindly forward to me your client's list of witnesses that Mr. Smith asked us all to provide on April 16<sup>th</sup>.

Sincerely,  
Stephan V. Futeral, Esq.  
Certified Civil & Family Court Mediator  
Futeral & Nelson, LLC  
1004 Anna Knapp Blvd., Mt. Pleasant, SC 29464  
Local 843-284-5500 Local | Toll Free 877-913-5500 | Fax 843-284-5501  
[www.charlestonlaw.net](http://www.charlestonlaw.net)

The information contained in this e-mail message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the recipient of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both state and federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any request for advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter described in a communication. Thank you.



1 STATE OF SOUTH CAROLINA ) COURT OF COMMON PLEAS  
2 )  
3 COUNTY OF LEXINGTON ) C/A: 2009-CP-32-00973  
4 )  
5 Crouch Construction Company, )  
6 Inc., )  
7 Plaintiff, )  
8 v. )  
9 Bryan Causey, Celebrations of )  
0 Columbia, LLC, and Causey )  
1 Consulting, LLC, )  
2 Defendants/Third Party Plaintiffs, )  
3 v. )  
4 GS2 Engineering and Environmental )  
5 Consultants, Inc., Gist, Inc., )  
6 Third Party Defendants. )

\* \* \* \* \*

The arbitration before James Bruner, was taken at Bruner Powell, 1735 St. Julian Place, Suite 200, Columbia, South Carolina on the 3rd day of November, 2010 before Suzanne R. Bryant, Court Reporter and Notary Public in and for the State of South Carolina.

## APPEARANCES:

1

2

3 Jean P. Derrick, Esquire

4 Attorney at Law

5 205 West Main Street

6 Lexington, South Carolina 29072

7 Attorney for the Plaintiff

8

9 Stephan V. Futeral, Esquire

10 Futeral &amp; Nelson, LLC

11 1004 Anna Knapp Boulevard

12 Mount Pleasant, South Carolina 29464

13 Attorney for the Defendant/Third Party Plaintiff

14

15

16

17

18

1 MR. FUTERAL: Now, as far as -- your -- obviously  
2 it's your decision whether you want to treble  
3 this, do whatever, you'd have to find it's  
4 willful, you know, all that -- you've heard  
5 everybody over the course of three days. I'm  
6 not recap all of that. We have not at this  
7 stage expressed to you exactly -- I'd like to  
8 do some research on the issue, if it helps any,  
9 of what happens when you have a mechanic lien,  
10 which is one way obviously prevailing party;  
11 you have a contract, which also provides for  
12 attorneys fees; and you have an Unfair Trade  
13 Practices claim that applies as well. I can't  
14 -- as I sit here today, I don't know that I  
15 could firmly -- I could sound convincing, but  
16 I don't know, without doing reasonable  
17 research, how that should work. And a lot of  
18 times it's just going to a mechanics lien or a  
19 breach of contract or what have you. But, you  
20 know, it's an issue in this case and it can  
21 make a difference. I don't know if it's -- so  
22 I don't know. I don't know. We'll know -- if  
23 we had to -- let me just say this. In  
24 different types of cases where there is  
25 attorneys fees awarded, like a UTPA claim and

1 I've made a few, okay, and then, say, breach of  
2 contract and this is not as a legal matter, but  
3 in trials I've had the judge before say, you  
4 know, this is how I view those things, okay.  
5 You didn't prevail on your UTPA claim, no  
6 attorney fees, no attorneys fees. Very seldom  
7 would an attorney say \$10,000 for UTPA, \$30,000  
8 for this. Either you've got it or you don't.  
9 So this is a different animal though because of  
10 the way you have to calculate who's the  
11 prevailing party under the statute, versus how  
12 you would calculate who's prevailing under a  
13 contract or UTPA claim. I'm raising more  
14 questions than giving answers.

15 THE COURT: It's fair enough. If it was easy,  
16 anybody could do it.

17 MR. FUTERAL: Exactly. Or you'd be telling me and  
18 us. But I would ask, if you would, to at least  
19 explore that. There maybe nothing out there on  
20 this. I don't know.

21 THE COURT: In other words, he wants as little bit  
22 of time to do research on the question of  
23 competing claims for attorneys fees.

24 MS. DERRICK: You know, I think that's anticipatory  
25 and I don't think we're going to have that

1 problem.

2 THE COURT: Well, I don't know if you're going to  
3 have that problem, but it is --

4 MS. DERRICK: After you make your decision, if he  
5 still wants to do that, then all right.

6 THE COURT: Then what I might do is simply say if  
7 you want two extra days --

8 MR. FUTERAL: Well, I'm going to get it as soon as I  
9 get back to the office.

10 THE COURT: That's right.

11 MR. FUTERAL: It's not like that's going to take 10  
12 days to do that. I guess --

13 THE COURT: I know what the standard is for  
14 attorneys fees under the mechanics lien under  
15 the statute. There's an old case, IN RE:  
16 Seconger that dealt with it under the common  
17 law standards for the prevailing party. But I  
18 think there might have been a subsequent case  
19 about that and if you want to research that and  
20 let me look at that --

21 MS. DERRICK: About the standard for the prevailing  
22 party reasonable?

23 THE COURT: In a contract.

24 MS. DERRICK: My Supreme Court ruling, ??? --

25 THE COURT: The attorneys fees got to be reasonable

1           --

2   MS. DERRICK:  -- decided that.

3   THE COURT:  -- but what is the -- how do you decide  
4           who is the prevailing party under common law in  
5           the contract case.  And in IN RE: Seconger  
6           said basically, if you are a contractor, in  
7           that case both of them -- and you get any award  
8           whatsoever, you're the prevailing party.  I'm  
9           not so sure there hasn't been another case that  
10          they've elaborated a little bit more --

11  MR. FUTERAL:  Okay.

12  THE COURT:  -- and said that if you are a party who  
13          has obtained substantially the result that you  
14          sought to achieve, then you are the prevailing  
15          party.

16  MS. DERRICK:  That's right.  That was my Supreme  
17          Court case, ??? --

18  THE COURT:  Was that yours?

19  MS. DERRICK:  -- issued about three years ago.

20  THE COURT:  Okay.

21  MS. DERRICK:  The -- it was a statute of clause real  
22          estate contract declared unenforceable because  
23          of the statute of clause and the Master -- and  
24          the Master wouldn't give us attorneys fees.  
25          But we went all the way up to the Court of

1 Appeals who confirmed and the Supreme Court  
2 confirmed and gave us attorneys fees, even  
3 though the contract was unenforceable.

4 THE COURT: Email me a copy of that.

5 MS. DERRICK: Sure. It was fully discussed about  
6 who was the prevailing party and that was --

7 THE COURT: And what we will do is, once I -- what I  
8 intend to -- well, let me make a few comments,  
9 first of all, since both of your clients are  
10 here I like to do this if it's warranted when  
11 they're here. Both of you folks have very fine  
12 lawyers and they have done a first-class job  
13 representing your interest in this matter.  
14 I've been doing this for 35 years and I know  
15 the difference between a lawyer doing a good  
16 job and a lawyer not being prepared. And  
17 that's not the case here. These are both --  
18 lawyers have done a very good job and both  
19 very well prepared. You've seen all the issues  
20 debated back and forth, and that's what it's  
21 about. They've done a very good job and it's  
22 a pleasure to work with lawyers who are  
23 prepared and can answer your questions. Now,  
24 it is immaterial that from time to time we get  
25 a little testy with each other. It's only part

1 of the process, but that's not indicative at  
2 all of their ability to represent you and  
3 represent you well. I'll tell you, I don't  
4 know what my decision will be. I've got to sit  
5 down and go through all this stuff and I've got  
6 to weigh that paperweight back there. But I've  
7 set aside all day tomorrow to do that while  
8 everything is fresh in my mind. So I  
9 anticipate it will probably be Monday because  
10 you've sufficiently confused me. It's going to  
11 take some of the weekend, but -- to read  
12 through this and make sure I've got my thoughts  
13 straight. So it will probably be Monday before  
14 I will notify you that I've got the award  
15 ready. I will notify you by email and I will  
16 send you a copy of the bill. When you have  
17 both paid that, then I will -- I will email --  
18 no, no, excuse me. I want you to -- do you  
19 want to see the award before you submit your  
20 affidavit for fees? I originally suggested to  
21 you that you give me the affidavit of fees and  
22 summary of costs when I tell you that I've got  
23 the award ready. I don't want it before that  
24 time --

25 MR. FUTERAL: Sure.

1 THE COURT: I would like -- does that suit you to  
2 present it to me at that time?

3 MR. FUTERAL: Sure.

4 THE COURT: I would like to have it then.

5 MS. DERRICK: Okay.

6 THE COURT: So then what I will present to you after  
7 I review that and you exchange that  
8 information, I will present a complete award.  
9 I will use a general verdict form. Do -- let  
10 me ask you this. Do you want me to break out  
11 the award for fees and costs or not? If you --  
12 well, do you have any preference?

13 MS. DERRICK: Probably, I think that would be  
14 helpful.

15 THE COURT: I think probably it would be. And it's  
16 not whether it's helpful, it's in this type of  
17 situation with a mechanics lien, if this were  
18 in court, you would know --

19 MR. FUTERAL: Who got -- you're entitled to this --

20 THE COURT: That's right.

21 MR. FUTERAL: -- you got that.

22 THE COURT: That's right. So I'll plan on doing it  
23 that way. So you can pretty much expect that  
24 probably on Monday I will -- if not before, I  
25 will notify you that the award is ready.

1 MR. FUTERAL: Okay.

2 THE COURT: And you can send me your affidavits of  
3 fees and costs and then we'll move on from  
4 there. Any questions, anything we need to  
5 address?

6 (There being nothing further, the arbitration  
7 concluded at 7:33 p.m.)

Crouch Construction v Causey et.al partial transcript hrg

STATE OF SOUTH CAROLINA       )  
                                      )  
COUNTY OF LEXINGTON        )     COURT OF COMMON PLEAS  
                                      )  
                                      )     C/A: 2009-CP-32-00973

Crouch Construction Company,       )  
Inc.,                                )  
                                      )  
Plaintiff,                         )  
                                      )  
v.                                    )  
                                      )  
Bryan Causey, Celebrations of       )  
Columbia, LLC, and Causey        )  
Consulting, LLC,                    )  
                                      )  
Defendants/Third Party Plaintiffs,   )  
                                      )  
v.                                    )  
                                      )  
GS2 Engineering and Environmental   )  
Consultants, Inc., Gist, Inc.,     )  
                                      )  
Third Party Defendants.            )  
\_\_\_\_\_ )

PARTIAL ARBITRATION TRANSCRIPT

\*\*\*\*\*

Wednesday, November 3, 2010  
DAY TWO

The arbitration before James Bruner, was taken  
at Bruner Powell, 1735 St. Julian Place, Suite 200,  
Columbia, South Carolina on the 3rd day of November,  
2010 before Suzanne R. Bryant, Court Reporter and  
Notary Public in and for the State of South Carolina.  
□

APPEARANCES:

Jean P. Derrick, Esquire  
Attorney at Law  
205 West Main Street  
Lexington, South Carolina 29072  
Attorney for the Plaintiff

Stephan V. Futeral, Esquire  
Futeral & Nelson, LLC  
1004 Anna Knapp Boulevard  
Mount Pleasant, South Carolina 29464  
Gary A. Pickren, Esquire  
Harvey, Casterline & Vallini, LLP  
900 Elmwood Avenue, Suite 200  
Columbia, South Carolina 29201  
Attorneys for the Defendant/Third Party Plaintiff

James Edward Bradley, Esquire  
Moore, Taylor & Thomas  
1700 Sunset Boulevard

INDEX

Certificate . . . . .4

EXHIBITS

(There were no exhibits attached to  
the partial transcript.)

□ ARBITRATOR: I'm Jim Bruner. It's nice to see you  
again, Margaret.

MS. MORRISON: Margaret Morrison, my pleasure.

ARBITRATOR: How have you been?

MS. MORRISON: Okay. May I sit here?

ARBITRATOR: Yes, that's your seat.

MS. DERRICK: That's where we want to put you. All  
right.

ARBITRATOR: Number Twenty-Six?

COURT REPORTER: Uh-huh (affirmative response). Yes.  
(Plaintiff's Exhibit Number Twenty-Six was marked for  
identification purposes.)

ARBITRATOR: Ms. Morrison, would you raise your  
right hand, please?

MS. MORRISON: Yes, sir.

MARGARET MORRISON, having been duly sworn, testifies  
as follows:

MS. MORRISON - DIRECT EXAMINATION BY MS. DERRICK:

Q: You are Margaret Morrison?

A: I am.

Q: And where are you employed?

A: By Terratec, Incorporated.

(End of partial transcript.)

## Jean Derrick

---

**From:** Jim Bruner [JBruner@brunerpowell.com]  
**Sent:** Friday, March 18, 2011 12:43 PM  
**To:** rcothranlc@sccourts.org  
**Cc:** Jean Derrick; Stephan Futeral  
**Subject:** Crouch Construction v. Causey, et. al.; Case No. 09-CP-32-9973  
**Attachments:** Judge.ltr.pdf; Affidavit.pdf

Judge Cothran:

I was the arbitrator in this case. Since the Defendant has now attacked my personal and professional integrity, please find attached a short letter and my affidavit.

*Jim Bruner*

James L. Bruner

### **BRUNERPOWELL**

Bruner Powell Wall & Mullins, LLC  
1735 St. Julian Place, Suite 200  
P. O. Box 61110  
Columbia, SC 29260  
(803) 252-7693  
1 (888) 522-7408 (Fax)  
[jbruner@BrunerPowell.com](mailto:jbruner@BrunerPowell.com)  
[www.BrunerPowell.com](http://www.BrunerPowell.com)

**PRIVILEGED AND CONFIDENTIAL:** This electronic message (including any attachments) is intended only for the use of the individual or entity to which it is addressed and may contain information that is attorney-client privileged, may be confidential work product, or may be exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is wrongful, is strictly prohibited, and may subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at 803-252-7693 or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.

**IRS CIRCULAR 230 DISCLOSURE:** To ensure compliance with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties that may be imposed by the IRS or to promote, market or recommend to any party any tax-related matter addressed herein. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addresses in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW

1735 ST. JULIAN PLACE, SUITE 200

POST OFFICE BOX 61110

COLUMBIA, SOUTH CAROLINA 29260-1110

TELEPHONE 803-252-7693

FAX 803-254-5719

WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.  
WARREN C. POWELL, JR., P.A.\*  
HENRY P. WALL, P.A.  
E. WADE MULLINS, III, P.A.  
BRIAN P. ROBINSON, P.A.  
WESLEY D. PEEL, P.A.

JOEY R. FLOYD, P.A.  
WILLIAM D. BRITT, JR., P.A.

LEAH EDWARDS GARLAND  
BENJAMIN C. BRUNER  
MATTHEW H. STABLER

AUTHOR'S E-MAIL: [JBruner@brunerpowell.com](mailto:JBruner@brunerpowell.com)

AUTHOR'S DIRECT FAX: (888) 522-7408

March 18, 2011

**VIA ELECTRONIC AND**  
**FIRST CLASS MAIL**

Honorable R. Ferrell Cothran, Jr.  
16 North Brooks Street  
Manning, SC 29102  
[rcothranlc@sccourts.org](mailto:rcothranlc@sccourts.org)

Re: ***Crouch Construction v. Bryan Causey, et. al.***  
**Case No 09-CP-32-009973**

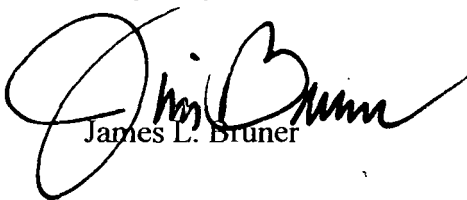
---

Dear Judge Cothran:

I understand that you are to hear motions in the above-referenced case on March 22, 2011. I was the arbitrator in this case. From the post-award motions I have seen, the Defendant is accusing me of unethical conduct and failure to disclose conflicts of interest. Normally, I would not respond to any post-award motions the parties may make after I render an arbitration award. However, in this instance my personal and professional integrity have been attacked. Consequently, I am enclosing my affidavit. I am sending the parties a copy of this affidavit as well.

With my kindest regards, I am

Very truly yours,



James L. Bruner

JLB/gd  
Enclosure

CC: Stephan V. Futeral, Esq./ [sfuteral@charlestonlaw.net](mailto:sfuteral@charlestonlaw.net)  
✓ Jean P. Derrick, Esq./ [jderrick@windstream.net](mailto:jderrick@windstream.net)  
(w/enclosure)

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )

**IN ARBITRATION**

Crouch Construction Company, Inc., )  
 )  
Plaintiff, )

Case No. 09-CP-32-00973

vs. )

**AFFIDAVIT OF  
JAMES L. BRUNER**

Bryan Causey, Celebrations of )  
Columbia, LLC and Causey )  
Consulting, LLC, )  
 )  
Defendants. )

PERSONALLY APPEARED BEFORE ME the undersigned James L. Bruner, who, being  
duly sworn, deposes and says:

1. I am over the age of 18 years and am competent to make this affidavit.
2. I have been a member in good standing of the South Carolina and American Bar Associations since 1975. I am admitted to practice before the Supreme Court of South Carolina (1975), the United States District Court for the District of South Carolina (1975), the United States Court of Appeals for the Fourth Circuit (1977), the United States Court of Federal Claims (2010) and the Supreme Court of the United States of America (2010).
3. I have been rated "AV" by Martindale-Hubbell for 20 years and I am listed in the Best Lawyers in America under construction law. I am a former member of the arbitration panel of the American Arbitration Association.
4. I was asked by the attorneys in the above-captioned case to be their arbitrator and I agreed to do so. I served as arbitrator through the hearings which were held in my office on November 2, 3 and 4, 2010 and thereafter rendered my written Award. At the hearings, the parties agreed on a

general verdict form of award and that is what I rendered. Thereafter, the Defendant requested a more detailed award of findings of fact and conclusions of law. After consultation with the parties, I prepared and issued an Amended Arbitration Award.

5. On March 2, 2011, I received a copy of a Motion to Vacate the award alleging that I had failed to disclose that a member of my law firm, Joey Floyd, was the brother of an employee of GS2. GS2 was not a party to the case I arbitrated but did present witnesses who testified. GS2 was the Defendant's engineer on the project in question.

6. I did not know that my partner had a brother or that he worked for GS2. So, I called my partner and found out that he did have a brother who worked for GS2. Before March 2, 2011, I had no knowledge of either fact and I communicated that information to both parties.

7. When I accepted the parties' request to be their arbitrator, I ran a conflicts check through our TABS system of the parties listed in the caption above. The conflicts check revealed no information or relationship between either me or my firm as to any party in the case.

8. Subsequently, the parties submitted to me a list of potential witnesses in the arbitration. It is attached as Exhibit A to this Affidavit. I reviewed this list personally to make sure that I had no relationships with any witnesses which would require disclosure to the parties. I did not.

9. On October 15, 2010, I received an updated witness list from the Defendant a copy of which is attached as Exhibit B to this Affidavit. I again reviewed this list personally to make sure that I had no relationships with any witnesses which would require disclosure to the parties. Once again, I did not.

10. I did not run either of these witness lists through our TABS conflict system because the persons listed were not parties to the case. They were described to me solely as potential witnesses

and, in fact, many of them were not called to testify. I did review each list personally.

11. Since the facts that my law partner had a brother and that he was employed by a company who provided two witnesses during the hearings were not known to me until well after the case was over, those facts had absolutely no bearing on the decision I rendered.

12. Moreover, I have now received a copy of a supplemental memorandum accusing me of failing to disclose that I brought suit against one of the expert witnesses called to testify, Terratec, Inc. My records reflect that I did bring a lawsuit against Terratec and others on behalf of a young homeowner ten (10) years before the arbitration.

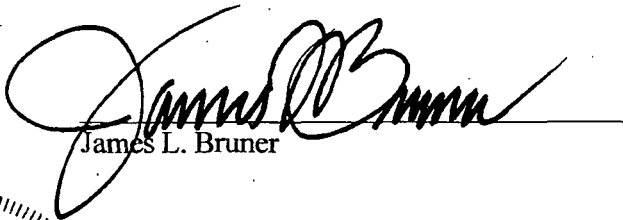
13. Neither Terratec nor Margaret Morrison, its President, was listed as a witness to me in advance of the hearings. Mrs. Morrison was, in fact, called as a witness by the Plaintiff and did not testify favorably for the Defendants. If I had recalled my prior lawsuit against Terratec when Mrs. Morrison was called as a witness, I would certainly have advised the parties of that fact. However, the prior lawsuit did not register in my mind when she was called as a witness because I was focusing on the case and the facts at hand.

14. I take my ethical responsibilities as an attorney as an arbitrator very seriously. I believe that I have fully complied with those ethical responsibilities.

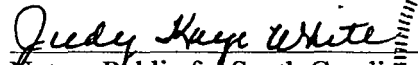
15. I could not have disclosed my law partner's brother's employment with GS2 because I did not know my partner had a brother until it was brought to my attention in the motion filed by the Defendant which I first saw on March 2, 2011.

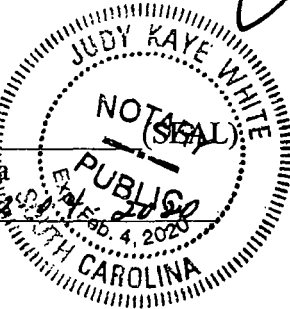


FURTHER AFFIANT SAYETH NOT.

  
James L. Bruner

SWORN to before me this 18th  
day of March, 2011.

  
Notary Public for South Carolina  
My Commission Expires: 02/04/2020



WITNESS LIST

Roger Crouch  
P. O. Box 1023  
Irmo, SC 29063

Skeet Crouch  
P. O. Box 1023  
Irmo, SC 29063

Ben Kelly  
c/o Harman Family Trust  
Lexington, SC

Ken Timmerman  
Kyzer & Timmerman  
580 Chris Drive  
W. Columbia, SC 29169

Scott Cursey  
1200 Veterans Road  
Columbia, SC 29209

Rock Yaulla  
ETC, Inc.  
Columbia, SC

Cleve Graham  
c/o Gist, Inc.

Ted Wingard  
810 Sunset Blvd.  
W. Columbia, SC 29169

Mike Epting  
1055 Loveless Lane  
Chapin, SC 29036

Larry Redmond  
165 Glenda Court  
Lexington, SC 29073

Randy Waddell

c/o Gist

Jimmy Gist  
c/o Gist

Melvin Portee  
1200 Veterans Road  
Columbia, SC 29209

Robert Bruorton  
1200 Veterans Road  
Columbia, SC 29209

Ryan MacDonald  
1200 Veterans Road  
Columbia, SC 29209

Mark W. King  
1200 Veterans Road  
Columbia, SC 29209

Stu Ware  
1200 Veterans Road  
Columbia, SC 29209

George Sembos  
GS2 Engineering & Environmental  
Consultants, Inc.  
241 Business Park Boulevard  
Columbia, SC 29203

## WITNESS LIST

1. Robert Bruorton  
1200 Veterans Road  
Columbia, SC 29209
2. Bryan Causey  
830 West Sunset Blvd  
Columbia, South Carolina 29169
3. Jamie Causey  
830 West Sunset Blvd  
Columbia, South Carolina 29169
4. Marcus Croswell  
National Bank of South Carolina  
P.O. Box 1457  
Columbia, South Carolina 29202
5. Roger Crouch  
P. O. Box 1023  
Irmo, SC 29063
6. Skeet Crouch  
P. O. Box 1023  
Irmo, SC 29063
7. Scott Cursey  
1200 Veterans Road  
Columbia, SC 29209
8. Dan Dennis  
Dennis Corporation  
500 Thurmond Mall, Suite 114,  
Columbia, South Carolina 29201
9. Kenny Edward  
140 Crouch Commercial Court  
Irmo, South Carolina 29063
10. Mike Edwards  
Dial, Dunlap, & Edwards, LLC  
1122 Barnwell Street  
Columbia, South Carolina 29201
11. Mike Epting  
1055 Loveless Lane  
Chapin, SC 29036
12. Jimmy Gist  
c/o Gist
13. Cleve Graham  
c/o Gist, Inc.
14. Jay Grimsley, Jr.  
Southern Heating and Air  
Conditioning, Inc.  
2744 Millwood Avenue  
Columbia, South Carolina 29205
15. Ben Kelly  
c/o Harman Family Trust  
Lexington, SC
16. Mark W. King  
1200 Veterans Road  
Columbia, SC 29209
17. D.S. Koon  
Southern Heating and Air  
Conditioning, Inc.  
2744 Millwood Avenue  
Columbia, South Carolina 29205
18. Jeffery Kremlick,  
GS2 Engineering & Environmental  
Consultants, Inc.  
1200 Veterans Road  
Columbia, South Carolina 29209
19. Ryan MacDonald  
1200 Veterans Road  
Columbia, SC 29209
20. Janice Pendley  
133 Tarrar Springs Road  
Lexington, South Carolina 29072

## WITNESS LIST

21. Melvin Portee  
1200 Veterans Road  
Columbia, SC 29209
22. Larry Redmond  
165 Glenda Court  
Lexington, SC 29073
23. Len Roberson  
Roberson Engineering  
Post Office Box 527  
Whiterock, SC 29177
24. George Sembos  
GS2 Engineering & Environmental  
Consultants, Inc.  
241 Business Park Boulevard  
Columbia, SC 29203
25. David Smith,  
Staley Co.  
2517 Laurel St,  
Columbia, South Carolina 29204
26. Ken Timmerman  
Kyzer & Timmerman  
580 Chris Drive  
W. Columbia, SC 29169
27. Ross Travis, PE  
Dennis Corporation  
500 Thurmond Mall, Suite 114  
Columbia, South Carolina 29201
28. Randy Waddell  
c/o Gist
29. Stu Ware  
1200 Veterans Road  
Columbia, SC 29209
30. Ronald Weathers  
Weathers Contracting, Inc.  
P.O. Box 3699  
West Columbia, South Carolina  
29171
31. Ted Wingard  
810 Sunset Blvd.  
W. Columbia, SC 29169
32. Rock Yaulla  
ETC, Inc.  
Columbia, SC
33. Michael Zinna,  
Weathers Contracting, Inc.  
P.O. Box 3699 - West Columbia,  
South Carolina - 29171

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

)  
)  
)

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Crouch Construction Co.,  
Inc.,

)  
)  
)

2009-CP-32-0973

Plaintiff,

)  
)  
)

vs.

Bryan Causey, Celebrations  
of Columbia, LLC, and Causey  
Consulting, LLC,

)  
)  
)

AFFIDAVIT OF ROGER CROUCH

Defendants/Third Party  
Plaintiffs,

)  
)  
)

vs.

GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.,

)  
)  
)

Third Party Defendants.

)  
)  
)

)  
)  
)

PERSONALLY APPEARED before me, Roger Crouch who, first being  
duly sworn, deposes and says:

1. I am the sole shareholder of Crouch Construction  
Company, Inc.

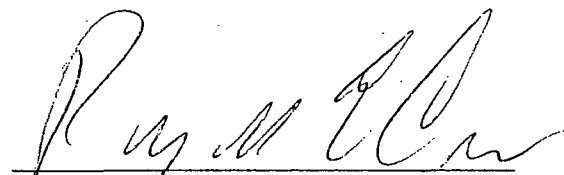
2. The only parties to the arbitration to resolve the  
dispute concerning the contract with Brian Causey were Crouch  
Construction Company, Inc., Celebrations of Columbia, LLC, and  
Causey Consulting, LLC.

3. I do not know Jason Floyd or Joey Floyd. The only GS2  
employee I know is Chad Bruorton.

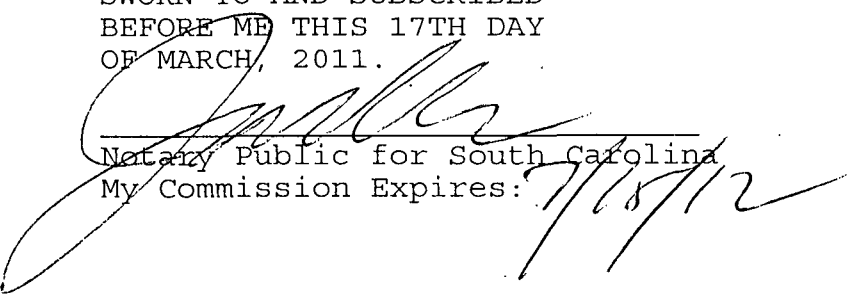
4. I was of course present throughout the entire  
arbitration proceedings. To my personal observation, the  
arbitrator conducted the proceedings efficiently, even-handedly  
and fairly.

5. In addition, to expert witnesses from GS2 (George Sembos and Chad Bruorton), Crouch Construction Company also presented the testimony of its engineers Kenneth Timmerman and Len Roberson, as well as Margaret Morrison of Tera Tec. All of these witnesses testified that the foundation of the warehouse Crouch Construction Company, Inc., constructed for Celebrations of Columbia, LLC was in good condition, and just showing some minor, normal cracks for settling, which is common to all concrete foundations.

FURTHER DEPONENT SAYETH NOT.

  
\_\_\_\_\_  
ROGER CROUCH

SWORN TO AND SUBSCRIBED  
BEFORE ME THIS 17TH DAY  
OF MARCH, 2011.

  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: 7/18/12

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

IN THE COURT OF COMMON PLEAS

Crouch Construction Company, Inc., )  
Plaintiff, )

C/A No. 09-CP-32-00973

vs. )

Bryan Causey, Celebrations of Columbia, )  
LLC, and Causey Consulting, LLC, )  
Defendants/Third Party Plaintiffs, )

**AFFIDAVIT OF GEORGE A. SEMBOS**

vs. )

GS2 Engineering and Environmental )  
Consultants, Inc., and Gist, Inc., )  
Third Party Defendant. )

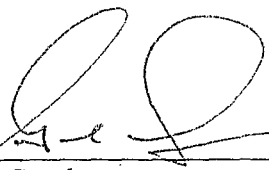
The affiant being duly sworn testifies as follows:

1. I am over the age of 18 and otherwise qualified to give sworn testimony in Court.
2. I am the President of GS2 Engineering & Environmental Consultants, Inc.
3. I have recently been told that Jayson Floyd, who is an employee of GS2, has a brother who works at the law firm of Bruner, Powell, Wall & Mullins.
4. Jayson Floyd came to work for GS2 in August of 2009. Although I know Jayson Floyd as an employee of GS2, I did not know that he had a brother. I did not know that his brother was a lawyer. I did not know that his brother worked at Bruner, Powell, Wall & Mullins.
5. This is not unusual. GS2 has approximately 90 employees. There is no way I could know what about all their families.

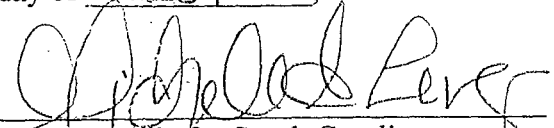
6. Jayson Floyd had absolutely nothing whatsoever to do with this project. He was not involved in the engineering work that GS2 did. He was not involved in the lawsuit at all.

7. I have never even discussed this matter with Jayson Floyd, and, until my lawyer told me there was some question raised about Jayson Floyd's brother, I did not know that Jayson Floyd had a brother, that his brother was a lawyer, or that his brother was a lawyer at Bruner, Powell, Wall & Mullins.

FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
George A. Sembos

SWORN to before me this 17  
day of March, 2011

  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: My Commission Expires June 2, 2014

## Jean Derrick

---

**From:** Frank Smith [FSmith@RichardsonPlowden.com]  
**Sent:** Thursday, April 29, 2010 4:38 PM  
**To:** 'Stephan Futeral'; jderrick@windstream.net  
**Cc:** garyp@hcvlaw.com  
**Subject:** RE: Crouch Arbitration  
**Attachments:** image001.gif

thanks

---

**From:** Stephan Futeral [mailto:sfuteral@charlestonlaw.net]  
**Sent:** Thursday, April 29, 2010 2:57 PM  
**To:** Frank Smith; jderrick@windstream.net  
**Cc:** garyp@hcvlaw.com  
**Subject:** Crouch Arbitration



Attorneys Serving the Lowcountry

Please note that the property owner consents to arbitration.

Sincerely,  
Stephan V. Futeral, Esq.  
Certified Civil & Family Court Mediator  
Futeral & Nelson, LLC  
1004 Anna Knapp Blvd., Mt. Pleasant, SC 29464  
Local 843-284-5500 Local | Toll Free 877-913-5500 | Fax 843-284-5501  
[www.charlestonlaw.net](http://www.charlestonlaw.net)

-----  
The information contained in this electronic message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both State and Federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication. Thank you.

-----

**Sandra Shaw**

---

**From:** Stephan Futeral [sfuteral@charlestonlaw.net]  
**Sent:** Monday, October 25, 2010 3:19 PM  
**To:** Jim Bruñer  
**Cc:** garyp@hcvlaw.com; Sandra Shaw; jderrick@windstream.net  
**Subject:** RE: CROUCH VS. CELEBRATIONS, ET.AL.



Attorneys Serving the Lowcountry

Dear Jim:

Pursuant to our conversation this afternoon, we consent to add the owner as a party to the arbitration without prejudice to the Defendants claims against GS2 in circuit court.

Sincerely,

Stephan V. Futeral  
Attorney at Law, Certified Civil & Family Court Mediator  
Futeral & Nelson, LLC  
1004 Anna Knapp Blvd., 2nd Floor  
Mt. Pleasant, SC 29464  
Telephone (843) 284-5500  
Toll Free (877) 913-5500  
Facsimile (843) 284-5501 sub. 225  
<http://www.charlestonlaw.net>

-----  
The information contained in this electronic message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both State and Federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication. Thank you.

-----

---

**From:** Stephan Futeral  
**Sent:** Friday, October 22, 2010 5:15 PM  
**To:** Sandra Shaw; Jean P. Derrick (jderrick@windstream.net)  
**Cc:** 'Gary Pickren (garyp@hcvlaw.com)'  
**Subject:** RE: CROUCH VS. CELEBRATIONS, ET.AL.



Attorneys Serving the Lowcountry

Jean:

## Jean Derrick

---

**From:** Stephan Futeral [sfuteral@charlestonlaw.net]  
**Sent:** Tuesday, June 15, 2010 12:11 PM  
**To:** Jean Derrick; sleventis01@windstream.net  
**Cc:** garyp@hcvlaw.com  
**Subject:** RE: Crouch Discovery  
**Attachments:** image001.gif

**Importance:** High



Attorneys Serving the Lowcountry

I am unable to confirm Mr. Cisa's availability. After further consideration, we will consent to use Jim Brunner. Please confirm that tomorrow's hearing has been cancelled.

Sincerely,  
Stephan V. Futeral, Esq.  
Certified Civil & Family Court Mediator  
Futeral & Nelson, LLC  
1004 Anna Knapp Blvd., Mt. Pleasant, SC 29464  
Local 843-284-5500 Local | Toll Free 877-913-5500 | Fax 843-284-5501  
[www.charlestonlaw.net](http://www.charlestonlaw.net)

-----  
The information contained in this electronic message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both State and Federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication. Thank you.  
-----

-----  
**From:** Jean Derrick [mailto:jderrick@windstream.net]  
**Sent:** Monday, June 14, 2010 3:44 PM  
**To:** Stephan Futeral  
**Subject:** RE: Crouch Discovery

Thanks for your discovery responses. Please go ahead and reimburse me for the copying charges I incurred in responding to your discovery requests. The bill was enclosed with the responses. Frank Cisa is agreeable as an arbitrator. Can your office arrange a conference call so we can schedule a hearing? Jean-D.

-----  
**From:** Stephan Futeral [mailto:sfuteral@charlestonlaw.net]  
**Sent:** Tuesday, June 08, 2010 2:09 PM  
**To:** jderrick@windstream.net; sleventis01@windstream.net  
**Cc:** Gary A. Pickren  
**Subject:** Crouch Discovery

cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication. Thank you.

Please consider the environment before printing.

**From:** Jean Derrick [mailto:jderrick@windstream.net]  
**Sent:** Thursday, March 03, 2011 10:55 AM  
**To:** 'Jim Bruner'  
**Cc:** Stephan Futeral  
**Subject:** RE: Crouch v. Causey

Yes, I would appreciate your doing so, Jean Derrick

**From:** Jim Bruner [mailto:JBruner@brunerpowell.com]  
**Sent:** Thursday, March 03, 2011 10:09 AM  
**To:** Stephan Futeral; Jean Derrick  
**Subject:** Crouch v. Causey

Stephan and Jean:

I have checked with my partner Joey Floyd and find that he does indeed have a brother by the name of Jason who now works at GS2. Today is the first I knew of this. Joey also tells me that he has sued GS2 in the past, see *Carolina Custom Construction v. Circle Bar T Demolition, et. al.*, 2008-CP-28-0516 (Kershaw County).

Our conflicts system did not reveal a hit for GS2. No partner had a conflict with the parties or their counsel. I reviewed the witness list for conflicts but did not circulate the witness list to all attorneys.

Since I did not know Joey even had a brother, much less that he worked for GS2, I could not have revealed that information up front.

If either of you wish for me to prepare an affidavit to that effect, let me know.

*Jim Bruner*

James L. Bruner

**BRUNERPOWELL**

Bruner Powell Wall & Mullins, LLC

1735 St. Julian Place, Suite 200

P. O. Box 61110

Columbia, SC 29260

(803) 252-7693

1 (888) 522-7408 (Fax)

[jbruner@BrunerPowell.com](mailto:jbruner@BrunerPowell.com)

[www.BrunerPowell.com](http://www.BrunerPowell.com)

**PRIVILEGED AND CONFIDENTIAL:** This electronic message (including any attachments) is intended only for the use of the individual or entity to which it is addressed and may contain information that is attorney-client privileged, may be confidential work product, or may be exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is wrongful, is strictly prohibited, and may subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at 803-252-7693 or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.

**IRS CIRCULAR 230 DISCLOSURE:** To ensure compliance with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties that may be imposed by the IRS or to promote, market or recommend to any party any tax-related matter addressed herein. In addition, if any such tax advice is used

**Jean Derrick**

---

**To:** Stephan Futeral  
**Cc:** Jim Bruner; rogercrouch; Ward Bradley; apeace@tcjps.com  
**Subject:** RE: Crouch v. Causey

You cannot attack with a sword the impartiality of the judicial officer, submitting affidavits alleging what he did or did not know, and then claim that same impartiality as a shield would prohibit a response from those directly impugned. Motions are supported by affidavits, and I believe affidavits from all concerned need to be taken. The arbitrator is not submitting an affidavit "for" either party, but I'm sure will furnish one simultaneously to both parties. We are, after all, trying to get to the truth of the fairness of the process, are we not? You have chosen to raise this spurious issue and I assure you it will be thoroughly developed. No one to date, up at least until this latest motion was filed, has done anything unethical or incorrect. Jean Derrick

**From:** Stephan Futeral [mailto:sfuteral@charlestonlaw.net]  
**Sent:** Thursday, March 03, 2011 11:45 AM  
**To:** Jim Bruner  
**Cc:** Jean Derrick; Gary A. Pickren; caus8242@bellsouth.net  
**Subject:** RE: Crouch v. Causey



Attorneys Serving the Lowcountry

Jim, I have thought over our recent emails regarding whether you should provide an affidavit to either party. The more I think about it, the more I come to the conclusion that it would not be appropriate for you to do so.

Frankly, your recent email raises more questions than it answers. For example, I find it problematic that your conflicts check did not reveal a 2008 case involving GS2 that is, as you know, a party to our lawsuit. Further, your recent email does not indicate whether you would have revealed such information had you known of it. Additionally, your email seems to raise questions regarding the timing of Jason Floyd's employment with GS2 although we understand that he was working there before you decided our case. Regardless of the answers to these and many more questions we have, the results remain the same because the integrity of the process remains in issue.

At this stage, for several reasons, it can not be said that you are acting impartially in providing an affidavit. For example, you clearly have a financial interest in the outcome of our motion that may result in the return of several thousand dollars in fees paid to you by your award. Of course, no one can stop you from giving an affidavit. However, before you sign one for Ms. Derrick or for yourself, I urge you to consider whether voluntarily providing an affidavit is fitting under these circumstances.

Sincerely,  
Stephan V. Futeral, Esq.  
Certified Civil & Family Court Mediator  
Futeral & Nelson, LLC  
1004 Anna Knapp Blvd., Mt. Pleasant, SC 29464  
Local 843-284-5500 Local | Toll Free 877-913-5500 | Fax 843-284-5501  
[www.charlestonlaw.net](http://www.charlestonlaw.net)

The information contained in this electronic message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both State and Federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and

Jim, the circumstances are regrettable, and I do not relish being placed in the position that we are in. Personally, I accept your explanation. Nonetheless, you should have included the fact and expert witnesses in your conflicts check as did Frank Smith. My client's concerns, and the "brew ha ha" that has ensued could have been avoided. The present circumstances should further illustrate to all of us the very reason why it is so crucial to make complete disclosures.

Again, I reemphasize that for purposes of our motion, why it happened and whether you were biased is immaterial. To keep tensions at a minimum I propose that everyone simmer down and let the court decide whether you are to stay uninvolved, give an affidavit, or be examined by the parties.

Sincerely,

Stephan V. Futeral, Esq.

Certified Civil & Family Court Mediator

Futeral & Nelson, LLC

1004 Anna Knapp Blvd., Mt. Pleasant, SC 29464

Local 843-284-5500 Local | Toll Free 877-913-5500 | Fax 843-284-5501

[www.charlestonlaw.net](http://www.charlestonlaw.net)

-----  
The information contained in this electronic message, including attachments, is intended only for the use of the individual or entity to which it was addressed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this communication is strictly prohibited by both State and Federal communications laws. If you have received this communication in error, please immediately notify us by telephone at the above number or by reply email to [info@charlestonlaw.net](mailto:info@charlestonlaw.net), and permanently delete the original message received by you.

IRS CIRCULAR 230 NOTICE: Any federal tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending any transaction or matter addressed in this communication. Thank you.  
-----

Please consider the environment before printing.

**From:** Jim Bruner [mailto:[JBruner@brunerpowell.com](mailto:JBruner@brunerpowell.com)]

**Sent:** Thursday, March 03, 2011 1:09 PM

**To:** Stephan Futeral

**Cc:** Jean Derrick; Gary A. Pickren; [caus8242@bellsouth.net](mailto:caus8242@bellsouth.net)

**Subject:** RE: Crouch v. Causey

Stephan:

I offered an affidavit to either party should anyone desire one. It is not inappropriate for me to offer one because with your motion, you have impugned my integrity and insuated that I was aware of something at that time that I should have disclosed. I resent the first and deny the second. If you go before a judge before whom I practice and attack my integrity, you can believe that I will defend myself.

1. When I ran a conflicts check through our system last year, I did not include either GS2, Gist or Appletree because none of those parties were parties to the arbitration.
2. I did not learn until this morning that Joey Floyd had a brother or that he worked at GS2.

3. If I had known last year when I considered conflicts that Joey had a brother who worked at GS2, I would have disclosed that fact to both parties when I reviewed the witness list. Since I did not know it, I had nothing to disclose.
4. I am now told that Joey Floyd's brother started work at GS2 in August 2009.
5. At this stage, I can tell you without reservation that I have acted impartially throughout this process and worked hard to provide an award that I believed was consistent with the facts as I found them and the law. I do not blame you for trying to advocate your client's interest. I do resent your attacking my integrity to further your client's interests.
6. If you persist in attacking me personally, you should expect me to defend myself.

Enough said.

*Jim Bruner*

James L. Bruner

BrunerPowell

Bruner Powell Wall & Mullins, LLC

1735 St. Julian Place, Suite 200

P. O. Box 61110

Columbia, SC 29260

(803) 252-7693

1 (888) 522-7408 (Fax)

[jbruner@BrunerPowell.com](mailto:jbruner@BrunerPowell.com)

[www.BrunerPowell.com](http://www.BrunerPowell.com)

**PRIVILEGED AND CONFIDENTIAL:** This electronic message (including any attachments) is intended only for the use of the individual or entity to which it is addressed and may contain information that is attorney-client privileged, may be confidential work product, or may be exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is wrongful, is strictly prohibited, and may subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at 803-252-7693 or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.

**IRS CIRCULAR 230 DISCLOSURE:** To ensure compliance with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties that may be imposed by the IRS or to promote, market or recommend to any party any tax-related matter addressed herein. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addresses in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

---

**From:** Stephan Futeral [mailto:[sfuteral@charlestonlaw.net](mailto:sfuteral@charlestonlaw.net)]

**Sent:** Thursday, March 03, 2011 11:45 AM

**To:** Jim Bruner

**Cc:** Jean Derrick; Gary A. Pickren; [caus8242@bellsouth.net](mailto:caus8242@bellsouth.net)

**Subject:** RE: Crouch v. Causey

Jean Derrick

---

**From:** Jim Bruner [JBruner@brunerpowell.com]  
**Sent:** Thursday, March 03, 2011 6:30 PM  
**To:** Stephan Futeral  
**Cc:** Jean Derrick; Gary A. Pickren  
**Subject:** RE: Crouch v. Causey

Thank you for lecturing me on how to conduct conflict checks. The fact is I had no knowledge of anything to disclose and what I did not know had no bearing on anything I decided. When you launch personal attacks on me and my integrity, do not expect me to simmer down.

*Jim Bruner*

James L. Bruner

**BRUNERPOWELL**

Bruner Powell Wall & Mullins, LLC  
1735 St. Julian Place, Suite 200  
P. O. Box 61110  
Columbia, SC 29260  
(803) 252-7693  
1 (888) 522-7408 (Fax)  
[jbruner@BrunerPowell.com](mailto:jbruner@BrunerPowell.com)  
[www.BrunerPowell.com](http://www.BrunerPowell.com)

**PRIVILEGED AND CONFIDENTIAL:** This electronic message (including any attachments) is intended only for the use of the individual or entity to which it is addressed and may contain information that is attorney-client privileged, may be confidential work product, or may be exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is wrongful, is strictly prohibited, and may subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at 803-252-7693 or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.

**IRS CIRCULAR 230 DISCLOSURE:** To ensure compliance with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties that may be imposed by the IRS or to promote, market or recommend to any party any tax-related matter addressed herein. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addresses in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

---

**From:** Stephan Futeral [mailto:[sfuteral@charlestonlaw.net](mailto:sfuteral@charlestonlaw.net)]  
**Sent:** Thursday, March 03, 2011 2:18 PM  
**To:** Jim Bruner  
**Cc:** Jean Derrick; Gary A. Pickren  
**Subject:** RE: Crouch v. Causey



Attorneys Serving the Lowcountry

**AGREEMENT FOR SERVICES**

This Agreement, made as of February 20, 2008 between GS2 Engineering & Environmental Consultants, Inc. (GS2) and Crouch Construction Company, Inc. (herein referred to as client), provides:

1. SERVICES. GS2 agrees to provide to client those certain services set forth of paragraph 2 below in connection with client's property described as follows:

Proposal for Geotechnical Exploration Services – Proposed Retail Development

West Columbia, South Carolina

2. SCOPE OF WORK. GS2 agrees to provide and client authorizes GS2 to provide the services detailed in attached estimate for the above mentioned project.

3. PAYMENT. Client agrees to pay for all services provided by GS2 and for all expenses incurred by GS2 in accordance with the attached estimate. Payment shall be due five (5) days from the date of GS2's invoice. A finance charge of 1.5% per month shall be charged on any unpaid balance more than 30 days past due, plus reasonable attorneys fees, if collected through an attorney. No deductions shall be made from our invoices on account of liquidated damages or other sums withheld from payments to others.

4. TERMS AND CONDITIONS. This Agreement shall be subject to all of the terms and conditions set forth on the reverse side hereof, which terms and conditions are expressly made a part of this Agreement and any reports issued by GS2 pursuant to this Agreement.

This Agreement accepted for:

GS2 Engineering & Environmental  
Consultants, Inc.

Chief Geotechnical Engineer, AVP

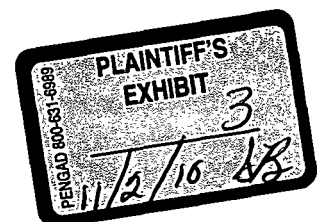
Title

Signature

Client

Title

Signature



## TERMS AND CONDITIONS

SERVICES TO BE PROVIDED: GSE will perform the above listed services at the above listed fees per item. No other services not contained in the above listed estimate will be performed. Responsibilities in the services to be performed should be reached prior to signing this Agreement. Otherwise Client should refer to the STANDARD OF CARE paragraph below. Any additional costs incurred to our undisclosed information may be added to the invoice at an agreed upon fee.

**STANDARD OF CARE:** GSE will perform its services using the degree of care and skill ordinarily accepted under similar conditions by applicable companies of our profession practicing in the same or similar locality. No other standard expected or implied is made by our estimate.

**PROFESSIONAL LIABILITY:** Client agrees that GSE's liability, and that of its officers, employees and subcontractors, in Client or any other third party's to any negligent act, error or omission or breach of contract will be limited to the our total fee or an aggregate of \$5,000, whichever ever is greater. GSE is not responsible for any damages or losses resulting on the property or a result of the property by the third or third parties before, during or after the agreed services are performed. Client agrees to indemnify GSE on these issues, and agree to pay any and all legal and income costs incurred by GSE resulting from any lawsuits from third parties concerning these issues.

**SITE OPERATIONS:** The client will arrange for right-of-way to the property for the purpose of performing the agreed services. Client represents that it possesses necessary permits and licenses required for its activities at this site. GSE is not responsible for any damages or losses resulting from the Client's lack of the above stated right-of-way, permits or licenses. Client agrees to indemnify GSE on these issues, and agree to pay any and all legal and income costs incurred by GSE resulting from any lawsuits from third parties concerning these issues.

We will take reasonable precautions to minimize damage to property caused by our operation. Our fee does not include costs for restoration due to any damage which may result.

**FORCE MAJEURE CONDITIONS:** It is possible that unforeseen conditions or occurrences may be encountered which could substantially alter necessary services or the site involved in conducting the services. If this occurs, we will promptly notify and consult the Client, but will not be bound by our judgment where that of our personnel is involved. At this point possible scenarios could include:

- 1) Complete the services according to our process, if deemed practical by GSE;
- 2) Agree with Client to change scope of services and determine cost to adjust to unforeseen conditions, must be agreed to in writing;
- 3) Terminate the services effective on the date specified by us in writing.

**SAMPLE DISPOSAL:** During samples and other samples are disposed of 30 days after submission of our report.

A. **NONHAZARDOUS SAMPLES:** At Client's written request, we will retain test specimens or samples for 30 days after our report is issued free of storage charges. After 30 days and upon written request, we will retain test specimens for a monthly per weight storage charge and paid of time. Client agrees that we are not responsible for loss of test specimens or samples retained in storage.

B. **HAZARDOUS OR POTENTIALLY HAZARDOUS SAMPLES:** In the event that samples contain hazardous constituents, we will retain such samples to the Client or provide them where they were obtained, or issuing a manifest stating the Client or the generator, have the samples disposed of at Client's direction. Client agrees that all costs incurred by GSE's handling and disposal of these samples will be paid for by the Client. Client also agrees that GSE is acting as a bailee and is not liable under the Uniform Commercial Code to hold samples.

**CLIENT DISCLOSURE:** Client agrees to inform or upon execution of this Agreement of any hazardous substances or any conditions, known or that should be known by Client, existing on, or near the site that may present a potential danger to human health, the environment or equipment. Client agrees to provide continuing information on so it becomes available to the Client in the future.

Upon entering this Agreement the Client agrees that we do not assume responsibility for reporting to any federal, state or local public agencies any conditions at the site that may present a potential danger to public health, safety or the environment. Client agrees to identify any federal, state or local public agencies as required by law, of any information that may present a danger to health, safety, or the environment.

Client understands that we may rely on any Client-provided documents in performing the services required under this Agreement; however, we assume no responsibility or liability for their accuracy.

**ENVIRONMENTAL LIABILITY:** Concerning any toxic and hazardous substances or contaminants, Client agrees to the maximum extent of the law to defend, hold harmless and indemnify GSE and its agents any and all claims and liabilities, unless caused by our sole negligence or willful acts resulting from:

- 1) Client's violation of any federal, state or local statute, regulation or ordinance relating to the disposal of toxic or hazardous substances or contaminants;
- 2) Client's understanding of or arrangement for the handling, removal, treatment, storage, transportation or disposal of toxic or hazardous substances or contaminants found or suspected at the subject site;
- 3) Toxic or hazardous substances or contaminants introduced to the site by the Client or third parties before, during and after the completion of services herein;
- 4) Allegations that GSE is a handler, generator, transporter, owner, or transporter, disposer under the Resource Conservation and Recovery Act of 1976 as amended or any other similar federal, state or local regulation or law.

If a third party brings suit or claim against GSE alleging personal injury or property damage from exposure to or release of toxic or hazardous substance or contaminants at the project site, before, during or after the services of this Agreement, Client agrees to the maximum extent of the law to defend us and pay any judgment resulting against us, including costs, unless such damages are caused by our sole negligence.

**DOCUMENTS:** GSE will supply the Client with the agreed upon number of reports and supporting documents. These instruments of service are furnished for the Client's use in accordance with the project or work defined in this Agreement. For any other purposes, any other documents generated by us under this Agreement, will remain property of GSE.

If Client wishes to provide said reports or documents to a third party we agree, provided the third party agrees to be bound by these terms and conditions in writing.

Client agrees that any documents provided to Client or requested third parties, if not paid for, shall be returned to GSE and will remain property of GSE.

Client agrees to obtain written consent prior to any kind of general distribution or publication of any of our documents. Any unauthorized use or distribution shall be at Client's sole risk and without liability to GSE.

**CLAIMS:** The parties agree to attempt to resolve any dispute without resort to litigation. However, if litigation occurs, and the claimant fails to prevail, then the claimant shall pay costs incurred in settling the claim, and reasonable attorney's fees. The claim will be considered proven if the judgment obtained and reduced through applicable spend is at least ten percent greater than the sum offered to resolve the matter prior to the commencement of suit.

In the event that GSE or any of its personnel required by anyone, whether or not a party to this Agreement, is held in court proceedings concerning services provided, Client hereby agrees to pay to GSE the legal and any such expenses incurred for such testimony.

**CONFIDENTIALITY:** GSE will maintain confidential any documents or information provided by Client unless otherwise specified by Client or unless GSE is compelled by order of a court or regulatory body of competent jurisdiction.

**SEVERABILITY:** In the event that any provision of this Agreement is found to be unenforceable, the other provisions shall remain in full effect.

**SURVIVAL:** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating responsibility or liability between Client and GSE shall survive the completion of the services and the termination of this Agreement.

**INTEGRATION:** This Agreement, the attached documents and those incorporated hereby constitute the entire Agreement between the parties and shall be binding except by written instrument signed by both parties.

**GOVERNING LAW:** This Agreement shall be governed in all respects by the laws of the State of South Carolina.

07/05/2008 15:50

07/05/2008

PAGE 02/11

08-291116

### AGREEMENT FOR SERVICES

This Agreement, made as of July 9th 2008, between GS2 Engineering & Environmental Consultants, Inc. (GS2) and Crouch Construction (herein referred to as client), provides:

1. **SERVICES** GS2 agrees to provide to client those certain services set forth in paragraph 2 below in connection with client's property described as follows:

Proposal for Construction Materials Testing Services - Celebrations of Columbia

2. **SCOPE OF WORK.** GS2 agrees to provide and client authorizes GS2 to provide the services detailed in attached estimate for the above mentioned project.

3. **LIMITATION OF SERVICES.** GS2 represents that the following limitations apply to our services:

- a. Our personnel and representatives presence at the project site and the services provided during their respective visit should not be construed as relieving the contractor from his responsibility to comply with the construction drawings and specifications.
- b. Our services consist of sampling, testing, and recording of representative construction materials. Test results should not be interpreted as a guarantee that the entire work meets the requirements set forth in the project drawings and specifications.
- c. Our personnel and representatives do not assume any responsibility for job site safety.
- d. Our personnel and representatives do not have or assume the authority to supervise or direct the personnel or work performed by the contractor.

4. **PAYMENT.** Client agrees to pay for all services provided by GS2 and for all expenses incurred by GS2 in accordance with the attached estimate. Payment shall be due five (5) days from the date of GS2's invoice. A finance charge of 1.5% per month shall be charged on any unpaid balance more than 30 days past due, plus reasonable attorneys fees, if collected through an attorney. No deductions shall be made from our invoices on account of liquidated damages or other sums withheld from payments to others.

5. **TERMS AND CONDITIONS.** This Agreement shall be subject to all of the terms and conditions set forth on the reverse side hereof, which terms and conditions are expressly made a part of this Agreement and any reports issued by GS2 pursuant to this Agreement.

This Agreement accepted for:

GS2 Engineering & Environmental Consultants, Inc.

Operations Manager  
Title  
[Signature]  
Signature

Crouch Const. Co. / Stuart Crouch  
Client  
Project Manager  
Title  
[Signature]  
Signature

WITNESS LIST

Roger Crouch  
P. O. Box 1023  
Irmo, SC 29063

Skeet Crouch  
P. O. Box 1023  
Irmo, SC 29063

Ben Kelly  
c/o Harman Family Trust  
Lexington, SC

Ken Timmerman  
Kyzer & Timmerman  
580 Chris Drive  
W. Columbia, SC 29169

Scott Cursey  
1200 Veterans Road  
Columbia, SC 29209

Rock Yaulla  
ETC, Inc.  
Columbia, SC

Cleve Graham  
c/o Gist, Inc.

Ted Wingard  
810 Sunset Blvd.  
W. Columbia, SC 29169

Mike Epting  
1055 Loveless Lane  
Chapin, SC 29036

Larry Redmond  
165 Glenda Court  
Lexington, SC 29073

Randy Waddell

c/o Gist

Jimmy Gist  
c/o Gist

Melvin Portee  
1200 Veterans Road  
Columbia, SC 29209

Robert Bruorton  
1200 Veterans Road  
Columbia, SC 29209

Ryan MacDonald  
1200 Veterans Road  
Columbia, SC 29209

Mark W. King  
1200 Veterans Road  
Columbia, SC 29209

Stu Ware  
1200 Veterans Road  
Columbia, SC 29209

George Sembos  
GS2 Engineering & Environmental  
Consultants, Inc.  
241 Business Park Boulevard  
Columbia, SC 29203



Attorneys Serving the Lowcountry

October 14, 2010

James Bruner, Esquire  
c/o Kaye White  
Bruner, Powell, Robbins, Wall, & Mullins, LLC  
1735 St. Julian Place, Suite 200  
Columbia, South Carolina 29171

RE: Crouch Construction Company, Inc. v. Bryan Causey, et al.  
Case No.: 09-CP-32-00973  
Client ID: 31603  
Matter ID: 9123684

Dear Mr. Bruner:

Please find enclosed an updated witness list for Defendants Causey, Causey Consulting, and Celebrations Columbia for arbitration.

Thank you.

Sincerely,

Kelsey J. Gilmore-Futeral  
Law Clerk

/kgf  
Enclosures

cc: Gary Pickren, Esquire via email  
Jean Derrick, Esquire

## WITNESS LIST

1. Robert Bruorton  
1200 Veterans Road  
Columbia, SC 29209
2. Bryan Causey  
830 West Sunset Blvd  
Columbia, South Carolina 29169
3. Jamie Causey  
830 West Sunset Blvd  
Columbia, South Carolina 29169
4. Marcus Croswell  
National Bank of South Carolina  
P.O. Box 1457  
Columbia, South Carolina 29202
5. Roger Crouch  
P. O. Box 1023  
Irmo, SC 29063
6. Skeet Crouch  
P. O. Box 1023  
Irmo, SC 29063
7. Scott Cursey  
1200 Veterans Road  
Columbia, SC 29209
8. Dan Dennis  
Dennis Corporation  
500 Thurmond Mall, Suite 114,  
Columbia, South Carolina 29201
9. Kenny Edward  
140 Crouch Commercial Court  
Irmo, South Carolina 29063
10. Mike Edwards  
Dial, Dunlap, & Edwards, LLC  
1122 Barnwell Street  
Columbia, South Carolina 29201
11. Mike Epting  
1055 Loveless Lane  
Chapin, SC 29036
12. Jimmy Gist  
c/o Gist
13. Cleve Graham  
c/o Gist, Inc.
14. Jay Grimsley, Jr.  
Southern Heating and Air  
Conditioning, Inc.  
2744 Millwood Avenue  
Columbia, South Carolina 29205
15. Ben Kelly  
c/o Harman Family Trust  
Lexington, SC
16. Mark W. King  
1200 Veterans Road  
Columbia, SC 29209
17. D.S. Koon  
Southern Heating and Air  
Conditioning, Inc.  
2744 Millwood Avenue  
Columbia, South Carolina 29205
18. Jeffery Kremlick,  
GS2 Engineering & Environmental  
Consultants, Inc.  
1200 Veterans Road  
Columbia, South Carolina 29209
19. Ryan MacDonald  
1200 Veterans Road  
Columbia, SC 29209
20. Janice Pendley  
133 Tarrar Springs Road  
Lexington, South Carolina 29072

## WITNESS LIST

21. Melvin Portee  
1200 Veterans Road  
Columbia, SC 29209
22. Larry Redmond  
165 Glenda Court  
Lexington, SC 29073
23. Len Roberson  
Roberson Engineering  
Post Office Box 527  
Whiterock, SC 29177
24. George Sembos  
GS2 Engineering & Environmental  
Consultants, Inc.  
241 Business Park Boulevard  
Columbia, SC 29203
25. David Smith,  
Staley Co.  
2517 Laurel St,  
Columbia, South Carolina 29204
26. Ken Timmerman  
Kyzer & Timmerman  
580 Chris Drive  
W. Columbia, SC 29169
27. Ross Travis, PE  
Dennis Corporation  
500 Thurmond Mall, Suite 114  
Columbia, South Carolina 29201
28. Randy Waddell  
c/o Gist
29. Stu Ware  
1200 Veterans Road  
Columbia, SC 29209
30. Ronald Weathers  
Weathers Contracting, Inc.  
P.O. Box 3699  
West Columbia, South Carolina  
29171
31. Ted Wingard  
810 Sunset Blvd.  
W. Columbia, SC 29169
32. Rock Yaulla  
ETC, Inc.  
Columbia, SC
33. Michael Zinna,  
Weathers Contracting, Inc.  
P.O. Box 3699 - West Columbia,  
South Carolina - 29171

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,  
Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,

3<sup>rd</sup> Party Defendant.

IN THE COURT OF COMMON PLEAS  
11<sup>th</sup> JUDICIAL CIRCUIT  
CASE NO.: 09-CP-32-00973

**DEFENDANTS'/3<sup>rd</sup> PARTY  
PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE THE  
ARBITRATION AWARD AND  
MOTION FOR RELIEF FROM  
ORDER PURSUANT TO RULE 60,  
SCRCivP**

Defendants respectfully submit this Supplemental Memorandum in support of their Motion to Vacate filed March 2, 2011 regarding the arbitrator's failure to disclose the familial relationship between his law partner, Joey R. Floyd, Esq, and GS2's Operations Manager, Jason Floyd, P.E.

In a recent exchange of communications between the parties' counsel and the arbitrator, the arbitrator confirmed that his law partner, Joey R. Floyd, Esq., is the brother of GS2's Operations Manager, Jason Floyd, P.E.<sup>1</sup> The arbitrator also revealed that his law partner brought suit against GS2 in Carolina Custom Construction v. Circle Bar T Demolition, 08-CP-28-00516, before his partner's brother began working there. Additionally, further investigation by Defendants' counsel has recently revealed that the arbitrator did not disclose that he brought suit

---

<sup>1</sup> Despite working together with his law partner for approximately thirteen years (from the time Joey Floyd was a law clerk until now) in a small law firm, the arbitrator claims that he did not know that his partner had a brother.

against one of the expert witnesses in the case of Vonda Pettit v. Terratec, Inc. et al., 2000-CP-32-2054. Terratec, Inc. was one of the Plaintiff's expert witnesses in arbitration who, in many respects, ended up testifying favorably for Defendants.

**I. THIS COURT SHOULD VACATE THE ARBITRATION AWARD BECAUSE THE ARBITRATOR VIOLATED CANON II OF THE SOUTH CAROLINA CODE OF ETHICS FOR ARBITRATORS BY IGNORING HIS DUTY TO INVESTIGATE AND DISCLOSE RELATIONSHIPS THAT REASONABLY CREATE AN APPEARANCE OF PARTIALITY BETWEEN HIM, OR HIS PARTNER, AND THE ARBITRATION WITNESSES.**

During the communications between the parties and the arbitrator, the arbitrator revealed that he did not run any conflicts checks on 3<sup>rd</sup> Party Defendant GS2 or on any of the witnesses who would testify at the arbitration such as GS2. According to the arbitrator, he did not include GS2 because it was not a party to the arbitration. Defendants' counsel wrote to the arbitrator that the situation was unfortunate; but that Defendants believed that the arbitrator "should have included the fact and expert witnesses in [his] conflicts check as did Frank Smith." The arbitrator derisively replied, "Thank you for lecturing me on how to conduct conflicts checks." In his reply, the arbitrator overlooks that his failure to conduct a full conflicts check violates Canon II of the South Carolina Code of Ethics for Arbitrators.

Canon II A clearly provides that an arbitrator must make disclosures "before accepting" to serve as arbitrator. Under Canon II A(2), the arbitrator must disclose relationships including "any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias." (emphasis added). Under Canon II A(2), disclosures include witnesses such as GS2 and others. Moreover, Canon II A(2) provides that an arbitrator should "disclose any such relationships involving members of their families or their current employers, partners or business associates."

Further, the arbitrator has a duty to discover such relationships. Canon II B, states that the arbitrator has a duty to "make a reasonable effort to inform [himself] of any interests or relationships" which might reasonably create an appearance of partiality or bias. In other words, the arbitrator must perform a conflicts check. Further, under Cannon II C, the duties of the arbitrator to disclose continue throughout the arbitration.

Here, the arbitrator made absolutely no effort whatsoever to inform himself of any relationships between himself, his firm, and the witnesses. Without justification, the arbitrator ignored his well-defined duty under the Code of Ethics for Arbitrators to disclose relationships regarding all of the witnesses to this action and to extend that disclosure to relationships between members of his firm such as his law partner.

### CONCLUSION

Defendants respectfully request that this court vacate the arbitration award because the arbitrator failed to disclose relationships that reasonably create an appearance of partiality or bias as set forth herein and thereby denied Defendants of their essential right to be the architects of their own arbitration process and to be the judges of their arbitrator's impartiality.

FUTERAL & NELSON, LLC



---

Stephan V. Futeral, Esquire  
S.C. Bar ID 66427  
Post Office Box 1543  
Mt. Pleasant, South Carolina 29465-1543  
Telephone (843) 284-5500 ext. 225  
Facsimile (843) 284-5501 sub. 225  
email to: sfuteral@charlestonlaw.net  
Attorney for Defendants/3<sup>rd</sup> Party Plaintiffs

Dated: March 16, 2011

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,

3<sup>rd</sup> Party Defendant.

IN THE COURT OF COMMON PLEAS

11<sup>th</sup> JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

**DEFENDANTS' 3<sup>rd</sup> PARTY  
PLAINTIFFS' 2<sup>nd</sup> SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE THE  
ARBITRATION AWARD AND  
MOTION FOR RELIEF FROM  
ORDER PURSUANT TO RULE 60,  
SCRCivP**

Defendants respectfully submit this 2<sup>nd</sup> Supplemental Memorandum regarding the affidavit of James Bruner, Esq. dated March 18, 2011.

Canon VI C of the South Carolina Code of Ethics for Arbitrators mandates that "[a]fter an arbitration award has been made, it is not proper for an arbitrator to assist in postarbitral proceedings, except as required by law." On March 3, 2011, Defendants, through counsel, indicated to the arbitrator that they did not believe it was appropriate for him to submit anything to the court unless requested by the court. Nevertheless, Mr. Bruner chose to submit a letter and an affidavit to this court on March 18, 2011. By assisting in these proceedings, Mr. Bruner has exacerbated the appearance of partiality by disregarding Canon VI in favor of protecting his reputation and encouraging this court to confirm the award.

Despite Mr. Bruner's assertions that he acted impartially, it is well-settled under Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968), that the parties rather than Mr. Bruner or the court should be the judges of Mr. Bruner's partiality. If, under Commonwealth Coatings, the parties are to be the judges of the arbitrator's partiality, then the arbitrator's duties to investigate and disclose conflicts must be enforced, even if this court find no actual bias was present or even if the arbitrator takes offense, either personally or a professionally, to Defendants' Motion to Vacate.

Respectfully submitted,

FUTERAL & NELSON, LLC



---

Stephan V. Futeral, Esquire  
S.C. Bar ID 66427  
Post Office Box 1543  
Mt. Pleasant, South Carolina 29465-1543  
Telephone (843) 284-5500 ext. 225  
Facsimile (843) 284-5501 sub. 225  
email to: sfuteral@charlestonlaw.net  
Attorney for Defendants/3<sup>rd</sup> Party Plaintiffs

Dated: March 18, 2011

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,  
Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,  
LLC, and Causey Consulting, LLC,

Defendants and  
3<sup>rd</sup> Party Plaintiffs,

vs.

GS2 Engineering and Environmental  
Consultants, Inc.,

3<sup>rd</sup> Party Defendant.

IN THE COURT OF COMMON PLEAS  
11<sup>th</sup> JUDICIAL CIRCUIT  
CASE NO.: 09-CP-32-00973

**DEFENDANTS'/3<sup>rd</sup> PARTY  
PLAINTIFFS' 2<sup>nd</sup> SUPPLEMENTAL  
MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE THE  
ARBITRATION AWARD AND  
MOTION FOR RELIEF FROM  
ORDER PURSUANT TO RULE 60,  
SCRCivP**

Defendants respectfully submit this 3<sup>rd</sup> Supplemental Memorandum regarding the affidavit of James Bruner, Esq. dated March 18, 2011 and Plaintiff's Memorandum in Opposition.

CONSOLIDATION AND HOBET

In its brief, Plaintiff cites Consolidation Co v. United Mine Workers of America, 48 F.3d 125 (4<sup>th</sup> Cir. 1995) and Hobet Mining, Inc. v. Int'l Union, 877 F.Supp. 1011 (S.D.W.Va. 1994) for the proposition that Defendants must provide to this court clear and convincing evidence of partiality or corruption. Plaintiff's reliance on Consolidation Co. and Hobet is misplaced for several reasons.<sup>1</sup>

---

<sup>1</sup> In its brief, Plaintiff misstates that the standard of proof is clear and convincing. Neither Consolidation nor Hobet set forth this standard.

In Consolidation and Hobet, the same arbitrator in both cases failed to disclose that his brother worked in another state for International Union of the United Mine Workers of America. In Consolidation and Hobet, the parties do not select their arbitrators. Consolidation and Hobet involve arbitration under the collective bargaining agreement known as the National Bituminous Coal Wage Agreement Act of 1988 [hereinafter the Wage Agreement]. Arbitrations under the Wage Agreement are conducted before “district arbitrators” who serve for a period of 18 months after being selected by the president of the International Union of the United Mine Workers of America and the president of the Bituminous Coal Operators’ Association. Hobet, 877 F.Supp. at 1014.

Unlike the parties in Consolidation and Hobet, the parties in the present case selected their arbitrators, and although Plaintiff rejected the first arbitrator based on his disclosures, Defendants were denied that same opportunity based on Mr. Bruner’s failure to make the same disclosures.

In Consolidation and Hobet, the arbitrators are not bound by the codes of the American Arbitration Association or any other similar organization. Consolidation, 48 F.3d at 128. Additionally, under the Wage Agreement, “[r]ecusal, disclosure, and other ethical issues are left to the discretion of each arbitrator.” Id.

Unlike the arbitrator in Consolidation and Hobet, Mr. Bruner was bound by the commercial codes of the American Arbitration Association, including R-16 that mandates that an arbitrator shall disclose “any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence . . . .” Further, under Canon II of the South Carolina Code of Ethics for Arbitrators, Mr. Bruner was without discretion regarding the necessary

investigation and disclosure of conflicts and any ethical issues. As set forth in Footnote 2 to the Introductory Note of Canon II:

In applying the provisions of this code relating to disclosure . . . arbitrators “should err on the side of disclosure” because “it is better that the relationship be disclosed at the outset when the parties are free to reject the arbitrator or accept him with knowledge of the relationship.”

#### ANR COAL COMPANY

Plaintiff’s reliance on ANR Coal Co. v. Cogentrix, 173 F.3d 493 (4<sup>th</sup> Cir. 1999) is misplaced. In ANR, one of three arbitrators in a panel disclosed that his law firm represented a company that sold electric power to one of the parties. Further, the arbitrator disclosed that nine years before the arbitration, the arbitrator’s law firm merged for a one-year period with the firm that was representing a party to the arbitration. However, during the time of the short merger, the arbitrator was ill with leukemia and had not been actively practicing law or involved with his firm or the merged firm. As set forth by the court in ANR, “if an arbitrator fails to investigate facts that come to light after the award, and those facts are not trivial, the aggrieved party may use this information to demonstrate evident partiality. . . .” ANR, 173 F.3d at 499 fn. 4. (citation omitted).

In ANR, the court analyzed whether the arbitrator met his duty to disclose under Rule 19 of the American Arbitration Association that provides: “Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.” (emphasis added). The court concluded that Rule 19 did not require an arbitrator to “disclose every interest or relationship with a party that could conceivably be regarded as a basis for bias. Rather, it only requires disclosure of an interest or relationship ‘likely to affect impartiality.’” ANR, 173 F.3d at 498.

Here, Plaintiff is acutely aware that according to Article 13.2 of the parties' contract for services, the rules applicable are the "Construction Industry Arbitration Rules of the American Arbitration Association." Therefore, Plaintiff is also aware that Rule 16 is applicable to the present case. Unlike Rule 19, Rule 16 requires the arbitrator to disclose "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence . . . ." (emphasis added). Therefore, contrary to Plaintiff's overall argument that these Defendants must show the court that Mr. Bruner was actually biased, these Defendants need only show any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence. Further, in ANR, the court did not apply Canon II that required Mr. Bruner to discover conflicts, to examine familial relationships between his business partners and witnesses, and to disclose the same to the parties.

#### ARBITRATOR'S AFFIDAVIT

On March 3, 2011, Defendants, through counsel, indicated to the arbitrator that they did not believe it was appropriate for him to submit anything to the court unless requested by the court. Canon VI C of the South Carolina Code of Ethics for Arbitrators mandates that "[a]fter an arbitration award has been made, it is not proper for an arbitrator to assist in postarbitral proceedings, except as required by law." Nevertheless, Mr. Bruner chose to submit a letter and an affidavit to this court on March 18, 2011. By assisting in these proceedings, Mr. Bruner has exacerbated the appearance of partiality by disregarding Canon VI in favor of protecting his reputation and encouraging this court to confirm the award.

In his affidavit, Mr. Bruner makes a few questionable assertions. First, Mr. Bruner claims that he did not know that his law partner, with whom he has worked approximately 13 years, had a brother, especially a brother who works in town in the construction industry.

Second, Mr. Bruner states he did not recall the lawsuit wherein he was involved with Margaret Morrison, the president of Terratec, Inc. Yet, during the arbitration hearing itself, Mr. Bruner recognized Margaret Morrison and stated to her, "It is nice to see you again Margaret" and asked her "How have you been?" See partial transcript of hearing attached hereto.

Despite Mr. Bruner's assertions that he acted impartially, it is well-settled under Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968), that the parties rather than Mr. Bruner or the court should be the judges of Mr. Bruner's partiality. If given the opportunity, Defendants never would have agreed to use Mr. Bruner because Defendants would have been highly skeptical of the notion that after approximately 13 years of working together, Mr. Bruner did not know his partner had a brother, especially a brother who works in town in the construction industry.

If, under Commonwealth Coatings, the parties are to be the judges of the arbitrator's partiality, then the arbitrator's duties to investigate and disclose conflicts must be enforced, even if this court finds no actual bias was present or even if the arbitrator takes offense, either personally or a professionally, to Defendants' Motion to Vacate.

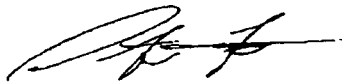
#### CONCLUSION

If, under Commonwealth Coatings, the parties are to be the judges of the arbitrator's partiality, then the arbitrator's duties to investigate and disclose conflicts must be enforced, even if this court finds no actual bias was present or if the arbitrator takes offense, either personally or a professionally, to Defendants' Motion to Vacate. Otherwise, based on: (1) all matters originally raised to this court such as the arbitrator's refusal to consider material evidence; (2) the arbitrator's failure to investigate and disclose conflicts; (3) the arbitrator's assistance in post arbitration proceedings; (4) the arbitrator's questionable lack of knowledge regarding his law

partner's brother; and (5) the divergence between the arbitrator's recognition of the Terratec witness at arbitration and the arbitrator's affidavit that he did not recall Terratec, then this court should vacate the award based upon the arbitrator's evident partiality.

Respectfully submitted,

FUTERAL & NELSON, LLC



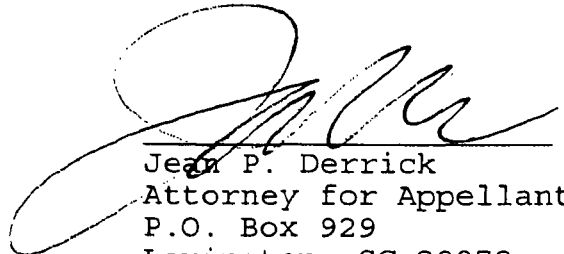
---

Stephan V. Futeral, Esquire  
S.C. Bar ID 66427  
Post Office Box 1543  
Mt. Pleasant, South Carolina 29465-1543  
Telephone (843) 284-5500 ext. 225  
Facsimile (843) 284-5501 sub. 225  
email to: [sfuteral@charlestonlaw.net](mailto:sfuteral@charlestonlaw.net)  
Attorney for Defendants/3<sup>rd</sup> Party Plaintiffs

Dated: March 21, 2011

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material. The undersigned also certifies that this Record on Appeal complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court filings.



Jean P. Derrick  
Attorney for Appellant  
P.O. Box 929  
Lexington, SC 29072  
Phone: (803) 359-6189  
Fax: (803) 808-1657  
jderrick@windstream.net

Columbia, SC  
December 18, 2011

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Hon. R. Ferrell Cothran, Jr., Judge

Case No.: 2009-CP-32-00973

**RECEIVED**

MAR 27 2012

**SC Court of Appeals**

Crouch Construction Company, Inc.....Appellant

vs.

Bryan Causey, Celebrations of Columbia, LLC, and  
Causey Consulting, LLC.....Respondents

vs.

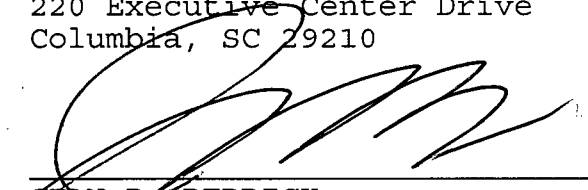
GS2 Engineering and Environmental  
Consultants, Inc., Gist, Inc.....Third Party Defendants

CERTIFICATE OF SERVICE

I, Jean P. Derrick, attorney for Appellant, hereby certify  
that I served, upon the persons named below at the addresses given,  
by placing in the United States mail, with proper postage affixed,  
a copy of the Amended Record on Appeal.

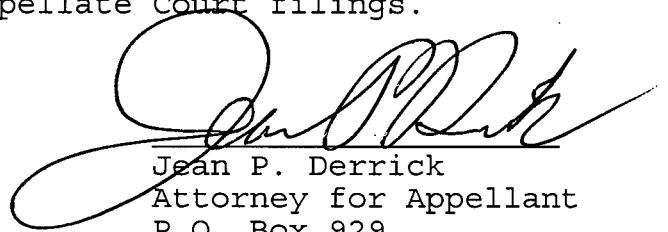
Stephen V. Futeral  
P.O. Box 1543  
Mount Pleasant, SC 29465

Gary A. Pickren  
220 Executive Center Drive  
Columbia, SC 29210

  
JEAN P. DERRICK  
March 27, 2012

AMENDED CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Amended Record on Appeal filed March 27, 2012 contains all materials proposed to be included by any of the parties and not any other material. The undersigned also certifies that this Amended Record on Appeal complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court filings.



Jean P. Derrick  
Attorney for Appellant  
P.O. Box 929  
Lexington, SC 29072  
Phone: (803) 359-6189  
Fax: (803) 808-1657  
jderrick@windstream.net

Columbia, SC  
September 25, 2012

RECEIVED

SEP 26 2012

SC Court of Appeals