

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Hon. R. Ferrell Cothran, Jr., Judge

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Case No.: 2009-CP-32-00973

---

Crouch Construction Company, Inc.....Appellant-Plaintiff

vs.

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

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APPELLANT'S FINAL BRIEF

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QUESTION PRESENTED

DID THE TRIAL JUDGE ERR IN VACATING THE ARBITRATION AWARD FOR EVIDENT PARTIALITY?

- A. Did Repondents fail to prove evident partiality?
- B. Did the arbitrator fulfill his duty to investigate and to disclose relationships?

## STATEMENT OF THE CASE

This action was commenced March 10, 2009 by Appellant Crouch Construction Company, Inc., (hereafter Crouch) to foreclose a mechanic's lien against real estate titled in the name of Respondent Causey Consulting, LLC. (hereafter Causey Consulting) One year earlier on March 4, 2008, Crouch and Respondent Celebrations of Columbia, LLC (hereafter Celebrations) had entered into a construction contract for Crouch to build a 10,000 square foot warehouse on property in West Columbia, for a contract price of \$616,538. The Complaint alleged that work had been completed December 10, 2008, and that Appellant was still owed the sum of \$114,154.38. (R.p. 45)

Respondents denied any debt to Appellant, and counterclaimed for negligent construction, breach of contract, breach of implied warranty of workmanlike service, negligent misrepresentation, breach of contract accompanied by a fraudulent act, violation of the South Carolina Trade Practices Act, and civil conspiracy. Appellant timely replied, denying these allegations.

By Order filed March 17, 2010, Appellant and Celebrations were ordered to arbitrate, pursuant to the terms of the contract. (R.p. 22) Respondent Causey Consulting also agreed to be a party to the arbitration. (R.p. 160, 161) After the initial arbitrator chosen by the parties, Frank Smith, withdrew, Appellant filed a motion to compel a choice of arbiter, and James Bruner was designated by the parties as arbiter. (R.p. 76; 162) He held an arbitration hearing over a course of three days, November 2, 3, and 4, 2010, and rendered an arbitration award November 10, 2010 granting Appellant a total award of \$130,305.87. (R.p. 24) Arbitrator Bruner issued a Modified and Amended Arbitration Award on December 7, 2010, detailing in a sixteen page modified award his findings and conclusions, and correcting a small mathematical error, awarding Appellant \$132,805.54. (R.p. 25)

Appellant moved to confirm the award in arbitration and Respondents moved to vacate the award in arbitration, alleging that the arbiter exceeded his powers, the arbiter refused to consider evidence, the arbiter conducted the hearing so as to prejudice substantially the rights of Respondents, and the arbitrator manifestly disregarded and perversely and misconstrued the law. (R.p. 90;93)

The motions were argued before the Honorable Ralph Cothran on February 7, 2011. Judge Cothran instructed the attorney for Appellant to prepare an order denying Respondents' grounds to vacate, and confirming the award in arbitration and entering judgment on it.

On March 2, 2011 Respondents filed a supplemental motion to vacate the Amended Arbitration Award upon the grounds that there was evident partiality by the arbitrator, pursuant to § 15-48-130(a)(2). (R.p. 95) The motion was argued before Judge Cothran March 22, 2011. Judge Cothran issued his Order Vacating Arbitration Award, filed May 19, 2011. (R.p. 3) Appellant moved to alter or amend the award, and this motion was denied by Order filed July 1, 2011. (R.p. 119;19)

Notice of intent to appeal was timely filed and served July 12, 2011.

#### FACTS

Appellant instituted this straight forward action to foreclose a mechanic's lien on March 10, 2009. Appellant contracted with Celebrations of Columbia, LLC March 4, 2008 to construct a 10,000 square foot warehouse for Celebrations. Respondent Bryan Causey purchased the property on May 28, 2008, and put title in the name of another LLC, Causey Consulting. He had full knowledge that the lot was a former dump site. Respondent Bryan Causey hired GS2 Engineering and Environmental Consultants, Inc. to perform a subsurface investigation. Their report dated March 18, 2008, found that unsuitable fill materials were indeed present on the property, and existed to a depth of between twelve

and fifteen feet deep at the location on the property where the new building was to be placed. During excavation, the unsuitable soil removed exceeded the estimates of all parties. Ultimately, the Crouch site preparation estimate of \$47,000 was instead a real expense of \$130,000 for excavation, replacement and compaction of suitable soils. In late July 2008 Bryan Causey disputed with a representative of Appellant this charge. However, the charge was paid as a construction draw, and work continued until the building was completed in mid-December 2008. Appellant's final application for payment and retainage was not paid in full. Crouch filed a lis pendens and notice of mechanic's lien for \$114,154.38.

The complaint for foreclosure of the mechanic's lien was filed March 10, 2009, against Bryan Causey, Celebrations of Columbia, LLC, and Causey Consulting, LLC. Respondents denied the debt, and filed a wide variety of counterclaims, for negligent construction, breach of contract, breach of implied warranty, negligent misrepresentation, breach of contract accompanied by fraudulent act, violation of the South Carolina Unfair Trade Practice Act, and civil conspiracy.

Appellant Crouch moved to compel arbitration, and the motion was granted by order of the Honorable William P. Keesley filed March 17, 2010, finding that, although the "arbitration clause does not comply with the requirements of South Carolina law, S.C. Code Ann. § 15-48-10...", the contract involved interstate commerce and federal law required that it be arbitrated. (R.p. 22)

Only the parties to the original construction contract, Crouch Construction, Inc., and Celebrations of Columbia, LLC were required to arbitrate. However, by consent Causey Consulting, LLC was added as a party to the arbitration. (R.p. 160; 161)

The parties agreed to arbitrate the matter using a single arbitrator. The contract specified as follows:

13.1 The Contract shall be governed by the law of the place where [the] 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 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 or any of his employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under the prevailing arbitration law.

The parties originally agreed upon Frank Smith, Esquire of the Columbia Bar as the arbitrator. However, Mr. Smith withdrew because of a conflict.

Thereafter, Appellant filed June 4, 2010 a motion to compel choice of arbiter. (R.p. 76) Appellant suggested five names, including Mr. Bruner, as replacement arbitrators. (R.p. 82) Respondents suggested Frank Cissa, of the Charleston County Bar, to whom Appellant was agreeable. (R.p. 162) However, Respondents were unable to confirm Mr. Cissa's availability, and therefore chose to use Mr. Bruner as arbitrator. (R.p. 162)

Mr. Bruner ran a conflicts check for the parties (Crouch Construction Company, Inc., Celebrations of Columbia, LLC, and Causey Consulting, LLC.) and their representatives (Jean Perrin Derrick, Esquire, Stephen V. Futeral, Esquire, and Gary Pickren, Esquire),

and received no "hits" in his firm's conflict system. Both parties also furnished Mr. Bruner with copies of their prospective witness list. (R.pp. 171-175) Mr. Bruner himself reviewed these lists of witnesses, Appellant listing eighteen potential witnesses and Respondents listing thirty-three potential witnesses. (R.p.148) The Arbitration was heard over three full days, November 2, 3 and 4, 2010. Appellant presented ten witnesses and Respondents called four witness to testify. The arbitrator issued his initial arbitration award November 10, 2010, and at Respondents' request, and with Appellant's consent, the arbitrator issued his meticulously reasoned Modified and Amended Arbitration Award on December 7, 2010. (R.p. 25)

At the hearing Appellant Crouch claimed entitlement to \$112,154.38. Respondents claimed that they owed Appellant nothing, and instead, pursuant to their counterclaims sought judgment against Appellant for \$296,018.82, asserting that the warehouse foundation was defective. The arbitrator in the Amended Arbitration Award reasoned that Appellant's contractor had over-excavated approximately 1700 cubic yards of unsuitable soil, given the size of the footprint of the building based upon the plans, and that giving Respondents credit for the amount of this over-excavated material, the bill for site preparation should be reduced from \$133,200 to \$107,555. The arbitrator also made several other adjustments on other change orders and incomplete work under the contract, all of which adjustments were to the financial favor of Respondents. However, the arbitrator found the warehouse foundations were not defective and there had been only normal settling. Ultimately, the arbitrator found that Crouch was owed \$68,160.68 on the contract, and added interest owing under the contract, plus attorney's fees and costs, for a total award to Appellant of \$132,805.54.

Appellant moved to confirm the award, and Respondents moved to vacate the award. Specifically, Respondents alleged as a ground for vacature:

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.
4. The arbitrator manifestly disregarded or perversely misconstrued the law applicable to this case by completely ignoring all of the Defendants' counterclaims. (R.p. 93)

The Honorable R. Ferrell Cothran, Jr., heard arguments on both motions sitting, in a non-jury term of the Lexington County Court of Common Pleas on February 7, 2011. Judge Cothran directed Appellant's counsel to prepare an order confirming the arbitration award and entering it as a judgment, and denying Respondents' motion.

Prior to entry of the Order confirming the award, Respondents filed March 2, 2011 a Supplemental Motion to Vacate the arbitration award, alleging that they had recently discovered that the arbitrator had a law partner, Joey Floyd, who in turn had a brother, Jayson Floyd, who was employed as operations manager by GS2 Engineering & Environmental Consultants, Inc., and alleging that the arbitration award should be vacated based upon evident partiality because this relationship had not been disclosed by the arbitrator.

The connection of GS2 is that Respondent Bryan Causey originally hired GS2 to conduct the geo-technical survey, which was done prior to his purchase of the property. (R.p. 168) Subsequently, Appellant Crouch during the actual contract also retained GS2 as the geo- technical engineer on this project, to identify defective soil materials, and supervise their replacement. (R.p. 170) Respondents had sued GS2 as a third party defendant, along with the counterclaims against Appellant Crouch (R.p.48), although GS2

was not a party to the arbitration. At the arbitration, Appellant called as expert witnesses two employees of GS2, George Sembos, the president, and engineer Chad Bruerton.

In a series of emails exchanged between the attorneys and the arbitrator, the arbitrator stated that he did not know his law partner Joey Floyd (one of ten lawyers with whom Mr. Bruner practiced) had a brother, and that he (Bruner) did not know that his partner's brother worked for GS2, until he was informed of this by Respondents, almost three months after the Amended Arbitration Award has been filed. (R.pp.163-167) Counsel for Respondents responded "Personally, I accept your explanation. Nonetheless, you should have included the fact and expert witnesses in your conflicts check..." (R.p. 165) Initially, after being selected as arbitrator, Mr. Bruner ran the names of all parties and all attorneys through his firm's conflict system, as well as circulating a list of those names to his partners. (R.pp. 149-150) The arbitrator reviewed the two witness lists for the parties for conflicts, but did not circulate the witness list to all attorneys. Neither he nor any of his partners had any conflicts with the parties or their counsel. Mr. Bruner did not recognize any of the names of the witnesses listed by either of the parties. (R.P. 148)

Respondents' Supplemental Motion to vacate was supported by an affidavit from Bryan K. Causey asserting that "I believe that James Bruner as an 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." (R.p. 117) Appellant submitted the affidavits of Roger Crouch, establishing that Mr. Crouch did know Jayson Floyd or Joey Floyd. The only employee of GS2 known to Mr. Crouch was Chad Bruerton, who was a witness. (R.p. 156) Appellant also submitted the affidavit of George Sembos, President of GS2, who testified as a witness at the arbitration hearing. Mr. Sembos did not know that Jayson Floyd, one of 90 employees at GS2, had a brother, or that the brother was a

lawyer, or that this lawyer brother worked at Bruner, Powell, Wall and Mullins. (R.p. 158) There is no evidence in the record that the arbitrator knew of this remote relationship, until he was told by Respondents, almost three months after he had issued the Amended Arbitration Award.

Joey Floyd, Esq., did not participate in any way in the arbitration, nor did Jayson Floyd work on this construction project

Judge Cothran heard arguments on Respondents' Supplemental Motion March 22, 2011, and filed a written Order vacating the arbitration award May 19, 2011. His order denying Appellant's Motion to Alter or Amend was filed July 1, 2011, and this appeal filed July 12, 2011.

## ARGUMENT

### THE TRIAL JUDGE ERRED IN VACATING THE ARBITRATION ARBITRATION AWARD FOR EVIDENT PARTIALITY.

What constitutes "evident partiality" pursuant to either §15-48-130(a)(2) South Carolina Code Ann. (S.C. Uniform Arbitration Act) or U.S.C.A. §10(a)(2)(Federal Arbitration Act) sufficient to vacate an arbitration award is a novel question which has never been addressed by our appellate courts in South Carolina. However, given the importance of the arbitration process in the overall success of all methods of alternative dispute resolution, it is extremely important that this Court, in deciding the issue in this appeal, "get it right". Both the facts, as well as a review of the federal case law, militate a reversal of the Order vacating the Amended Arbitration Award, and reinstatement of the award.

It is well settled that arbitration "is a favored method of settling disputes in South Carolina." Gissel vs. Hart, 382 S.C. 235, 240 676 S.E.2d 320 323 (2009).

As the South Carolina Court of Appeals has stated, "Arbitration is not litigation carried on by other means, but is an alternative means for resolving disputes without the cost and delay of a lawsuit." Lauro vs. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 555

Our Supreme Court in Gissel also recognized that:

Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances...An arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law...

However, for a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit and clearly applicable...Case law presumes something beyond a mere error in construing or applying the law. Even a 'clearly erroneous interpretation of the contract' cannot be disturbed...The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law...An arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it...Factual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers...

Here, the Court of Appeals recognized the four statutory grounds on which an arbitrator's award may be vacated, to wit:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) *where there was evident partiality or corruption in the arbitrators, or either of them;*
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject

matter submitted was not made. 9 U.S.A. § 10(a)  
(1)-(4)(West Supp. 2006)(FN3 S.C. Code Ann.  
§ 15-48-130(a) sets forth similar state grounds.)  
Gissel vs. Hart, 382 S.C. 241, 242, 676 S.E.2d  
323,324. (case citations omitted) (emphasis added)

Also, the South Carolina Supreme Court recognized in Munoz vs. Greentree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001):

Unless the parties have contracted to the contrary, the FAA [Federal Arbitration Act] applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.

Here, the trial court, in compelling arbitration, noted that the South Carolina Uniform Arbitration Act [SCUAA] did not apply, because the contract did not meet the SCUAA's requirements of the arbitration clause being contained on the first page, in bold underlined capitals, as well as of course, the uncontested fact that this construction contract involves interstate commerce. (R.p. 22)

However, general contract principles pursuant to South Carolina law still apply. Munoz, 343 S.C. at 539, 542 S.E.2d at 364; Simpson vs. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). Therefore, this Court's analysis under South Carolina law is "ultimately the same" as the analysis under federal law. Simpson, 373 S.C. at 22 note 1, 644 S.E.2d at 667 note 1; Davis vs. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct.App.2011).

Here, the statutory grounds for vacating an arbitration award for evident partiality are stated virtually identically, under both federal and state law.

FAA Title 9 USCA § 10(a)(2) vacates an award "where there was evident partiality or corruption in the arbitrators, or either of them..." The South Carolina Uniform Arbitration Act, § 15-48-130(a)(2) vacates an award where "[t]here was evident partiality by an

arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party..." Therefore, the grounds for appeal under both statutes are essentially the same, although federal law applies because arbitration was ordered pursuant to the FAA. See Gissell vs. Hart, supra, 382 S.C. at 242, 676 S.E.2d at 324 (2009).

There are no reported South Carolina decisions vacating an arbitration award for "evident partiality" under the South Carolina Uniform Arbitration Act. However, there is a well developed body of federal law. In applying federal law, South Carolina has primarily, though not exclusively, followed the approach adopted by the federal courts of the Fourth Circuit. Rich vs. Walsh, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct.App.2003).

A. RESPONDENTS HAVE FAILED TO PROVE EVIDENT PARTIALITY.

The seminal case in the Fourth Circuit Court of Appeals is ANR Coal Company, Inc., vs. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999). There, the Fourth Circuit Court of Appeals reinstated an arbitration award vacated by the federal magistrate. The court found that mere failure to disclose provided no basis to vacate an award under the FAA, and the facts did not demonstrate evident partiality by the arbitrator.

This was an arbitration of a dispute in a coal sales contract between Cogentrix (Utility) and ANR Coal Company, Inc. (Coal Company). The coal sales contract was subject to arbitration under the American Arbitration Association Commercial Arbitration Rules, by three arbiters. Wilburn Brewer, a partner in the law firm of Nexsen, Pruitt, Jacobs and Pollard, sat as one of the three arbiters. Prior to the arbitration, it was disclosed that Nexsen Pruitt occasionally represented Carolina Power in electrocution cases. Carolina Power was dedicated, sole customer of the Utility. Subsequent to the award in favor of the Utility, it was discovered that Mr. Brewer's law firm had represented Carolina Power in a broader range of legal matters, and that also a law firm with which Mr.

Brewer's firm had merged, Moore and Van Allen, had represented the Utility. In addition some partners in Moore and Van Allen had loaned money to the Utility, in consideration for issuance of stock warrants.

The arbitration award was vacated by the federal magistrate judge, who reasoned that "Brewer violated his duty to disclose all information regarding his past and present relations with [Utility] and other interested parties." *Id.*, 173 F.3d 493, 496.

The Fourth Circuit Court of Appeals reversed, holding that the Federal Arbitration Act, 9 U.S.C. § 10 (the FAA) "**makes no mention of an arbitrator's failure to disclose information as a basis for vacating an arbitration award.**" 173 F.3d at 497." "Rather, in determining whether to set aside an arbitration award, a court may only consider whether the complaining party has demonstrated a violation of the governing statute." 173 F.3d at 499.

The appealing Coal Company argued that Brewer had violated Rule 19 of the AAA Commercial Arbitration Rules, which provides:

Any person appointed as a 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...

The Fourth Circuit held that, although it was not at all clear that Brewer had in fact violated AAA Rule 19, even if he had, that violation "**would not, by itself, require or even permit a court to nullify an arbitration award. When parties agree to be bound by the AAA rules, those rules do not give a federal court license to vacate an award on grounds other than those set forth in 9 U.S.C. § 10.**" 173 F.3d at 499.

The Fourth Circuit in ANR reasoned, as a matter of policy, that to allow an arbitration award to be vacated on mere non-disclosure, in and of itself, would undermine

the stability of the arbitration process, and "permit a 'disgruntled party' to seize upon an undisclosed relationship 'as a pretext for invalidating the award.'" 173 F.3d 493, 500, quoting In re Andros Compania Maritima, SA, 579 F.2d 691, 700 (2nd Cir. 1978).

While concluding that the AAA rules provide "significant and helpful regulation of the arbitration process, they 'are not the proper starting point for an inquiry into an award's validity.'" 173 F.3d 499, quoting Merit Insurance Company vs. Leatherby Insurance company, 714 F.2d 673, 677 (7th Cir. 1983).

The Fourth Circuit also in its opinion in ANR discussed at length the old Supreme Court case of Commonwealth Coatings Corp vs. Continental Casualty Company, 393 U.S. 145 (1968), concluding that the holding of that plurality opinion was that "where an arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed." 173 F.3d at 499, quoting Commonwealth Coatings, 393 U.S. at 151 (White, J, concurring).

The Fourth Circuit in ANR held that a party appealing an arbitration award and alleging evident partiality "**must put forth facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.**" 173 F.3d 493, 501 The burden of proof was a "heavy one", to meet this "onerous" standard. 173 F.3d 501, quoting Peoples Security Life Insurance Company vs. Monumental Life Insurance Company, 991 F.2d 141, 146 (4th Cir. 1993); and Al-Harbi vs. City Bank, NA, 85 F.3d, 680, 683 (D.C. Cir. 1996).

Significantly, ANR holds:

A court should examine four factors to determine if a claimant has 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 and time between the relationship and the arbitration proceeding. 173 F.3d at 500. Citing Consolidation Coal Company Local 1643, United Mine workers of America, 48 F.3d 125, 130 (4<sup>th</sup> Cir. 1995).

"When considering each factor, the court should determine whether the asserted bias is 'direct, definite and capable of demonstration rather than remote, uncertain or speculative' and whether the facts are sufficient to indicate improper motives on the part of the arbitrator." 173 F.3d at 500, quoting Consolidation Coal, 48 F.3d at 129.

The remainder of the opinion in ANR analyzes in detail the facts asserted by the Coal Company pursuant to these four factors, repeatedly pointing out the lack of direct or definite evidence, and concluding that the arbitrator had only a trivial relationship with the Utility which did not justify vacatur of the award.

Another relevant decision of the Fourth Circuit Court of Appeals is Peoples Security Life Insurance Company vs. Monumental Life Insurance Company, 991 F.2d 141 (1993). There, an insurance company appealing from an arbitration award claimed that one of the three arbiters was evidently partial, because, during the course of the lengthy arbitration proceeding, a lawyer, who had represented the other arbitrating insurance company at the initiation of the proceeding, became a partner in the law firm of that arbitrator.

The Fourth Circuit affirmed the award, noting that the arbitrator and his new partner did not know each other, worked in separate offices, and were unaware of the connection until the motion to vacate based on evident partiality was filed. The Fourth Circuit held that **the appellant had failed to show that "a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration."** 991 F.2d at 146, quoting Apperson vs. Fleet Carrier Corp, 879 F.2d 1344, 1358 (6<sup>th</sup> Cir.), cert. denied 493

U.S. 809 (1989). The "burden on a claimant for vacation of an arbitration award due to `evident partiality' is heavy, and the claimant must establish specific facts that indicate improper motives on the part of an arbitrator." 991 F.2d at 146.

See also Three S Delaware, Incorporated vs. Dataquick Information Systems, Inc., 495 F.3d 520 (4th Cir. 2007) holding that appellant failed to present proof that the arbitrator was partial, and failed "to demonstrate anything more than the fact that the arbitrator ruled against 3 S on certain issues." 492 F.3d at 530.

Also relevant are the decisions in Consolidation Coal Company vs. Local 1643, United Mine Workers of America, 48 F.3d 125 (4th Cir. 1995) and Hobet Mining Company vs. International Union, United Mine Workers of America, 877 F.Supp. 1011 (S.D.W.V. 1994). Both of these cases uphold arbitration awards rendered under collective bargain agreements administered by the Coal Arbitration Service, and not the American Arbitration Association. However, the arbitrator allegedly partial was a member of the American Arbitration Association, and the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provided: "The duty to disclose includes...financial or immediate family interest in the company or union involved [in a proceeding to be heard by him]." Hobet Mining Inc., 877 F.Supp at 1015.

"Although the Federal Arbitration Act (FAA) `does not apply to disputes stemming from collective bargaining agreements, courts have applied FAA evident partiality standards to arbitration awards involving collective bargaining agreements'." Consolidation Coal Company, 48 F.3d at 128, 129, quoting Domino Sugar Corp vs. Sugar Workers Local Union, 392, 10 F.3d 1064, 1067 (4th Cir. 1993).

It turns out that the arbitrator had a brother who was an employee, in another state, of the international union which was a party to both of the arbitrations in Hobet Mining, Inc. and Consolidation Coal Company.

The Fourth Circuit in Consolidation Coal Company adopted the four factor analysis initially used by District Judge Copenhaver in Hobet Mining, Inc. The Fourth Circuit and the district court both concluded that each arbitration award should be upheld.

In neither case did the appealing coal company bear the heavy burden of proof to demonstrate evident partiality, such **"that a reasonable person would have to conclude that a arbitrator was partial' to the other party to the arbitration."** Consolidation Coal Company, 48 F.3d at 129, quoting Peoples Security Life Insurance Company, 991 F.2d at 145.

Each case held **that this standard required a showing of something more than the "appearance of bias"**. Consolidation Coal Company, 48 F.2d 129; Hobet Mining Company, 877 F.Supp. 1018.

Both cases hold that an arbitration award will not be set aside on the mere basis of non-disclosure, but such non-disclosure instead only subjects the award to review for evident partiality. Furthermore, Judge Copenhaver in Hobet Mining Company declined to hold that the sibling relationship, in and of itself, constituted per se partiality, distinguishing Morelite Construction Company vs. New York City Carpenter's Funds, 748 F.2d 79 (2nd Cir. 1984), where the father of an arbitrator became president of the union, which was a party to the arbitration during the proceeding. The Second Circuit vacated the award in Morelite, based upon its "strong feeling that sons are most often than not loyal to their fathers, partial to their fathers, and biased on behalf of their fathers." Morelite, 748 F.2d at 81. However, at the same time the Court in Morelite recognized that any "list of familial or other relationships that would result in the per se vacation of an arbitration award...would most likely be very short." Morelite, 748 F.2d at 85.

Instead, Judge Copenhaver in Hobet Mining held:

It is accordingly more appropriate to examine the nature of the relationship and its connection

to the arbitration dispute to determine whether [mining company] has met its burden of proving direct and definite partiality or specific facts indicating improper motive such that a reasonable person, looking at all of the circumstances, would have to conclude that arbitrator Roberts, because of his relationship with [his brother], was partial to [the union] 877 F. Supp. at 1021

Turning to an analysis of the facts in the case at hand, it is apparent that Respondents have not borne their heavy burden of proof to show evident partiality.

Initially, **it is very important to note that the configuration of the relationship scrutinized here is not between the arbitrator and a party, but rather between the arbitrator and mere witnesses, which is remote and speculative.** In every reported state and federal case, cited by either party in this appeal, the alleged undisclosed relationship is between the arbitrator and a party, or counsel. As argued in the succeeding subsection, there is no duty to investigate or disclose a relationship with mere witnesses, under American Arbitration Association Rule 19, or South Carolina's ADR Rule 17(a). More importantly, **there is no reported state or federal decision vacating an arbitration award for evident partiality based on the arbitrator's relationship with a mere witness.**

**Also, it is very important to note that the arbitrator did not know of the relationship between his law partner and that partner's brother's employment with a witness** in the arbitration proceeding. The arbitrator states this conclusively in his affidavit. (R.p. 148) While Respondent Bryan Causey speculates in his affidavit that there may have been such knowledge, such statements are baseless and remote, not the direct and certain evidence needed. The facts in this case are most like the facts in Peoples Security Life Insurance Company, where the arbitrator was unaware that former counsel for one of the parties had joined the arbitrator's law firm during the arbitration proceeding.

Also, in ANR Coal Company, while the opinion doesn't say whether Brewer knew or didn't know of the additional (but attenuated) facts regarding the scope of his firm's representation of a party to the arbitration, the opinion emphasizes that Brewer was ill with leukemia and not practicing in 1988, when these other events occurred, thus indicating lack of knowledge on his part.

This case itself is not a "non-disclosure case", but a lack of knowledge case. An arbitrator cannot disclose what he does not know, and there is no evidence to support Defendant's assertion that there was "a failure to disclose" this remote relationship.

In all the other cases, in which the award was either upheld or vacated, the arbitrator knew and failed to disclose. In Hobet Mining and Consolidation Coal, the arbitrator certainly knew he had a brother that worked for the international union, which was a party to the arbitration. In Commonwealth Coatings Corp, the arbitrator knew that he had been paid \$12,000 over a period of several years by one of the parties to the arbitration. In Positive Software Solutions, Inc., vs. New Century Mortgage Corporation, 436 F.3d 495 (5th Cir. 2006) the arbitrator knew that he worked for seven years in significant litigation as co-counsel with counsel for one of the parties in the arbitration proceeding before him. In Schmitz vs. Prudential-Bache Securities, Inc., 20 F.3d 1043 (9th Cir. 1994), the lawyer had constructive knowledge of his own firm's representation of the parent company of a party to the arbitration.

The scant facts in the record may be analyzed under the four factors adopted by the Fourth Circuit in ANR as follows:

**(1) The extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding.**

There is no evidence in the record of any personal or pecuniary interest of the arbitrator in the proceeding. He has no connection with Crouch Construction

Company, Inc. He has no connection with Respondent Bryan Causey, or either of Causey's two limited liability corporations. However, Mr. Bruner's law partner, Joey Floyd had earlier sued GS2, the company by which his brother is now employed. (R.p. 163)

The Amended Arbitration Award itself is a meticulously reasoned, and imminently fair resolution of the disputes between the actual parties to this arbitration. The arbitrator starts from the written contract between the parties to the arbitration, and makes adjustments for the additional work required by change orders, and offsets for work not fully performed under the contract. Significantly, there is a hefty discount made by the arbitrator in estimating the proper amount of loads of unsuitable soils excavated by Appellant's subcontractor, Gist, Inc., reducing the amount claimed by Appellant by over \$25,000. Likewise, the arbitrator made adjustments in the amounts claimed due by Appellant under the change orders, every adjustment being in favor of Respondents.

**(2) The directness of the relationship between the arbitrator and the party is he alleged to favor.**

There is no evidence in the record about any connection between the arbitrator and Appellant Crouch..

GS2 is not a party to this arbitration. GS2 was sued as third party defendant by Respondents, but that litigation proceeded separately. Counsel for Appellant was not privy to being served with any subsequent pleadings, discovery, or notice of hearings in the proceedings between Respondents and GS2. GS2, from Appellant's standpoint, is merely one of a number of subcontractors who worked on the construction project, and was paid a total fee for its services of something less than \$8,000 (R.p. 31) Earlier, Bryan Causey himself, prior to the purchase of the real estate, had hired GS2 as his own agent, to conduct the geo-technical study and render a report, which it did, indicating extensive amounts of unsuitable building soils on the property. GS2's participation in the arbitration

was limited to the expert witness testimony of its president George Sembos and its primary engineer on the project, Chad Bruerton, regarding the proper steps they took to insure that unsuitable soil was removed and acceptable replacement soil correctly compacted.

**(3) The connection of that relationship to the arbitration.**

There is no relationship of the arbitrator to connect to the proceeding. Analyzing this factor from the GS2 standpoint, the arbitrator's law partner had no connection to this arbitration proceeding, nor did the law partner's brother Jayson Floyd participate in any way in the construction project itself, or the subsequent litigation and arbitration.

**(4) The proximity and time between the relationship and the arbitration proceeding.**

Jayson Floyd was hired by GS2 in August of 2009. Jim Bruner was chosen by the parties to be arbitrator June 15, 2010 (R.p. 162), and rendered his Amended Arbitration Award in December 7, 2010.

On pages 13 and 14 of the Order on appeal, a jumbled, inconsistent effort is made to consider the facts of this case under these four factors. When analyzed, it logically fails for lack of proof. The initial premise is that the arbitrator shares direct economic and professional interest with his law partner. Then it reasons that the partner and the brother have a direct financial relationship. There is no evidence of this. One brother is a lawyer, one brother is an engineer. There is no evidence of any financial bond between the two, even no evidence that either Joey Floyd or Jayson Floyd were aware of this proceeding. In the fact, all the evidence is that neither was aware of the proceeding or involved in it. The order on appeal, at the bottom of R.p. 15 nevertheless reasons that "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." There is no evidence to support this conclusion.

GS2 was paid less than \$8,000 for the services here. This was a minor job for them. (R.p. 31) There is no evidence of the impact, if any, this arbitration award would have on GS2. None, because it's not a party. On page 10 of the Order on appeal, the trial judge notes that after the Amended Award was issued, GS2 moved for summary judgment against Respondents on the basis of non-mutual collateral estoppel, and this purportedly establishes a connection with the arbitration. However, **there is no precedential value to an arbitration award.** See Peoples Security Life Insurance Insurance Company vs. Monumental Life Insurance Company, 991 F.Supp. 141, 147 (4<sup>th</sup> Cir. 1993); Smith vs. Kerrville Bus. Co., 709 F.2d 914, 918, Fn 2 (5<sup>th</sup> Cir. 1983) (Courts are not bound by arbitral rulings); Little Six Corporation vs. United Mine Workers, Local Union 8332, 701 F.2d 26, 29 (4<sup>th</sup> Circuit 1983).

The speculation by Respondents, that the arbitrator ruled against them to protect GS2, really begs the question, which is whether the preponderance of the evidence in the record before the arbitrator showed that the foundation of the final warehouse constructed by Appellant for Respondents was not settling, but instead functioning correctly as designed and built. Respondents cannot deny that to this day, they continue to use the warehouse built for them by Appellant, (but not as yet paid for), and that it is fully functional.

Bottom line, Respondents are disgruntled litigants seeking to impugn the integrity of an arbitrator by charging him with evident partiality, when instead all he did was rule against them on the merits on some of the issues in the arbitration.

The fallacy of the reasoning of the Order Vacating Award, and why it is clearly erroneous, is that the Order reasons that:

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 based upon the Canons of the South Carolina Alternate Dispute Resolution Rules and also based upon R-19(a) of the American Arbitration Association Construction Industry Arbitration Rules, the arbitrator had a duty to investigate and to disclose to the parties the familial relationship. (R.p. 6)

In fact, the arbitrator had no duty to investigate further than reviewing the witness lists of the parties and nothing to disclose, as argued in the succeeding sub-question. However, based upon this erroneous premise, the Order concludes he should have investigated and he should have disclosed, relying primarily on the Supreme Court decision in Commonwealth Coatings, Corp. supra, and utilizing an out of context quotation from Justice Black's opinion that "evident partiality" under the statute is proved per se unless "arbiters disclose to the parties any dealings that might create an impression of possible bias." (R.p. 8) In fact, the Commonwealth Coatings's decision is a plurality, with three justices dissenting. The majority of the court failed to enunciate any clear standard to define evident partiality. Apperson vs. Fleet Carrier Corporation, 879 F.2d 1344, 1358 nt. 19 (6<sup>th</sup> Cir. 1989); Int'l Produce, Inc. vs. A/S Rosshavet, 638 F.2d 548, 531 (2<sup>nd</sup> Cir. 1981). See also Schmitz vs. Prudential-Bache Securities, Inc., 20 F.3d 1043, 1047 (9th Cir. 1994) ("The majority did not articulate a succinct standard.")

As the numerous above discussed federal cases hold, canons and ethics rules do not trump the FAA, and canons and ethics rules do not carry the force of law.

The erroneous holding of the Order on appeal is the paragraph on R.p. 11:

Based on cases such as Commonwealth, Schmitz, and Positive, it appears that in non-disclosure 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 arbiters are chosen is at issue in non-disclosure cases. Whether the arbitrator's decision itself is faulty is not necessarily relevant.* (emphasis added)

The error is that this language focuses on some pre-award process of choosing the arbiter, which is not the point here. Instead, Respondents must bear the heavy burden of proof of evident partiality by direct and definite, and not remote and speculative, evidence. An appellate standard of "reasonable impression of bias" would open the flood gates to every arbitration award being overturned by a disgruntled litigant. Instead, the standard here, as found in ANR, is that "a party seeking vacatur must put forth facts that *objectively* demonstrate such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." 173 F.3d 501.

"It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality." Peoples Security Life Insurance Company vs. Monumental Life Insurance Company, 991 F.2d 141, 146, citing Health Servs. Management Corporation vs. Hughes, 975 F.2d 1253, 1264 (7<sup>th</sup> Cir. 1992); Apperson, 879 F.2d at 1358; Morelite Constr. Corporation vs. New York City Carpenter's Benefit Funds, 748 F.2d 79, 83 (2<sup>nd</sup> Cir. 1984). The important distinction between the "a reasonable person would have to conclude the arbiter was biased" standard and the standard set forth in the Order on appeal, which would require per se vacatur of any award upon a mere "impression of bias" was succinctly stated by the Fourth Circuit Court of Appeals in Consolidation Coal Company:

To demonstrate evident partiality under the FAA, the party seeking vacation has the burden of proving that 'a reasonable person would have to conclude that an arbitrator was partial' to the other party to the arbitration." Peoples, 991 F.2d at

146 (quoting Apperson, 879 F.2d 1344 at 1358). This reasonable person standard requires a showing of something more than the “appearance of bias” but not the “insurmountable” standard of “proof of actual bias.” Morelite, 748 F.2d 79 at 84. This Court has reasoned that “the alleged partiality must be `direct, definite, and capable of demonstration rather than remote, uncertain or speculative’.” Peoples, 991 F.2d at 146 (quoting Health Servs. Management Corporation vs. Hughes, 975 F.2d 1253, 1264 (7<sup>th</sup> Cir. 1992)). Furthermore, the party asserting evident partiality “must establish specific facts that indicate improper motives on the part of the arbitrator.” Peoples, 991 F.2d at 146, 48 F.3d at 129.

A review of the precedential authorities cited in the Order on appeal reveals the shallowness and insufficiency of their reasoning. The Order on appeal itself concedes, at R.p. 9 that “Justice White’s concurrence and Justice Black’s opinion [ in Commonwealth Coatings Corporation] did not define a clear standard as to the specific types of relationships that will generally constitute evident partiality if undisclosed by an arbitrator.” In other words, everyone agrees that Commonwealth Coatings encourages disclosures, but fails to define or set forth any type of objective standard to prove evident partiality.

The Schmitz case, discussed beginning R.p. 9 of the Order, is a decision in an arbitration case governed by the arbitration procedure of the National Association of Securities Dealers (NASD), which requires arbitrators to make an investigation of “any personal relationships with any party, its counsel, or witnesses.” 20 F.3d 1043 (9<sup>th</sup> Cir. 1994). In this case, one of the arbitors failed to reveal that his law firm represented the parent company of one of the parties. Schmitz struggles with interpreting Commonwealth Coatings, concluding:

[I]t is clear that the majority opinion, including its “appearance of bias” language, received at least five votes. Even so, *the majority did not articulate a succinct standard.* “Reasonable impression of partiality,” a formulation adopted by other courts and preferred in [earlier cases in this Circuit], is the best expression of the Commonwealth Coatings court’s holding.

*Whether the arbitrator's decision itself is faulty is not necessarily relevant. But in an actual bias determination, the integrity of the arbitrator's decision is directly at issue. That a reasonable impression of partiality is present does not mean the arbitration award was the product of impropriety.*

*Perhaps the notion that a reasonable impression of bias does not add up to actual bias prompted the Kinney Air court to state: "The appearance of impropriety, standing alone, is insufficient." 756 F.2d at 76 [omitting other citations] Yet this proposition in conjunction with Kinney Air's (and later cases') use of the Commonwealth Coatings standard means that an impression of bias is sufficient while an appearance is not. Certainly, the Commonwealth Coatings majority did not initiate the use of such a hairline distinction, if such a distinction is even possible. 20 F.3d at 1047. (emphasis added)*

Appellant would submit that neither a mere "impression of bias" nor the "appearance" of impropriety" is sufficient to constitute under either the state or federal statute governing appeals from arbitration awards.

Finally, in Positive Software Solutions, Inc., vs. New Century Mortgage Corporation, 436 F.3d 495 (5<sup>th</sup> Cir. 2006), an arbitrator failed to reveal that he had worked closely over a number years with a law firm representing one of the parties in the arbitration. Vacating the award, the Fifth Circuit adopted Canon II of the AAA's Code of Ethics for Arbitrators in commercial disputes, acknowledging that " [d]eciding what constitutes "evident partiality" in an arbitrator...has proved troublesome. The case law in this area is confusing and complicated." 436 F.3d 495 499. The Fifth Circuit in Positive Software recognized there was a divergence in Circuits, in which some Circuits have adopted the definition of "evident partiality" which requires that the evidence of bias or interest of an arbitrator be direct, definite and capable of demonstration rather than remote, uncertain or speculative (4<sup>th</sup>, 6<sup>th</sup>,

7<sup>th</sup> and 10<sup>th</sup> Cir.). Other courts have adopted a “much broader standard”, which requires per se vacating an arbitration award if there is a “reasonable impression of partiality.” The 5<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> Circuits adhere to this standard. 436 F.3d at 501, 502.

**Factually, all the cases relied upon by Respondents involved known conflicts which were intentionally not disclosed.** In Commonwealth, the arbitrator knew that one of the parties had been a big a client of his, paying \$12,000 in fees to the arbitrator as a consultant in the prior few years. In Schmitz, the arbitrator had constructive knowledge that his law firm represented the parent company of one of the parties. In Postive Software, the arbitrator knew he had been co-counsel with the law firm of one of the parties.

Furthermore, the conflict or connection in all these was between the arbitrator and a party or counsel, not a mere witness.

**On the facts of this case, there is not even proof which would rise to a reasonable impression of partiality.**

Whatever standard is used In this case, proof of evident partiality fails.

The Order on appeal at R.p. 16 attempts to muster and marshall the facts. First, the Order on appeal relies upon the arbitrator's non-disclosure itself to show partiality. Because the arbitrator had no knowledge of any connection between his law partner and an employee of the non-party GS2 Engineering firm, which itself has 90 employees, no inference of partiality can be drawn from this.

Second, Respondents assert that "the arbitrator refused to consider evidence material to Defendants' claims." This was one of the grounds to vacate the arbitration award raised by Respondent in its initial first Motion to Vacate, and in opposition of Appellant's Motion to Confirm the award. During an on-site inspection of the premises, the arbitrator instructed the attorneys for both the parties, that, while they were allowed to be

present, they were not to speak, were not to point out alleged problems, or run any non-scientific experiments. That is certainly his prerogative, and proper in carrying out a view of the premises pursuant to § 14-7-1320, S.C. Code Ann. While the view itself is not regarded as the taking of evidence, the finder of fact may certainly consider facts observed based upon inspection of the premises, these facts throwing light on the testimony in the record and enabling the finder of fact to understand the evidence already taken. Jacks vs. Townsend, 228 S.C. 26, 8 S.E.2d 776 (1955); Sanders vs. State Highway Department, 212 S.C. 224, 47 S.E.2d 306 (1948). In fact, Respondents have already argued this ground before Judge Cothran on February 7, 2011, and he denied it. (R.p. 5)

Next, Respondents assert that "over Defendant's objections the arbitrator permitted GS2 and its counsel to view the subject property..." (R.p. 16) Prior to the arbitration Appellant requested that all of its experts be allowed to view the premises. Surprisingly, Respondents adamantly opposed this, although of course the condition of the warehouse, and whether or not there were any foundation settling problems, was a key issue at the arbitration. The arbitrator, in a phone conference, after listening to arguments from both sides, ruled that Appellant and its experts could have an hour and half access to the premises to inspect it, which they did. Measurements and photos were allowed, destructive testing was prohibited. There were two representatives of GS2 present. In addition, also present was Ken Timmerman, P.E., Margaret Morrison, Roger Crouch, Skeet Crouch, and counsel. Subsequently, another of Appellant's engineers, Len Robertson, also was allowed to inspect, for one hour. GS2 was not singled out for any preferential treatment, and its representatives were mere witnesses. Again, this same claim was argued in Respondent's motion and denied by Judge Cothran.

Also, Respondents assert partiality is shown from the fact that the arbitrator submitted his affidavit to the trial court. (R.p. 16) After Respondents' brought this remote

and attenuated connection to light, there was an exchange of emails between counsel and the arbitrator (R.pp. 162-167) Given the inferences (but not facts) contained in the affidavits submitted by Respondents in support of their second Motion to Vacate, Appellant's counsel, in an email copied to Respondents' counsel, requested that the arbitrator submit an affidavit, which he did. (R.p. 163;148) Both parties also submitted other affidavits, all of which are included in this Record on Appeal. The Order on appeal notes that pursuant to "Canon VI of the South Carolina Code of Ethics for Arbitrators, "after an arbitration award has been made it is not proper for an arbitrator to assist in post arbitral proceedings, *except as required by law.*" (R.p.16) (emphasis added) Certainly, it is procedurally correct to support or oppose a motion by affidavit. SCRCP Rule 6(d). Furthermore, a submission of an affidavit is not "assistance" in post trial proceedings. He is merely furnishing accurate, relevant information to the Court. The procedure followed here was much like that in Peoples Security Life Insurance Company vs. Monumental Life Insurance Company 991 F.2d 141 (4<sup>th</sup> Cir. 1993), where the arbiter (Judge Lacey), as well as his unknown partner (Mr. Nolan, who had earlier represented one of the parties in the arbitration), submitted affidavits during the appeal and indeed "offered to make themselves available for cross examination by [the appealing company], but [the appealing company] did not seek discovery." 991 F.2d at 146. The mere submission of an affidavit is no evidence of partiality.

Also, Respondent makes much of an purported discrepancy between the emails and affidavit of the arbitrator. On the day he learned that his law partner Joey Floyd had a brother named Jayson who works for GS2 (March 3, 2011), the arbitrator wrote to the attorneys for the parties, in an email, "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 lists for conflicts but did not circulate the witness list to all attorneys." (R.p. 163) Subsequently that

day the arbitrator emailed all counsel "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." (R.p. 165) In his affidavit, the arbitrator stated "When I accepted the parties' request to be their arbitrator, I ran a conflicts check through our TABS systems for 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." (R.p. 149, para. 7) The upshot of these statements is that the arbitrator properly ran a formal conflicts check for the parties and counsel in this case, and personally reviewed the witness list, and did not have any knowledge of any relationship with any of the witnesses then listed, such as GS2. The arbitrator in his initial email, when he states "Our conflicts system did not reveal a hit for GS2" is apparently using the phrase "conflicts system" as a general, encompassing process that the firm follows, using a TABS system as well as generally circulating the names of the parties and lawyers to partners. There is no discrepancy showing evident partiality in these statements, which are consistent.

Finally, the Order asserts that the arbitrator was evidently partial because he failed to reveal a prior law suit he had brought against Margaret Morrison, who was one of Appellant's expert witnesses. (R.p. 17) Mrs. Morrison was not listed by Appellant on the witness list submitted to the arbitrator (R.p. 150; 152; 171-175) so it was a surprise to him when she appeared at the hearing. The failure to list her was an oversight on the part of Appellant's counsel. Ken Timmerman, P.E., an initial expert listed by Appellant, requested on the date of the inspection (which was finally allowed immediately before the hearing) that Mrs. Morrison accompany him to it, during the brief hour and a half allowed, and she did so. Appellant's counsel thereby became aware of her as a potential witness, and called her to testify at the hearing, identifying her as an expert to Respondents, but failing to supplement the witness list given to the arbitrator some five months previously. The

connection between Mrs. Morrison and the arbitrator was that he had sued her earlier (R.p. 150), which would appear to favor Respondents regarding the arbitrator's weighing of her testimony. In any event, there is no evident partiality proved here.

None of these facts in the Order come anywhere close to clear, definite and direct proof of evident partiality sufficient to vacate this award. Instead, all Respondents can muster is an attenuated, remote and speculative relationship between the arbitrator's law partner and his brother, who was one of 90 employees of an engineering firm from which two of Appellant's numerous expert witnesses were drawn. This is trival.

**B. THE ARBITRATOR FULFILLED HIS DUTY TO INVESTIGATE AND TO DISCLOSE RELATIONSHIPS.**

The contract between the parties provided that all claims or disputes "shall be decided by arbitration in accordance with Construction Industry Arbitration Rules of the American Arbitration Association..." (R.p. 74) These are the rules to which an arbitrator would initially look to determine the scope of investigation and disclosures.

AAA Rule-19. Disclosure provides in paragraph (a):

Any person appointed or to be appointed as an arbitrator as well as the parties and their representatives shall disclose to the AAA, 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*. Such obligation shall remain in effect throughout the arbitration. (emphasis added)

The whole scope of disclosure therefore is limited to the parties and their representatives. Of course, good practice would be for the arbitrator to review the list of witnesses, as he did here, to see if there are any known relationships, which he would also in turn disclose. The arbitrator in fact complied with AAA Rule 19(a), but even if he had

not, as noted by the Fourth Circuit in ANR:

[That failure to disclose] would not by itself, require or even permit a court to nullify an arbitration award. When parties agree to be bound by the AAA rules, those rules do not give a federal court license to vacate an award on grounds other than those set forth in 9 U.S.C. § 10. Thus, although AAA rules provide significant and helpful regulation of the arbitration process, they are not the proper starting point for an inquiry into an award's validity.' 173 F.3d 500, quoting Merit, 714 F.2d at 677.

Appellant would point out that, in the Order on appeal, (R.p. 14), there is an incorrect partial quote of this rule, which omits the language concerning "the parties or their representatives", and makes this quote misleading. This incomplete quote occurs on page 12 of the Order (R.p. 14) in an unsuccessful effort to distinguish ANR from the case at hand. Judge Cothran writes that the AAA Rule in ANR, which is the Commercial Arbitration Rule 19, (rather than as here, the AAA Construction Industry Rule 19), merely requires the arbitrator to disclose "any circumstance **likely to affect** impartiality," whereas the AAA Construction Industry Rule requires the arbitrator disclose any circumstance "likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence." [sic] There is no meaningful difference between these two standards.

The other procedural rule applicable to the arbitrator is ADR Rule 13(d), which provides:

The arbitrator has a duty to be impartial and to disclose any circumstance likely to affect impartiality or independence, including any bias, prejudice or financial or personal interest in the result of the arbitration or any past or present relationships with the parties or their representatives.

Our state ADR Rule, like the AAA Rule, therefore limits the duty to investigate to the parties

and their attorneys. Here, the arbitrator fulfilled those obligations.

If indeed, as the Order appealed from apparently holds, the arbitrator had a duty to investigate possible connections with all witnesses of either party, the mind boggles at the parameters of such an investigation, and the impossible burden it would place upon arbitrators. For example, should a member of a firm with 100 lawyers record in the firm's formal conflict system the siblings of all the lawyers, their places of employment, and other pertinent data? What about parents? What about first cousins? How about aunts and uncles? What about children? How would such a system be updated? Would it require additional information every time there is a change of employment or church membership of a remote relative of one of the arbitrator's 99 law partners?

Clearly, the common sense answer, which is dictated by court cases as well as AAA and ADR Rules, is that the focus is on an affirmative duty to investigate and reveal connections with the parties and the lawyers, supplemented with whatever direct knowledge the arbitrator actually has about the witnesses to be called by each party:

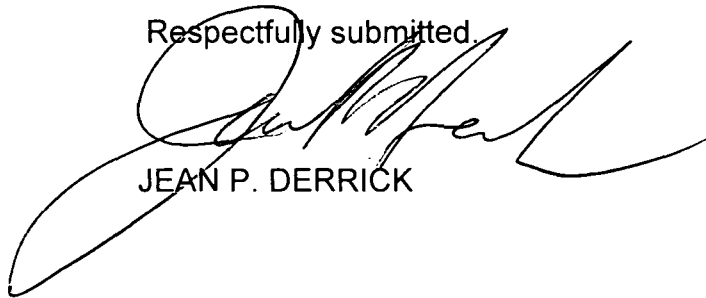
## CONCLUSION

Respondents are merely disgruntled litigants, complaining of instances in which the arbitrator ruled against their position, in the normal course of the hearing. Both the South Carolina Uniform Arbitration Act and the Federal Arbitration Act require clear and definite proof of evident partiality before an award can be vacated. This standard of proof is not met by showing a mere "appearance of impropriety" or "a reasonable impression of bias...." (R.p. 9, Order on appeal) but rather that "a reasonable person would have to conclude that an arbiter was partial to the other party in the arbitration." This higher standard will focus on the fairness of the award, and discourage pot-shot appeals. However, under either standard, the remote connection here between the arbiter and a witness is trival. None of the authorities, cited by either party, or in the Order on appeal, vacate an arbitration award

on such flimsy facts as the case at hand. The arbitrator fulfilled his obligations to investigate and disclose all connections with the parties and counsel, as well as witnesses.

The Order on appeal should be reversed, and the Amended Arbitration Award reinstated, and this case remanded for issuance of an Order of Reference to foreclose the mechanic's lien.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Jean P. Derrick', is written over the typed name below.

JEAN P. DERRICK

April 19, 2012

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

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 Appellant's Final Brief.

Stephen V. Futeral  
P.O. Box 1543  
Mount Pleasant, SC 29465

Gary A. Pickren  
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Columbia, SC 29210

  
JEAN P. DERRICK  
April 24, 2012

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APR 24 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Hon. R. Ferrell Cothran, Jr., Judge

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Crouch Construction Company, Inc.....Appellant

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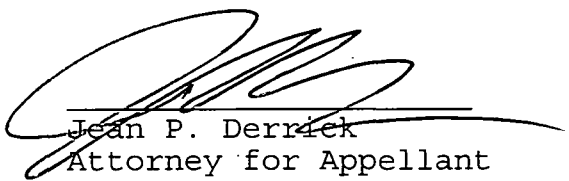
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vs.

GS2 Engineering and Environmental  
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RULE 211 CERTIFICATION

I certify that Appellant's Final Brief complies with Rule 211,  
SCACR.

  
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Lexington, SC  
April 24, 2012

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