

The Supreme Court of South Carolina

Crouch Construction Company, Inc., Appellant,

v.

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

v.

GS2 Engineering and Environmental Consultants, Inc.,
Gist, Inc., 3rd Party Defendants.

Appellate Case No. 2011-195510

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court. Upon receipt of this order, the Court of Appeals is hereby directed to forward the case file, all records and briefs and any exhibits on file to this Court.

IT IS SO ORDERED.



FOR THE COURT C.J.

Columbia, South Carolina

December 28, 2012

cc:

Jean Perrin Derrick

Gary Allen Pickren

Stephan Victor Futeral

The Honorable Jenny Kitchings

The Supreme Court of South Carolina

Crouch Construction Company, Inc., Appellant,

v.

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

v.

GS2 Engineering and Environmental Consultants, Inc.,
Gist, Inc., 3rd Party Defendants.

Appellate Case No. 2011-195510

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IT IS SO ORDERED.


C.J.
FOR THE COURT

RECEIVED
DEC 31 2012
SC COURT OF APPEALS

Columbia, South Carolina

December 28, 2012

cc:

Jean Perrin Derrick

Gary Allen Pickren

Stephan Victor Futeral

The Honorable Jenny Kitchings



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

December 18, 2012

Mrs. Jean Perrin Derrick
PO Box 929
Lexington SC 29072

Mr. Gary Allen Pickren
220 Executive Center Drive
Columbia SC 29210

Mr. Stephan Victor Futeral
1004 Anna Knapp Blvd.
2nd Floor
Mt. Pleasant SC 29464

Re: Crouch Construction v. Causey, Brian
Appellate Case No. 2011-195510

Dear Counsel:

Please be advised the Court of Appeals has decided to request certification from the Supreme Court in this case. You will be advised of the certification decision when it is made.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

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
jderrick@windstream.net

December 18, 2012

Jenny Abbott Kitchens, Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Crouch Construction vs. Bryan Causey, et.al.

Dear Clerk Kitchens:

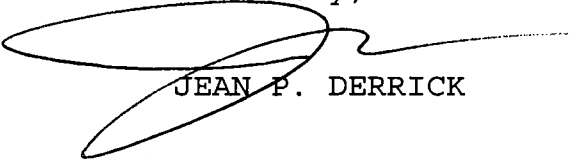
This is to request that argument in this case be rescheduled, because of an unanticipated conflict. Specifically, since I filled in and returned the questionnaire from the Court of Appeals about scheduling, I've been retained by a client who has a 2 day trial scheduled in Calhoun County on February 5th and 6, 2013.

I would therefore request that argument in this case be rescheduled, if possible, for February 4, 2013 or February 7, 2013. I am also available for argument February 12 and 13, 2013, but not February 14, 2013.

This is an important case, raising novel issues regarding by what standards an arbitration award may be vacated, and I truly believe that oral argument is important and would be beneficial to the Panel.

I appreciate in advance your assistance in the matter.

Sincerely,


JEAN P. DERRICK

JPD/ss
cc: Gary Pickren, Esq.
Stephen Futeral, Esq.

RECEIVED

DEC 19 2012

SC Court of Appeals



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 09, 2012

Mrs. Jean Perrin Derrick
PO Box 929
Lexington SC 29072

Re: Crouch Construction v. Causey, Brian
Appellate Case No. 2011-195510

Dear Counsel:

The following order has been endorsed on your request for additional time to serve and file the appellant's final brief and appellant's final reply brief in the above matter.

"Granted.

FOR THE COURT

By s/ V. Claire Allen
CLERK

July 09, 2012."

Please be advised the appellant's final brief and appellant's final reply brief have been received and are accepted as filed. Within ten days, Counsel is requested to provide a certificate of counsel, pursuant to Rule 210, for the amended record on appeal.

Very truly yours,

V. Cloire Allen, Deputy

CLERK

cc: Gary Allen Pickren
Stephan Victor Futeral

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
jderrick@windstream.net

April 13, 2012

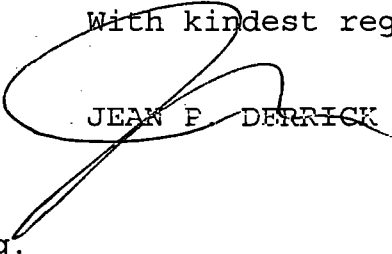
Hon. Tanya Gee
S.C. Court of Appeals
P.O. Box 11269
Columbia, SC 29211

Re: Crouch Construction Company, Inc., Appellant
vs. Bryan Causey, Celebrations of Columbia, LLC
And Causey Consulting, LLC, Respondents
vs. GS2 Engineering and Environmental Consultants, Inc.
and Gist, Inc. Third party Defendants
2009-CP-32-00973

Dear Clerk Gee:

I believe that Appellant's Final Brief and Final Reply Brief need to be filed Monday April 16, 2012. This is to request an additional 10 days in which to file and serve these Final Briefs. I am enclosing a motion fee of \$25. Thank you for your consideration in the matter.

With kindest regards,


JEAN P. DERRICK

JPD/sss
Enclosure
cc: Stephen V. Futeral, Esq.
Gary A. Pickren, Esq.

GRANTED
JOHN CANNON FEW, C.J.
FOR THE COURT

By: V. Claire Allen
(Clerk) (Deputy Clerk)

FILED

Cartu 7/9/12

RECEIVED
APR 18 2012
SC Court of Appeals

The South Carolina Court of Appeals

Crouch Construction Company, Inc., Appellant,

v.

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

v.

GS2 Engineering and Environmental
Consultants, Inc., Gist, Inc., 3rd Party Defendants.

The Honorable R. Ferrell Cothran, Jr.
Lexington County
Trial Court Case No. 2009-CP-32-00973

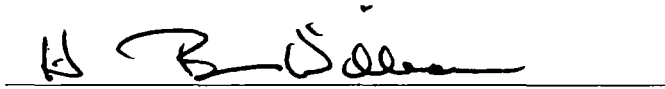
ORDER

Respondents have filed a motion to compel Appellant to file a supplemental Record on Appeal or to correct and re-file the Record on Appeal. Respondents contend Appellant erred in including underlines or hand-written notes on eight pages of the Record on Appeal, including the February 20, 2008 Agreement for Services in the Record on Appeal instead of the July 9, 2008 Agreement for Services, including an Index that is "off by 2 [or 3] pages," and listing three memoranda in the "Exhibits and other Materials" portion of the Record on Appeal instead of the "pleadings" section. Appellant filed a return.

After careful consideration, Respondent's motion is granted in part and denied in part. Within twenty days, excluding the filing date of this order, Appellant shall serve and file an

amended Record on Appeal that contains all matters designated by both parties to be included in the Record on Appeal, including the designated July 9, 2008 Agreement for Services. The amended Record on Appeal shall contain a proper Index with proper pagination. Additionally, all handwritten notes and underlines shall be omitted from the matters included in the Record on Appeal. Appellant does not need to revise the placement of the memoranda currently contained in the "Exhibits and other Materials" portion of the Record on Appeal.

IT IS SO ORDERED.



Columbia, South Carolina

cc: Jean Perrin Derrick, Esquire
Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire

FILED
Watts 3/8/10



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 8, 2012

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

Stephan Victor Futeral, Esquire
Futeral & Nelson, LLC
1004 Anna Knapp Blvd.
2nd Floor
Mt. Pleasant, SC 29464

Re: Crouch Construction v. Causey, Brian
Case Tracking #: 2011195510

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding the above case.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Gary A. Pickren, Esquire

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

JAN 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

APPELLANT'S RETURN TO RESPONDENTS' AMENDED MOTION TO COMPEL

Appellant makes his Return as follows:

1. Underlining: There are indeed occasional underlinings on some of the documents, but these marks do not obscure or obstruct the full text. Respondents' object to these lines because "they may be construed as arguments that were not contained in Appellant's Initial Brief." This attenuated concern is baseless. There are underlinings on Respondents' documents printed in the record, as well as Appellant's.

2. Agreement for Services: The Agreement for Services should be indexed, and a corrected Index is attached. This is the document Appellant understood Respondents designated to be included

in the record. It is the only Agreement for Services which was entered in the record at the arbitration hearing. See attached exhibit list. The Agreement for Services printed in the record is Plaintiff's exhibit three.

3. Agreement for Services dated July 9, 2008: This Agreement for Services was not entered into evidence before the arbitrator. See attached exhibit list. However, if Respondents want it printed, Appellant is happy to prepare a Supplemental Record with this single page. (Appellant would however note that there is handwriting on this exhibit proposed to be printed by Respondents.)

4. Incorrect page numbers: Appellant agrees that a corrected Index, which is attached, needs to be inserted in the Record on Appeal.

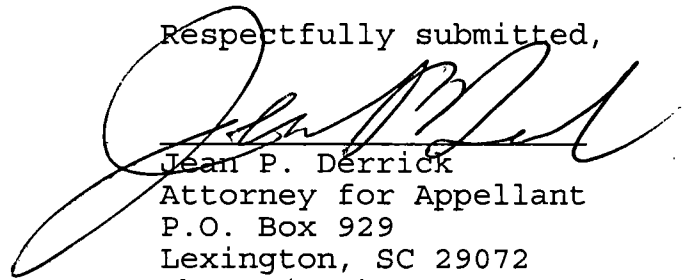
5. Location of Respondents' Memoranda: Pursuant to Rule 210(c) SCARC, the memoranda of Respondents are properly indexed under Other Materials. These memoranda are certainly not pleadings. See Rule 7(a) SCRCP.

6. Dating pleadings: Dates of all of Respondents' pleadings are included in the revised Index, as attached.

WHEREFORE, Appellant would pray that this Court allow the two pages of the corrected Index be inserted in the Record on appeal. Also, as requested by Respondents, Appellant is willing to prepare and file a Supplemental Record on appeal, containing the single page of the Agreement for Services dated July 8, 2008. The remaining complaints of Respondents (some minor, infrequent underscoring on documents of both parties), and the indexing of

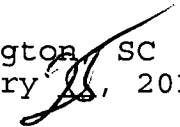
Respondents' memoranda under Other Materials, rather than pleadings, are inconsequential points, and should be denied.

Respectfully submitted,



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

Lexington, SC
January 28, 2012



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Crouch & Causey

Arbitration 11/2-4/10

Page 1 of 2

Exhibit's Exhibits

- #1 - Contract w/ Crouch
- #2 - Specifications
- #3 - Causey Contract w/ CCC
- #4 - Geotechnical Report
- #5 - Other bids
- #6 - Bid from Gist
- #7 - Billings & Checks AIA
- #8 - Photographs
- #9 - Change Order 3 Rev.
- #10 - Correspondence between Steel & Mr. Causey
- #11 - Change Order 4
- #12 - Change Order 5
- #13 - Change Order 6
- #14 -
- #15 - Change Order 7 & letter
- #16 - Change Order 10
- #17 -
- #18 - Emails
- #19 - Deed
- #20 - Load Count Summation
- #21 -

Plaintiff's Exhibits (Cont'd):

Page 2 of 2

- # 22 - Report - 9/20/11
- # 23 - Report - 10/7/10
- # 24 - Timmerman Invoice
- # 25 - Roberson Report
- # 26 - Ferratec Inc. Report
- # 27 - Ch. 8 of unknown text - supporting doc
- # 28 - Army Corps of Engineers PCA
- # 29 - Staley Payment
- # 30 - Photograph
- # 31 - Handwritten Calculations by Roger Crouch & supporting doc
- # 32 - Gist Change Order signed by Bryan Causey
- # 33 - Change Orders 2 & 8
- # 34 - Rebuttal to Dennis Report by Crouch
- # 35 - Change Orders 14 & 17

Defendant's Exhibits:

- # 1 - Letter dated ?
- # 2 - Preliminary drawings by Crouch
- # 3 - Change Order 1 - 5/27/08
- # 4 -
- # 5 - Progress Report
- # 6 - Progress Report

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- #7 - Proposal for Retention Piers
- #8 - Applications for Payment
- #9 - Plans by Robertson
- #10 - Photographs of erosion
- #11 - Brurton Report - 10/1/10
- #12 - Dennis Report - 4/8/09
- #13 - Dennis Report - 7/10/09
- #14 - Dennis Report - 8/7/09
- #15 - Dennis Report - 10/25/10
- #16 - Proctors done by GSD
- #17 - Supplemental Report by Brurton
- #18 - Cover Letter + Final Estimate
- #19 - Back-up Calculations for Estimates
- #20 -
- #21 - Photographs
- #22 - Dennis Report - 8/7/09
- #23 - Proctor Tests by Travis
- #24 - Field Penetrometer Tests - 4/17/09
- #25 - Field Penetrometer Tests - 10/21/09
- #26 - Core Sample
- #27 - Dennis Invoice - 10/31/10
- #28 - Dennis Invoice - 11/5/10
- #29 - Dennis Invoice

10-1-55

Page 1 of 1

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.

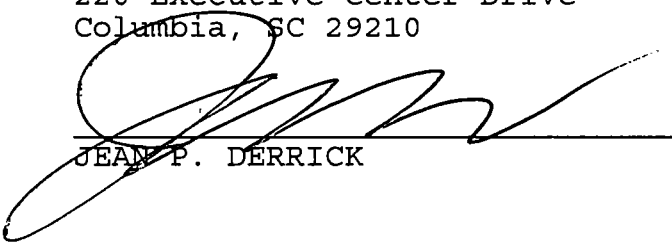
GS2 Engineering and Environmental
Consultants, Inc., Gist, Inc.....Third Party Defendants

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 Return to Respondents' Amended Motion to
Compel on January 25, 2012.

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

Gary A. Pickren
220 Executive Center Drive
Columbia, SC 29210


JEAN P. DERRICK

RECEIVED

JAN 27 2012

SC Court of Appeals

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
jderrick@windstream.net

January 25, 2012

Hon. Tanya Gee
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

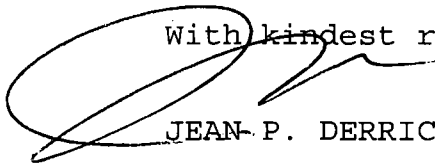
Re: Crouch Construction Company, Inc.
vs. Bryan Causey, Celebrations of Columbia, LLC
And Causey Consulting, LLC
97-CP-32-00973
Case Tracking Number: 2011195510

Dear Clerk Gee:

Enclosed please find the original and six copies of
Appellant's Return to Respondents' Amended Motion to Compel.
Also enclosed is an original Proof of Service by mail upon
opposing counsel of this Return.

I would appreciate your filing these materials.

With kindest regards,



JEAN P. DERRICK

JPD/sss
Enclosures
cc: Stephen Futeral, Esq., w/Encls.
Gary A. Pickren, Esq., w/Encls.

RECEIVED
JAN 27 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

RECEIVED
JAN 17 2012
SC Court of Appeals

Crouch Construction Company, Inc., ...Appellant,

v.

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

v.

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

**RESPONDENTS' AMENDED MOTION TO COMPEL APPELLANT TO
SUPPLEMENT AND/OR RE-FILE RECORD ON APPEAL AND TO STAY TIME FOR
RESPONDENTS TO SERVE THEIR FINAL BRIEF UNTIL THIS MOTION IS
DECIDED**

Respondents, by and through undersigned counsel, pursuant to Rules 210, 212, and 240, SCACR, move this Honorable Court to compel Appellant to supplement and/or re-file the Record on Appeal. This motion sets forth all of the grounds set forth in the original motion except that it modifies paragraph 2 and adds paragraph 3, below, all of which are set forth as follows:

1. Appellant has improperly added underlines and hand-written notes on various documents in the Record on Appeal on the following pages: 27, 33 – 34, 142, 178, 180 – 182, and

184. These underlines and notes are improper as they may be construed as arguments that were not contained in Appellant's initial brief.

2. An Agreement for Services dated February 20, 2008 is found on pg. 168 but is not listed in the index. This document was not designated by any party and should be removed from the Record on Appeal.
3. Respondents' Designation of Matter included an "Agreement for Services" dated July 9, 2008. Appellant did not include this document in the Record on Appeal. This document is important to this appeal and should be included in the Record on Appeal. A copy of this document is attached hereto as Exhibit A.
4. The page numbers are incorrect. They are off by 2 pages each until page 173 where they become off by 3 pages. It is implicit that the Index required by Rule 210(e), SCACR should be correct and the discrepancies may create confusion or difficulty for the reviewing authority.
5. Appellant lists three (3) of Respondents' memorandums after the "Exhibits and other Materials" portion of the Record where these memorandums should be contained in the "pleadings" section by their corresponding motions. This misplacement may de-emphasize the arguments contained in Appellant's memorandums.
6. Although Appellant properly dated every one of her designated pleadings in the Index, Appellant failed to properly do the same with many of Respondents' pleadings despite Respondents listing said dates in their Designation of Matter. Appellant has a duty to create a Record with as even of a playing field as possible. These omissions may confuse the reviewing authority. Specifically, the following pleadings are missing dates:

- a. Amended Answer and Counterclaim of Defendants Causey, Celebrations of Columbia, LLC, and Causey Consulting, LLC
- b. Defendants' 3rd Party Plaintiff's Notice of Motion and Motion to Change and/or Clarify the Arbitration Award
- c. Defendants' 3rd Party Plaintiffs' Motion to Vacate Both the Arbitration Award and the Amended Arbitration Award
- d. Defendants' 3rd Party Plaintiffs' Supplemental Motion to Vacate the Arbitration Award and Motion for Relief from Order Pursuant to Rule 60, SCRCivP
- e. Reply to Plaintiff's Motion to Alter or Amend

CONCLUSION

Appellant did not meet its duty to provide a Record on Appeal in compliance with fairness and the South Carolina Appellate Court Rules. Accordingly, Appellant should be compelled to correct these deficiencies and re-file and re-serve the Record on Appeal. Respondent respectfully requests that this Honorable Court stay the time for filing Respondents' Final Brief until this motion is decided and to allow at least ten (10) days after any decision for Respondents to file and serve their Final Brief.

Respectfully submitted,

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

Attorney for Respondents

Dated: 1/12/12

EXHIBIT A

07/05/2002 15:52

CROUCH CONSTRUCTION

PAGE 02/11

DB-29114C

AGREEMENT FOR SERVICES

This Agreement, made as of July 9th 2002, 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 of 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 presents 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

Client

Title

Signature

Crouch Const Co / Stuart G. Guel

Project Manager

[Signature]

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

Crouch Construction Company, Inc., ...Appellant,

v.

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

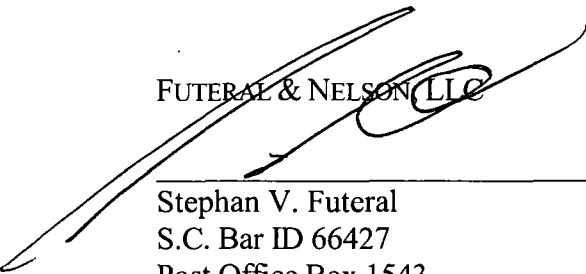
v.

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

**PROOF OF SERVICE OF
RESPONDENTS' AMENDED MOTION TO COMPEL APPELLANT TO
SUPPLEMENT AND/OR RE-FILE RECORD ON APPEAL AND TO STAY TIME FOR
RESPONDENTS TO SERVE THEIR FINAL BRIEF UNTIL THIS MOTION IS
DECIDED**

I certify that I have served Respondents' Motion to Compel Appellant to Supplement and/or Re-File the Record on Appeal and to Stay the Time for Respondents to Serve their Final Brief Until this Motion is Decided by delivering a copy via United States Mail, postage pre-paid, on January 12, 2012, addressed to Appellant's counsel at the following address:

Ms. Jean P. Derrick
205 West Main Street
Post Office Box 929
Lexington South Carolina 29072.



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

Dated: 1/12/12

Attorneys for Respondents



Attorneys Serving the Lowcountry

January 12, 2012

The Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Crouch Construction v. Causey et al.
Case No. 09-CP-32-973
Case Tracking No.: 2011195510

Dear Ms. Gee:

Please find enclosed an original and seven (7) copies of Respondents' Amended Motion to Compel Appellant to Supplement and/or Re-File the Record on Appeal and to Stay the Time for Respondents to Serve their Final Brief Until this Motion is Decided for the above-referenced case. Please also find an original and one (1) copy of a Proof of Service regarding the same. Please file the originals and return one clocked copy of each document to our office in the enclosed envelope. It is my understanding that no filing fee is required of an amended motion, but if such is required, please advise me, and my office will promptly deliver a check to your office.

Thank you for your kind assistance.

Sincerely,

Stephanie M. Smith
Legal Assistant to Stephan V. Futeral

Enc.

cc: Jean Derrick, Esq.
Gary Pickren, Esq. via email

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JAN 17 2012

SC COURT OF APPEALS

Local 843-284-5500 Toll Free 877-913-5500 Fax 843-284-5501

1004 Anna Knapp Blvd., 2nd Floor • Mount Pleasant, South Carolina 29464
Reply to: P. O. Box 1543 • Mount Pleasant, South Carolina 29465-1543

www.charlestonlaw.net

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

Crouch Construction Company, Inc., ...Appellant,

v.

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

v.

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

**RESPONDENTS' MOTION TO COMPEL APPELLANT TO SUPPLEMENT AND/OR
RE-FILE RECORD ON APPEAL AND TO STAY TIME FOR RESPONDENTS TO
SERVE THEIR FINAL BRIEF UNTIL THIS MOTION IS DECIDED**

Respondents, by and through undersigned counsel, pursuant to Rules 210, 212, and 240, SCACR, move this Honorable Court to compel Appellant to supplement and/or re-file the Record on Appeal. The grounds for this motion are as follows:

1. Appellant has improperly added underlines and hand-written notes on various documents in the Record on Appeal on the following pages: 27, 33 – 34, 142, 178, 180 – 182, and 184. These underlines and notes are improper as they may be construed as arguments that were not contained in Appellant's initial brief.

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SC Court of Appeals

*Amended motion
filed 1/17/12*

2. The Agreement for Services designated by Respondents is found on pg. 168 but is not listed in the index. Such omission could create difficulty in locating and reviewing this matter which was designated by Respondents.
3. The page numbers are incorrect. They are off by 2 pages each until page 173 where they become off by 3 pages. It is implicit that the Index required by Rule 210(e), SCACR should be correct and the discrepancies may create confusion or difficulty for the reviewing authority.
4. Appellant lists three (3) of Respondents' memorandums after the "Exhibits and other Materials" portion of the Record where these memorandums should be contained in the "pleadings" section by their corresponding motions. This misplacement may de-emphasize the arguments contained in Appellant's memorandums.
5. Although Appellant properly dated every one of her designated pleadings in the Index, Appellant failed to properly do the same with many of Respondents' pleadings despite Respondents listing said dates in their Designation of Matter. Appellant has a duty to create a Record with as even of a playing field as possible. These omissions may confuse the reviewing authority. Specifically, the following pleadings are missing dates:
 - a. Amended Answer and Counterclaim of Defendants Causey, Celebrations of Columbia, LLC, and Causey Consulting, LLC
 - b. Defendants' 3rd Party Plaintiff's Notice of Motion and Motion to Change and/or Clarify the Arbitration Award
 - c. Defendants' 3rd Party Plaintiffs' Motion to Vacate Both the Arbitration Award and the Amended Arbitration Award

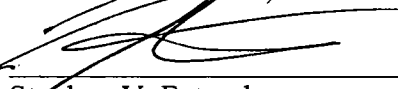
- d. Defendants' 3rd Party Plaintiffs' Supplemental Motion to Vacate the Arbitration Award and Motion for Relief from Order Pursuant to Rule 60, SCRCivP
- e. Reply to Plaintiff's Motion to Alter or Amend

CONCLUSION

Appellant did not meet its duty to provide a Record on Appeal in compliance with fairness and the South Carolina Appellate Court Rules. Accordingly, Appellant should be compelled to correct these deficiencies and re-file and re-serve the Record on Appeal. At a minimum, Appellant should be required to supplement the index of the existing record to correct the deficiencies described in paragraph 2 – 5, above. Respondent respectfully requests that this Honorable Court stay the time for filing Respondents' Final Brief until this motion is decided and to allow at least ten (10) days after any decision for Respondents to file and serve their Final Brief.

Respectfully submitted,

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
Attorney for Respondents

Dated: 1/9/12

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

Crouch Construction Company, Inc., ...Appellant,

v.

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

v.

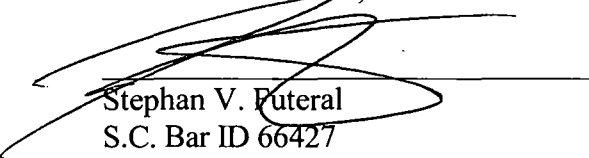
GS2 Engineering and Environmental
Consultants, Inc., Gist, Inc., ... Third Party Defendants.

**PROOF OF SERVICE OF
RESPONDENTS' MOTION TO COMPEL APPELLANT TO SUPPLEMENT AND/OR
RE-FILE RECORD ON APPEAL AND TO STAY TIME FOR RESPONDENTS TO
SERVE THEIR FINAL BRIEF UNTIL THIS MOTION IS DECIDED**

I certify that I have served Respondents' Motion to Compel Appellant to Supplement and/or Re-File the Record on Appeal and to Stay the Time for Respondents to Serve their Final Brief Until this Motion is Decided by delivering a copy via United States Mail, postage pre-paid, on January 9, 2012, addressed to Appellant's counsel at the following address:

Ms. Jean P. Derrick
205 West Main Street
Post Office Box 929
Lexington South Carolina 29072.

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

Dated: 1/9/12

Attorneys for Respondents



Attorneys Serving the Lowcountry

January 9, 2012

The Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Crouch Construction v. Causey et al.
Case No. 09-CP-32-973
Case Tracking No.: 2011195510

Dear Ms. Gee:

Please find enclosed an original and seven (7) copies of Respondents' Motion to Compel Appellant to Supplement and/or Re-File the Record on Appeal and to Stay the Time for Respondents to Serve their Final Brief Until this Motion is Decided for the above-referenced case. Please also find an original and one (1) copy of a Proof of Service regarding the same. Please file the originals and return one clocked copy of each document to our office in the enclosed envelope. I have enclosed this firm's check in the amount of \$25.00 to satisfy the filing fee.

Sincerely,

Stephanie M. Smith
Legal Assistant to Stephan V. Futeral

Enc.

cc: Jean Derrick, Esq.
Gary Pickren, Esq. via email

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JAN 10 2012

SC Court of Appeals

Local 843-284-5500 Toll Free 877-913-5500 Fax 843-284-5501

1004 Anna Knapp Blvd., 2nd Floor • Mount Pleasant, South Carolina 29464
Reply to: P. O. Box 1543 • Mount Pleasant, South Carolina 29465-1543

www.charlestonlaw.net

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
jderrick@windstream.net

December 28, 2011

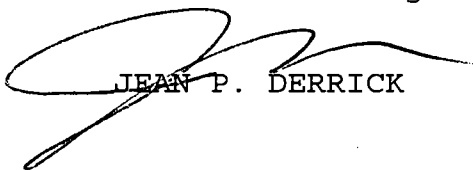
HAND DELIVERED
Hon. Tanya Gee
S.C. Court of Appeals
1015 Sumter Street
John C. Calhoun Bldg.
Columbia, SC 29211

Re: Crouch Construction Company, Inc.
vs. Bryan Causey, Celebrations of Columbia, LLC
And Causey Consulting, LLC
97-CP-32-00973

Dear Clerk Gee:

Enclosed please find the original (unbound) and 15 copies of the Record on Appeal, together with my original Certificate of Service, in the above captioned case.

With kindest regards,


JEAN P. DERRICK

JPD/sss
Enclosures
cc: Stephen Futeral, Esq., w/Encls.
Gary A. Pickren, Esq., w/Encls.

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DEC 28 2011
SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 5, 2012

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

Re: Crouch Construction v. Causey, Brian
2011195510

Dear Ms. Derrick:

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1205 Pendleton Street, Columbia, S.C. 29201. Thank you for your attention to this.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ma

cc: Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire

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.

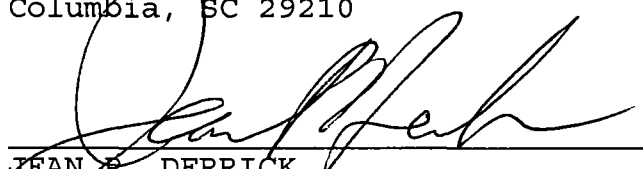
GS2 Engineering and Environmental
Consultants, Inc., Gist, Inc.....Third Party Defendants

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 Initial Reply Brief dated December 5, 2011.

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

Gary A. Pickren
220 Executive Center Drive
Columbia, SC 29210


JEAN P. DERRICK
December 5, 2011

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SC Court of Appeals

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
jderrick@windstream.net

December 5, 2011

Hon. Tanya A. Gee
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

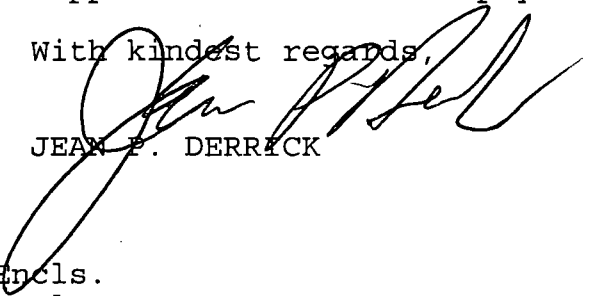
Re: Crouch Construction Company, Inc.
vs. Bryan Causey, Celebrations of Columbia, LLC
And Causey Consulting, LLC
97-CP-32-00973

Dear Clerk Gee:

Enclosed please find a copy of Appellant's Initial Reply Brief, together with the original proof of service of this Brief on opposing counsel.

Under cover of copy of this letter, I am serving each opposing counsel with a copy of Appellant's Initial Reply Brief.

With kindest regards,


JEAN P. DERRICK

JPD/sss
Enclosures
cc: Stephen Futeral, Esq., w/Encls.
Gary A. Pickren, Esq., w/Encls.

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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

Case No.: 2009-CP-32-00973

Crouch Construction Company, Inc.....Appellant

v.

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

v.

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

APPELLANT'S INITIAL REPLY BRIEF

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

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A. RESPONDENTS HAVE FAILED TO PROVE EVIDENT PARTIALITY

Remarkably, nowhere in their brief do Respondents point to any proof that the arbitrator James Bruner had knowledge either prior to or during the arbitration of the relationships about which Respondents complain. While Respondents repeatedly complain about the arbitrator's failure to disclose, Respondents themselves failed to explain how Mr. Bruner could disclose anything of which he had no knowledge. Therein lies Respondents' conundrum. There is a total lack of proof that Bruner knew about a remote familial connection between one of his law partners and an engineering firm that employed 90 people. [Affidavit of Sembos; Bruner].

Respondents can prove that the arbitrator's law partner Joey Floyd in 2008 had actually sued this engineering firm, GS2. Respondents can also prove that the arbitrator himself, some ten years earlier, had sued one of Appellant's expert witnesses, Margaret Morrison (whose name was never given to the arbitrator on any witness list, because she was added as an expert witness by Appellant just a few days before the hearing). [Bruner email]

The above three relationships are the sum total of the "conflicts" which Respondents assert to prove evident partiality. However, it is plain that these relationships do not even meet the flimsy standard of proof urged by Respondents, of an "appearance of bias". Certainly, employing the majority rule applicable in the Fourth Circuit Court of Appeals, Respondents bear a heavy burden of proof to demonstrate evident partiality "such that 'a reasonable person would have to conclude that an arbitrator was partial' to

the other party..." Consolidation Coal Company vs. Local 1643, United Mine Workers of America, 48 F.3d 125, 129 (4th Cir. 1995), quoting Peoples Security Life Insurance Company vs. Monumental Life Insurance Company, 991 F.2d 141, 146 (4th Cir. 1993). Respondents fail in their burden.

Again remarkably, Respondents have failed to identify any reported decision, from any jurisdiction, either state or federal, which vacates an arbitration award based upon an arbitrator's relationship with a mere witness in an arbitration. Instead, all cases cited by Respondents in which an award was vacated for non-disclosure are cases in which the information was clearly known to the arbitrator prior to and during the arbitration proceeding, but not disclosed. Further, in all those cases in which the award was vacated, it was based upon a relationship between the arbitrator and a party or counsel to the arbitration, not a mere witness.

Finally, Respondents fail to distinguish two opinions from the Fourth Circuit Court of Appeals, each confirming an arbitration award entered by an arbiter whose own brother was employed by one of the parties to the arbitration. (Consolidation Coal Company vs. Local 1643, United Mine Workers of America, 48 F.3d 125, 129 (4th Cir. 1995); Hobet Mining Company vs. International Union Mine Workers of America, 877 F.Supp. 1011 (S.D.W.V. 1994)).

Plainly, no reported decision, either state or federal, has ever vacated an arbitration award for an arbitrator's failure to disclose an unknown, attenuated connection with a witness.

To disguise and distract from the paucity of both proof as well as legal authority, Respondents open their first argument with a statement: "Appellant argues that South Carolina law does not apply to this arbitration, and that this Court should apply federal law instead. Appellant's argument is without merit..." [Respondent's Brief at page 7] This is a transparent straw man argument. Respondents' brief cites the one and only South Carolina case contained in the whole brief (South Carolina Department of Transportation vs. Horry County, 391 S.C. 76, 705 S.E. 21 (2011)), for the proposition that to be preserved for appellate review an issue must be raised and ruled upon. Thereafter, all cases cited by Respondents are federal cases. (See Table of Authorities, Respondents' Brief ii).

Respondents spend the remainder of the brief unsuccessfully trying to explain why the three strong precedential cases in the Fourth Circuit Court of Appeals of Consolidation vs. United Mine Workers, Hobet Mining, Inc. vs. International Union, and ANR Coal Company vs. Cogentrix are distinguishable. Clearly, Respondent agrees and concedes this Court should apply federal law. In fact, Judge Keesley, in granting Appellant's motion to compel arbitration, held that Respondents were "bound by the arbitration clause of the contract under federal law...." (Order filed March 17, 2010). Our Supreme Court in Gissell vs. Hart, 282 S.E.2d 235, 676 S.E.2d 320 (2009) recognized the applicability of the Federal Arbitration Act, 9 U.S.C.A. Section 10. See also Rich vs. Walsch, 357 S.C. 64, 590 S.E.2d 506 (Ct.App.2003). Respondents' point is

therefore meaningless. Both parties agree there are no reported state authorities determining what constitutes "evident partiality" as a statutory ground of appeal from an award in arbitration, and that this Court should look to Federal authority. Therefore, Respondents' first argument is a non-issue.

Respondents' brief then spends the next three pages discussing the significance of the Supreme Court decision in Commonwealth Coatings Corp vs. Continental Casualty Company, 393 U.S. 145 (1968), where an arbitrator intentionally failed to disclose he had been paid \$12,000 in consulting engineering fees over several years by one of the parties in the arbitration. While repeatedly referring to the present action as a "non-disclosure case", Respondents fail to ever explain how the arbitrator here could have disclosed an unknown and attenuated relationship between his law partner and an engineering company from which Appellant called several expert witnesses.

Then, on page 11, Respondents assert:

In its brief, Appellant claims that the 'connection of GS2 is that Respondent Bryan Causey originally hired GS2 to conduct the geo-technical survey....' Appellant's claim is misleading because the Agreement for Services, dated July 9, 2008, was between GS2 and Crouch Construction Company." (Brief at 11)

This statement of Respondents is incorrect. The Agreement for Services with GS2 Engineering and Environmental Consultants, Inc. is signed "Bryan Causey, owner". [Record] Why even do Respondents bother to make this factually incorrect assertion? Again, Appellant submits it is to distract from the flimsiness of the

facts and legal position in the case.

Next, using short, incomplete quotes of the Code of Ethics for arbitrators, Respondents conclude the argument of their first question by asserting that the arbitrator breached the canons of ethics by failing to fully investigate his relationship between his law partner and the employer of two of Appellant's witnesses.

In context, Canon II, Appendix A, Code of Ethics for Arbitrators provides:

Disclosure.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality of which might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving members of their families or their current employers, partners or business associates.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in the preceding paragraph A.

C. The obligation to disclose interests or relationships described in the preceding paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

[Paragraphs D and E are omitted as irrelevant]

Here, when Mr. Bruner was agreed upon by the parties as

arbitrator, he immediately ran a conflicts check through his law firm's TABS system, utilizing the names of all parties to the arbitration and their counsel. There were no "hits"--no connections between the arbitrator and his law practice, and the parties and their attorneys. He also requested witness lists from both parties, and reviewed them. These lists contained approximately 60 names. [Affidavit; emails] He did not recognize the names of any witnesses listed by either of the parties.

It is plain that the arbitrator fulfilled his ethical responsibilities and made a reasonable investigation of any connections he might have between the parties, the lawyers or the witnesses, both under the rules of ethics, as well as the Construction Industry Arbitration Rules of the American Arbitration Association, and ADR Rule 13(d), as argued in Appellant's Brief at pp. 30-32.

Respondents make two misleading statements on page 13 of their brief. First, Respondents claim: "Additionally, although Mr. Bruner claimed that his TABS conflict system failed to reveal that his firm had been involved in litigation with GS2 in 2008, Mr. Bruner offered no explanation whatsoever as to why Mr. Bruner's system purported failed." Mr. Bruner has been totally consistent with the parties and the Court at all times regarding his actions in searching for conflicts with the parties, their attorneys and the witnesses. Mr. Bruner's conflict system has never failed. What counsel is referring to are the consistent statements Mr. Bruner made in his emails to counsel on March 3, 2011, the date

that Respondents "sprung" on him this connection between the law partner and the engineer. In an email, Mr. Bruner stated: "Our conflict 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." [email]

Later that same date, Mr. Bruner elucidated "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." [email] Clearly, the "conflict system" he is referring to is a combination of a formal TABS check for lawyers and parties, as well as a personal "eyeball" review of extensive witness lists.

Bottom line, there is no inconsistency or failure. In fact, if the arbitrator had run initially a TABS check, what would have been revealed was information favorable to Respondents--Joey Floyd had sued GS2 earlier [Record], and the arbitrator himself had sued Teratec. [Record] Again, Respondents' argument is pointless.

Further, Respondents ignore and fail to address the logical conclusion that, even if the Arbitrator had run a full TABS search on GS2 (and/or George Sembos and Chad Bruerton, the witnesses employed by GS2 who testified for Appellant) nothing would have been shown except that GS2 had earlier been a Defendant. The employment relationship between a law partner of the arbitrator and that law partner's brother would not and should not be included in a TABS system--it's attenuated and irrelevant.

Secondly, and also on page 13 of their brief, Respondents assert that "this Court should note with concern that what is conspicuously absent from the record in this case is an affidavit from either Mr. Bruner's partner, Joey Floyd, Esquire...or GS2's operations manager, Jason Floyd, PE." [Respondent's Brief at 13] Respondents overlook the fact that the burden of proof is on them. Furthermore, Appellant filed affidavits from Roger Crouch and George Sembos, which clearly establish that neither Joey or Jason Floyd had anything to do with the arbitration proceeding, or the underlying construction contract which gave rise to the arbitration proceeding.

In summary, Respondents have failed in their factual burden of proof, as well as argument of legal authorities.

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

Respondents assert that the arbitration award was correctly vacated for four purported reasons:

1. The arbitrator's failure to disclose created an impression of possible bias.
2. The arbitrator showed favoritism to GS2.
3. The arbitrator improperly attempted to influence lower court to affirm the arbitration award.
4. The arbitrator gave conflicting reasons regarding his failure to disclose.

Close examination of these reasons show their flimsiness.

1. The arbitrator's failure to disclose created an impression of possible bias. Respondent's repeat this assertion

like a mantra, but failed to point to any evidence which supports any knowledge of the arbitrator of anything to disclose. In fact, the only evidence in the record is that the arbitrator was unaware of this relationship. George Sembos, the President of GS2 who testified as a witness, was also unaware of this relationship, as were all the parties and counsel. [Affidavits]

Furthermore, Respondents' standard of an "impression of possible bias" has never been the standard for any Court to vacate any arbitration award. "Possible bias" is insufficient to show evident partiality, even under the line of cases in the federal circuits supporting a broader standard--"reasonable impression of partiality" As was argued in Appellant's primary brief, the majority of federal circuits hold 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 (7th Cir.1992); Apperson, 879 F.2d 1344, 1358 (6th Cir), Cert. denied 493 U.S. 809 (1989); Morelite Constr. Corporation vs. New York City Carpenter's Benefit Funds, 748 F.2d 79, 83 (2nd Cir. 1984).

2. The arbitrator showed favoritism to GS2.

Respondents complain that, because the arbitrator allowed Appellant, and all of Appellant's expert witnesses, an hour and a half to inspect the property shortly before the two day arbitration hearing was to begin, this shows favoritism to GS2. This is preposterous. What is remarkable is that Respondents would refuse

anyone the opportunity to inspect the warehouse the foundations of which, Respondents assert, are failing such that the warehouse needs at present \$200,000 of helical piers to shore it up. Clearly, the warehouse does not need to be shored up, and at the arbitration a parade of very well qualified engineers and experts testified that the foundations were fine. Respondents presented the testimony of a single engineer, Ross Travis, who asserted that the warehouse was settling. The arbitrator found, upon a view of the premises, that there was only normal settling. [Amended Award] The real question is, why in the world would Respondents ever refuse a view of the premises, if in truth there was real settling and damage to the foundations of the building? The answer is obvious.

Respondents also allege that the arbitrator failed to consider evidence material to its claims and "refused to look at the damage caused by GS2 vis a vis the foundations deflection." [Brief at 16] The short answer is that Respondents had every opportunity to present proof of a deflection during two days of testimony and reception of evidence by the arbitrator. They did not offer such evidence. At the conclusion of Appellant's case, Appellant offered the scene in view. The arbitrator stated he would wait until the record was closed to view the property. He stated that counsel could accompany him on the inspection, but he did not want any discussion or conversation during his inspection, nor would experiments be performed. It was well known to Respondents during the entire portion of their case these would be the terms of the view. They did not offer any evidence of a deflection of the

foundation in their case.

Respondents argued both of these grounds in the initial motion to vacate heard by Judge Cothran. [Motion] Judge Cothran denied both of these grounds.

The arbitrator showed no favoritism in allowing an inspection of the premises by Appellant's witnesses, and in conducting the view of the premises. Both these actions are routine, customary rulings in construction cases.

3. The arbitrator improperly attempted to influence the lower Court.

This is spurious. Three months after the Amended Award was issued, when Respondents, out of left stage, made the assertion that the arbitrator was biased, there was a flurry of emails between counsel and the arbitrator. [Emails] The arbitrator realized that what he knew or didn't know, and when he knew it, were relevant facts, given the grounds which Respondents were now asserting. Respondents submitted affidavits of Brian Causey and Ross Travis, inferring the arbitrator knew of the familial relationship at the time of the arbitration. [Affidavits] The arbitrator discussed with the parties the necessity or not of him submitting an affidavit. Counsel for Appellant requested that he submit an affidavit. [email] The arbitrator did so. [Affidavit]

This procedure is much like that followed by Judge Lacey in People's Security Life Insurance Company, supra.

There, in an appeal from an arbitration award:

Uncontroverted evidence was presented and
the district court found that Judge Lacey

was unaware of his professional relationship with Mr. Noland [who had previously represented a party in the arbitration, and who joined Judge Lacey's law firm] during the arbitration proceedings. Specifically, Judge Lacey stated that, until Monumental filed its Motion to Vacate Award in October 1991, he was unaware of either Mr. Noland's presence at LeBoeuf [law firm] or of his [Noland's] representation of Peoples Security in 1986 and early 1987. On November 5, 1991, Mr. Noland signed an affidavit stating that he had never met or spoken to Judge Lacey. Furthermore, Mr. Noland stated that he was unaware of Judge Lacey's participation as an arbitrator in this dispute until he obtained the a copy of the Final Award of Damages entered on September 10, 1991. Both Lacey and Noland offered to make themselves available for cross examination by Monumental's attorneys, but Monumental did seek discovery. 991 F.d at 145-146.

Appellant also argues that "Just as surely as it would be inappropriate for the Honorable R. Ferrell Cothran, Jr., to submit an affidavit to this Court to uphold Judge Cothran's decision, Mr. Bruner acted inappropriately by submitting a supporting affidavit to Judge Cothran to uphold the arbitration award." The fallacy in this argument is that no one is claiming that Judge Cothran knew or did not know about some alleged conflict at any point in time. Respondents specifically raised this issue. They cannot be heard to complain that affidavits have been submitted into the record by both sides regarding this point.

4. The arbitrator gave conflicting reasons regarding his failure to disclose.

As above discussed, there are no conflicting statements in the arbitrator's emails and affidavit. [Brief] Respondents' argument is here shop worn, and falls far short of proof of evident

partiality.

In any event, if a full conflict search had been run through the arbitrator's TABS system for all 60 odd witnesses, what would have been revealed is simply that the arbitrator's law partner Joey Floyd had sued GS2, and the arbitrator had sued Teratec--inconsequential relationships which nevertheless cut in Respondents' favor.

However, the arbitrator was never even given the opportunity to reveal any connection with Margret Morrison of Teratec, because Appellant did not list her on his witness list.

Finally, Respondents urge that this Court not adopt the four factor test in ANR Coal Company, Inc., vs. Cogentrix of North Carolina, Inc., 173 F.3d 493 (4th Cir. 1999) to determine whether the complaining party has borne the heavy burden of proof to demonstrate evident partiality by direct and definite evidence, rather than remote, uncertain or speculative evidence. Respondents give three reasons:

1. Respondents allege a court would be increasing its role in arbitration by becoming the judge of the arbiter's impartiality. [Brief at 19] Apparently, Respondents would support a rule requiring automatic vacation of an award if there is an appearance of "possible bias". This would allow any disgruntled litigant to trump up facts to vacate any arbitration award, and undercut substantially the effectiveness of arbitration as a legitimate alternative to extended, expensive litigation. Whenever the objectivity of an arbitrator is questioned on appeal, by an

allegation of evident partiality, a court should indeed scrutinize the award to insure that all parties received fair consideration, and that the arbitration process was fair. This is an important obligation and prerogative of the judicial system. The four factors set forth in ANR do this, requiring objective evidence to be produced by the appealing party.

2. Respondents assert that the ANR court discourages disclosures from arbitrators. [Brief at 20] To the contrary, the ANR factors focus very clearly upon whether the arbiter was in fact independent and impartial, looking at all surrounding circumstances. Non-disclosure by an arbitrator subjects the arbitration award to review, utilizing these four ANR factors. Ethics and procedural rules continue to encourage arbitrators to make full disclosure, pre-hearing, of all relationships between the parties, attorneys and witnesses. A post-award review utilizing the ANR factors, conducted only if disclosure has allegedly not been made, likewise encourages pre-hearing disclosures of known relationships, as well as insuring the fairness of an untainted award.

3. Respondents complain that "ANR places a burden on the aggrieved party to investigate, uncover and to provide more details of what the arbitrator failed to disclose. Such a burden is totally impracticable, completely inequitable, and highly prejudicial to the aggrieved party." [Brief at 20] The burden of proof in our American jurisprudence is always on the appealing party. What Respondents are really admitting is that here, in this

case, there exists no evidence from which a reasonable person would have to conclude that the arbitrator was partial.

"A trivial relationship, even if undisclosed, will not justify a vacatur of an arbitration award." ANR, 173 F.3d at 502. Knowing this, Respondents submitted the affidavits of Ross Travis and Bryan Causey in support of their motion.[Affidavits] Certainly, they could have conducted more discovery if they wished, but they failed to do so. Bottomline, however, our system of jurisprudence is built upon evidence and not speculation. The reasoning of Respondents is spurious.

The Fourth Circuit Court of Appeals enunciated the "sound policy" behind their four factor test to determine whether evident partiality had been proven:

Parties value commercial arbitration, at least in part, because they 'prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of the subject matter'... The approach proposed by [Appellant] would permit a 'disgruntled party' to seize upon an undisclosed relationship 'as a pretext for invalidating the award.'....Under such a rule, an arbitration award could be vacated due to an arbitrator's failure to disclose a trivial fact even though that fact, if known prior to the arbitration, would not have enabled the losing party to have the arbitrator removed for cause. Such a system would undermine the parties faith in commercial arbitration and make the task of finding qualified arbitrators 'exceedingly burdensome.' 173 F.2d at 500 [omitting citations].

Respondents conclude by a superficial, incorrect analysis, reciting the four factors of ANR, but incorrectly applying them. The ANR factors focus on the relationship between the arbitrator

and a party--Respondents are fixated with GS2, not a party to the arbitration. A proper consideration of the ANR factors, contained in Appellant's Brief at pages 18 through 20, clearly establishes there is no proof of evident partiality.

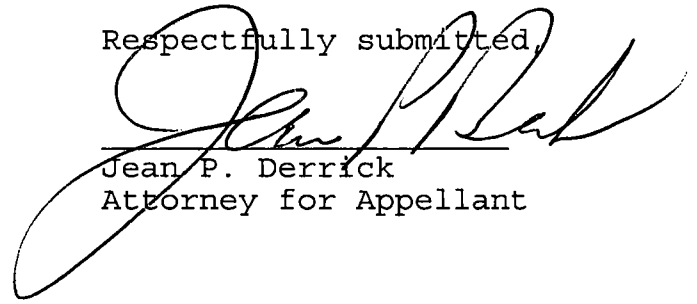
CONCLUSION

Thus far, the arbitration process in this action has been carried out as litigation under another name. Clearly, Respondents are merely disgruntled litigants. A review of the precise, fair reasoning of the Amended Arbitration Award reveals that the disinterested arbitrator clearly analyzed numerous assertions by both parties, and considered them in reaching the award. Respondents are simply seeking a second bite of the apple to continue this litigation. They can certainly do so with GS2, but not Crouch Construction Company, which has bought its peace with the arbitration clause contained in the construction contract. Certainly, when Respondents make the dramatic assertion that they have been unfairly treated by the arbiter who has been evidently partial to Appellant, Respondents are entitled to a review of that assertion, and have their day in court at an appellate level. This Court should scrutinize the facts, which clearly show only trivial, remote and irrelevant relationships which were unknown to the arbitrator.

Appellant would request that this Court reverse the Circuit Court Order filed May 19, 2011, confirm the Amended Arbitration Award and enter it as a judgment, and allow the foreclosure of the mechanic's lien to proceed, remanding the matter to the Circuit Court to determine additional attorney's fees and interest due Appellant.

Lexington, S.C.
December 5, 2011

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Jean P. Derrick". The signature is written over a horizontal line.

Jean P. Derrick
Attorney for Appellant

The South Carolina Court of Appeals

Crouch Construction Company, Inc., Appellant,

v.

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

v.

GS2 Engineering and Environmental
Consultants, Inc., Gist, Inc., 3rd Party Defendants.

The Honorable R. Ferrell Cothran, Jr.
Lexington County
Trial Court Case No. 2009-CP-32-00973

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Reply Brief in the above entitled matter is hereby extended until December 5, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Jean Perrin Derrick, Esquire
Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire

FILED

Cartier 12/1/11

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
jderrick@windstream.net

November 21, 2011

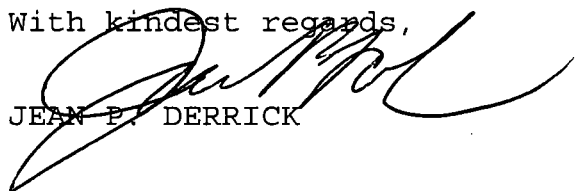
V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Crouch Construction Company, Inc, vs. Bryan Causey,
Celebrations of Columbia, LLC, and Causey Consulting, LLC vs.
GS2 Engineering and Environmental Consultants, Inc., Gist,
Inc.
2009-CP-32-00973

Dear Clerk Allen:

This is to request an additional 10 days for Appellant to
file his Reply Brief. Enclosed is my \$25 fee. By copy of this
letter to opposing counsel I am advising them of this request.

With kindest regards,


JEAN P. DERRICK

JPD/sss
Enclosure
cc: Stephen V. Futeral, Esq.
Gary A. Pickren, Esq.

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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr.

Case No. 2009-CP-32-00973

Crouch Construction Co., Inc., ... Appellant,

v.

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

Of Whom Celebrations of Columbia, LLC and
Causey Consulting, LLC are the, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

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

Gary Pickren
Rogers, Townsend & Thomas, PC
220 Executive Center Drive
Columbia South Carolina 29210
Telephone (803) 744-5312
Facsimile (803) 744-3644
gary.pickren@rtt-law.com

Attorneys for Respondents

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ORIGINAL

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR IN HOLDING THAT THE ARBITRATOR WAS REQUIRED TO INVESTIGATE AND DISCLOSE THE FAMILIAL RELATIONSHIP BETWEEN THE ARBITRATOR'S LAW PARTNER AND THE OPERATIONS MANAGER OF A PARTY TO THE LITIGATION?
- II. DID THE LOWER COURT ERR IN VACATING THE ARBITRATION AWARD WHERE THE ARBITRATOR FAILED TO DISCLOSE A FAMILIAL RELATIONSHIP BETWEEN THE ARBITRATOR'S LAW PARTNER AND THE OPERATIONS MANAGER OF A PARTY TO THE LITIGATION, WHERE THE ARBITRATOR SHOWED FAVORITISM TO THAT PARTY BEFORE AND DURING THE ARBITRATION, WHERE THE ARBITRATOR IMPROPERLY ATTEMPTED TO INFLUENCE THE LOWER COURT TO AFFIRM THE ARBITRATION AWARD, AND WHERE THE ARBITRATOR GAVE CONFLICTING REASONS REGARDING HIS FAILURE TO DISCLOSE?

STATEMENT OF THE CASE

This case involves the failure of an arbitrator to disclose conflicts prior to and during the arbitration of a commercial construction dispute. Appellant constructed a commercial building that is owned by Respondent Causey Consulting, LLC [hereinafter "Owner"], and is occupied by Respondent Celebrations of Columbia, LLC [hereinafter "Tenant"]. On March 10, 2009, Appellant filed suit to foreclose its mechanic's lien after Respondents refused to pay Appellant additional sums for the project. [Complaint] On April 1, 2009, Respondents filed an Answer and Counterclaims and on October 14, 2010 filed an Amended Answer and Counterclaims. Respondents seek, among other things, damages against Appellant for costs to repair the building's foundation. [Answer, Amended Answer]

By court order, the aforementioned claims were submitted to arbitration. [Order filed March 17, 2010] The arbitrator, James L. Bruner, Esquire, issued his decision on November 10, 2010. [Arbitration Award dated November 10, 2010] On November 16, 2010, Appellant filed a Motion to Confirm the Arbitration Award. [Appellant's Motion to Confirm the Arbitration Award filed November 16, 2010] On November 18, 2010, Respondents filed a Motion to Clarify

or Modify the Arbitration award. [Respondents' Motion to Clarify or Modify Arbitration Award filed November 18, 2010] On December 7, 2010, the arbitrator issued a Modified and Amended Arbitration Award. [Modified and Amended Arbitration Award dated December 7, 2010]. On February 3, 2011, Respondents filed a Motion to Vacate the Arbitration Award. [Respondents' Motion to Vacate filed February 3, 2011] On February 14, 2011, the lower court heard the parties' respective motions regarding the arbitration award. On March 2, 2011, before the lower court issued a written order regarding the parties' motions, Respondents filed a Supplemental Motion to Vacate the Arbitration Award. [Respondents' Supplemental Motion to Vacate filed March 2, 2011] On May 19, 2011, the lower court issued an order vacating the arbitration award. [Order filed May 19, 2011] On June 2, 2011, Appellant filed a Motion to Alter or Amend the Order Vacating the Arbitration Award. [Appellant's Motion to Alter or Amend filed June 2, 2011] On July 1, 2011, the lower court issued an order denying Appellant's Motion to Alter or Amend. [Order filed July 1, 2011] This appeal followed.

STATEMENT OF THE FACTS

This case involves a commercial building that was constructed by Appellant. At the completion of the project, Appellant demanded payment of over \$100,000.00 beyond the parties' original contract price. [Respondents' Supplemental Motion and Memorandum to Vacate the Arbitration Award] Owner refused to make the final payment because, among other things, the building' foundation is failing and the cost to repair the failing foundation is over \$200,000.00. [Respondents' Supplemental Motion and Memorandum to Vacate the Arbitration Award] Owner claims that the foundation is failing because Appellant's subcontractor, 3rd 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. [Original and Amended Answer and Counterclaim; Order filed May 19, 2011]

The parties to the arbitration were initially Appellant and Tenant. Respondents proposed Frank Smith, Esquire as an arbitrator, and Appellant consented to Mr. Smith provided that Respondents agreed to limit discovery and also agreed to add Owner as a party to the arbitration. [Exhibits B and C to Defendants' Supplemental Motion to Vacate filed March 2, 2011; Email dated October 22, 2010, 5:15 pm, from Respondents to Appellant]

Prior to serving as the arbitrator, Mr. Smith performed an extensive and thorough conflicts check and he made a complete disclosure to the parties. On April 16, 2010, Mr. Smith wrote "Anytime I serve as an arbitrator I make full disclosures regarding any past connections with the attorneys, parties or witnesses." [Exhibit B Defendants' Supplemental Motion to Vacate filed March 2, 2011] At that time, Mr. Smith disclosed that in 1988 his firm defended a party that was sued by Appellant. [Exhibit B Defendants' Supplemental Motion to Vacate filed March 2, 2011] Mr. Smith also disclosed that in 2001 his firm defended a party that was a co-defendant with Appellant. [Exhibit B Defendants' Supplemental Motion to Vacate filed March 2, 2011] On May 4, 2011, Mr. Smith asked the parties to provide him with a list of witnesses for disclosure purposes, and Respondents' replied the same day with their list of witnesses. [Exhibit B Defendants' Supplemental Motion to Vacate filed March 2, 2011] Mr. Smith also disclosed that one of Respondents' expert witnesses worked for the Dennis Corporation which was Mr. Smith's client. [Exhibit B Defendants' Supplemental Motion to Vacate filed March 2, 2011] Additionally, Mr. Smith disclosed that he was "representing a client on an issue that is adverse to GS2, Inc. the [sic] 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 Defendants' Supplemental

Motion to Vacate filed March 2, 2011] On May 5, 2011, Appellant's counsel responded that Appellant saw no conflict with Mr. Smith. [Exhibit B Defendants' Supplemental Motion to Vacate filed March 2, 2011] However, Appellant later changed its position regarding Mr. Smith and rejected him. Thereafter, the parties agreed to use James L. Bruner, Esq., as their arbitrator. 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. [Order filed May 19, 2011] At no time before or during arbitration did Mr. Bruner reveal any potential conflicts to the parties.

Before and during arbitration, the parties made Mr. Bruner aware of GS2's multifaceted role in this case as a 3rd Party Defendant in the underlying lawsuit, as a fact witness, as an expert witness designated by Appellant, and as a party responsible for much of the damage suffered by Respondents. GS2 was also a source of contention prior to the arbitration hearing itself.

In September 2010, Appellant was scheduled to physically inspect Owner's property. On September 23, 2010, Appellant added the owner of GS2 to Appellant's inspection party. At that time, Respondents informed Mr. Bruner that Respondents had a pending motion for sanctions against GS2 and a request to exclude GS2 employees as experts in the underlying lawsuit. Respondents requested that GS2 and its counsel not be allowed on the property until the pending motion for sanctions was resolved by the circuit court. [Exhibit E Defendants' Supplemental Motion to Vacate filed March 2, 2011] Despite the outstanding motion for sanctions, and over Owner's objection, Mr. Bruner ordered that both GS2 and its attorney be permitted to physically inspect Owner's property. [Order filed May 19, 2011]

During the arbitration, representatives of GS2 testified as Appellant's experts regarding their inspection of the property. Additionally, during the arbitration hearing, Mr. Bruner

recognized Margaret Morrison, who testified as an expert witness for Appellant, and stated to her, “It is nice to see you again Margaret” and he asked her “How have you been?” [Partial Transcript of Arbitration Hearing - November 3, 2010] Nevertheless, during the hearing, Mr. Bruner made no mention of his prior association with Ms. Morrison wherein he was involved in a lawsuit regarding Margaret Morrison’s company, Terratec, Inc.¹ [Order filed May 19, 2011; Affidavit of Jim Bruner]

At the end of the arbitration, Mr. Bruner visited Owner’s property. During his visit to the subject property, the arbitrator declined to view first-hand evidence of the deflection of the building’s foundation that Respondents contended was significant proof of Respondents’ claims against Appellant and GS2. [Order filed May 19, 2011]

On November 10, 2010, Mr. Bruner issued an award to Appellant in the amount of \$130,305.87. [Arbitration Award] On December 7, 2010, Mr. Bruner modified the award to Appellant to the amount of \$132,805.54. [Amended Arbitration Award]

On February 23, 2011, after the lower court heard the parties’ respective motions regarding the arbitration award, Respondents discovered that Mr. Bruner failed to disclose that a member of his law firm, Joey R. Floyd, Esq, is the brother of Jason Floyd, P.E., who was a geotechnical engineer for and the Operations Manager of GS2 prior to and during arbitration. [Exhibit D, Affidavit of Ross Travis, P.E., Defendants’ Supplemental Motion to Vacate filed March 2, 2011]

After Respondents filed their Supplemental Motion to Vacate the Arbitration Award, on March 3, 2011, Mr. Bruner wrote to the parties confirming that his law partner, Joey Floyd, was the brother of Jason Floyd, P.E. [Email from James L. Bruner dated March 3, 2011, 10:09 am]

¹ Vonda Pettit v. Terratec, Inc. et al., 2000-CP-32-2054

According to Mr. Bruner, his “conflicts system” did not reveal that his firm had been involved in litigation with GS2 in 2008.² [Email from James L. Bruner dated March 3, 2011, 10:09 am] Also, Mr. Bruner revealed that he had not circulated the parties’ witness lists to all the attorneys in his firm. [Email from James L. Bruner dated March 3, 2011, 10:09 am] Lastly, Mr. Bruner offered to provide the parties an affidavit from him. [Email from James L. Bruner dated March 3, 2011, 10:09 am] Respondents’ counsel replied that he did not believe it would be appropriate for Mr. Bruner to submit an affidavit regarding the motion to vacate. [Email from Respondents dated March 3, 2011, 11:45 am] Mr. Bruner replied that he resented his personal integrity being attacked and that he would “defend” himself. [Email from James L. Bruner dated March 3, 2011, 1:09 pm] Respondents’ counsel wrote back to Mr. Bruner and suggested that “everyone simmer down and let the court decide whether you are to stay uninvolved, give an affidavit, or be examined by the parties.” [Email from Respondents dated March 3, 2011, 2:18 pm] Mr. Bruner responded by personalizing the matter and writing “do not expect me to simmer down.” [Email from James L. Bruner dated March 3, 2011, 6:30 pm]

On March 18, 2011, four days before the court hearing, Mr. Bruner sent an email, a letter, and an affidavit directly to the lower court. [Email from James L. Bruner dated March 18, 2011, 12:43 pm; Letter from James L. Bruner dated March 18, 2011; Affidavit of James L. Bruner dated March 18, 2011] In his affidavit, Mr. Bruner again claimed that his “conflicts system” did not reveal that his firm had been involved in litigation with GS2 in 2008. [Email from James L. Bruner dated March 3, 2011, 1:09 pm; Affidavit of James L. Bruner] Additionally, Mr. Bruner admitted that he did not run any of the witnesses through a conflicts check in his law firm. [Affidavit of James L. Bruner] Lastly, Mr. Bruner admitted that he was involved in a lawsuit

² Carolina Custom Const. v. Circle Bar T Demolition, et al., 2008-CP-28-0516.

regarding one of Appellant's expert witnesses, Ms. Morrison, but Mr. Bruner claimed that "the prior lawsuit did not register in my mind when she was called as a witness" [Affidavit of James L. Bruner]

ARGUMENTS

I. THE LOWER COURT CORRECTLY HELD THAT THE ARBITRATOR WAS REQUIRED TO INVESTIGATE AND TO DISCLOSE THE FAMILIAL RELATIONSHIP BETWEEN HIS LAW PARTNER AND THE OPERATIONS MANAGER OF GS2 WHERE THE ARBITRATOR KNEW THE SIGNIFICANT ROLE GS2 PLAYED IN THE ARBITRATION.

Appellant argues that South Carolina law does not apply to this arbitration, and that this Court should apply federal law instead. Appellant's argument is without merit for three reasons. First, Appellant raises this issue for the first time on appeal, and this Court should not rule upon it. *See S.C. Dep't of Transp. v. Horry County*, 391 S.C. 76, 705 S.E.2d 21 (2011) (issue must be raised and ruled upon to be preserved for appellate review). Second, contrary to Appellant's argument, the lower court merely held that the parties' "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." [Order filed March 17, 2010] Third, at all stages of this proceeding, South Carolina law has been invoked and relied upon by the parties, the arbitrator, and the lower court. The arbitrator issued the award "in accordance with South Carolina Uniform Arbitration Act." [Arbitration Award]. Also, Appellant sought confirmation and enforcement of the award "pursuant to § 15-48-150 and § 15-48-160 of the Uniform Arbitration Act, South Carolina Code of Laws, Ann." [Motion to Confirm Arbitration Award] Finally, the lower court rendered its decision pursuant to Respondents' motion to vacate pursuant to S.C. Code Ann. § 15-48-130. [Supplemental Motion to Vacate an Arbitration Award]

Although this Court is not bound by any federal decisions regarding the application of the Federal Arbitration Act (FAA), a review of these cases may aid this Court in deciding this appeal. S.C. Code Ann. § 15-48-130(a)(2) provides that the court shall vacate an award where there was “evident partiality by an arbitrator appointed as a neutral” In South Carolina, there are no reported decisions concerning whether an arbitrator’s failure to investigate and to disclose a conflict constitutes “evident partiality” under South Carolina law. Section 15-48-130(a)(2) is similar to 9 U.S.C § 10(a)(2) that provides that a court may vacate an arbitration award “where there was evident partiality or corruption in the arbitrators, or either of them”

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 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 imposed the same ethical standards on arbitrators as are faced by judges:

[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.

Id. at 150; 89 S. Ct. at 340; 21 L. Ed. 2d at 305 (emphasis added). 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. (emphasis added).

In applying the FAA, Federal courts have differed over the meaning and the application of Commonwealth because when Justice White purported to join the majority, Justice White's concurring opinion seems to delimit the application of Justice Black's opinion. Specifically, Justice White wrote that "the Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." Id. at 150; 89 S. Ct. at 340; 21 L. Ed. 2d at 305. Lastly, Justice White wrote that arbitrators should not be automatically disqualified based on an undisclosed relationship if "the relationship is trivial." Id. at 150; 89 S. Ct. at 340; 21 L. Ed. 2d at 306.

Some courts have looked to Justice Black's opinion regarding "appearance of bias" as authoritative while other courts have adopted Justice White's concurrence. Compare Schmitz v. Zilveti, 20 F.3d 1043, 1046-47 (9th Cir. 1994) (reconciling the opinions and following the "appearance of bias" approach), with Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 83-84 (2d Cir. N.Y. 1984) (looking to Justice White's concurring opinion and adopting a standard more stringent than an "appearance of bias" but short of requiring proof of actual bias). In either view, no court has required actual proof of bias in a nondisclosure case. See Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996) (distinguishing the burden of proof in nondisclosure cases as being at a lower threshold than

proof of actual bias which is needed when actual bias is asserted); Morelite, 748 F.2d at 84 (discussing how the impossibility of proving actual bias).

Regarding the present case, this Court should not be concerned whether Justice Black's or Justice White's views are the authoritative interpretation of the FAA's evident partiality standard. Justice Black's and Justice White's views are simpatico because they both persuasively explained the importance of full disclosure by arbitrators of relationships that might create a reasonable impression of bias. Justice White simply left open the possibility that an undisclosed relationship could be so insubstantial that vacatur was not required. As set forth herein, based on all the facts and the circumstances surrounding Mr. Bruner's failure to disclose, the relationship is not trivial.

In deciding Commonwealth, the Supreme Court applied an American Arbitration Association (AAA) disclosure rule and a canon of judicial ethics regarding disclosure of social relationships by reasoning that the AAA rule and the judicial canon, "rest on the premise that any 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 at 150, 89 S. Ct. at 340, 21 L. Ed. 2d at 305 (emphasis added).

Here, to determine whether there was the appearance of partiality, the lower court correctly followed Commonwealth by examining Mr. Bruner's duty to investigate and to disclose under the AAA rule and the ethical canons applicable to this arbitration. Pursuant to Article 13.2 of the parties' construction contract, Construction Industry AAA Arbitration Rules apply to this dispute. Appellant argues that because GS2 was not a party or a party's

representative, Mr. Bruner had no obligation to investigate and to disclose the familial relationship under the AAA disclosure rule. However, Appellant overlooks the requirement that Mr. Bruner was required to “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).

In its brief, Appellant claims that the “connection of GS2 is that Respondent Bryan Causey originally hired GS2 to conduct the geo-technical survey” Appellant’s claim is misleading because the Agreement for Services, dated July 9, 2008, was between GS2 and Crouch Construction Company. [Agreement for Services dated July 9, 2008]

Here, Mr. Bruner was completely aware of the significant role GS2 and its representatives played in the arbitration. Mr. Bruner was informed that GS2 was a party to the underlying lawsuit and that Respondents allege: (1) that both Appellant and GS2 were negligent in construction and supervision of the project; (2) that both Appellant and GS2 engaged in unnecessary excavation and improper compaction of the property soil; (3) that Appellant and GS2 jointly engaged in unfair trade practices including overbilling; and (4) that Appellant and GS2 engaged in a civil conspiracy with one another. [Amended Answer and Counterclaims] Mr. Bruner had the duty and the opportunity to obtain the necessary knowledge to make an appropriate disclosure. Under the circumstances of this case, it would appear that Mr. Bruner would have had to avoid reading important documents, such as the pleadings, to remain in a state of ignorance. Further, Mr. Bruner was informed that Respondents sought significant damages at the arbitration that Respondents claimed were caused by GS2. Mr. Bruner was informed that

GS2's representatives would testify as experts during the arbitration. Moreover, Mr. Bruner permitted GS2's representatives to prepare their expert testimony in the arbitration by allowing GS2 to physically inspect the property over Respondents' objection. Lastly, Mr. Bruner was informed that the issues of excavation and compaction were the most contested and the most significant issues presented in the arbitration.

Pursuant to Rule 17(b), SCADRR, any person serving as an arbitrator 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 partiality or bias." 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 "make 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 duties of an arbitrator to disclose continue throughout the arbitration.

Appellant argues that because GS2 was not a party to the arbitration proceeding, Mr. Bruner was not required to investigate and to disclose the familial relationship between his law partner and GS2's operations manager. Appellant's argument overlooks Mr. Bruner's recognition that the familial relationship was subject to disclosure when Mr. Bruner 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.” [Email from James L. Bruner dated March 3, 2011, 1:09 pm] Appellant’s argument also overlooks Canon II A (2) that requires disclosure of “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.” Here, even if the family relationship between Mr. Bruner’s law partner and the manager of GS2 did not affect Mr. Bruner’s impartiality, the lower court correctly held that the circumstances “might reasonably create an appearance of partiality or bias.”

Appellant also argues that Mr. Bruner could not disclose what he did not know. Appellant’s argument overlooks Mr. Bruner’s duty to “make a reasonable effort to inform [himself] of any interests or relationships” subject to disclosure. By his own admission, Mr. Bruner did not circulate the parties’ witness lists to all the attorneys in his firm despite the requirement under Canon II A (2) that an arbitrator should “disclose any such relationships involving their “partners or business associates.” Additionally, although Mr. Bruner claimed that his TABS conflicts system failed to reveal that his firm had been involved in litigation with GS2 in 2008, Mr. Bruner offered no explanation whatsoever as to why Mr. Bruner’s system purportedly failed. Also, this Court should note with concern that what is conspicuously absent from the record in this case is an affidavit from either Mr. Bruner’s partner, Joey Floyd, Esq., who has a background as a consulting engineer, or GS2’s operations manager, Jason Floyd, P.E.

Appellant argues that if this Court upholds the decision to vacate the arbitration award, then this Court is placing an “impossible” and supposedly mind-boggling obligation upon arbitrators to disclose conflicts including relationships with first cousins, aunts and uncles, and church memberships of remote relatives. Appellant’s argument lacks merit for four reasons.

First and foremost, Appellant overlooks the obvious fact that Frank Smith, who practices with over thirty other attorneys at Richardson Plowden, was able to perform an extensive and thorough conflicts investigation and make a complete disclosure to the parties regarding relationships to the parties, the witnesses, and the witnesses' employers. Ironically, Appellant took advantage of Mr. Smith's investigation and disclosure by asking Mr. Smith to recuse himself, yet Appellant asks this Court to deny Respondents the same opportunity. Second, in the 21st century there is no shortage of computer software to allow a law firm, regardless of its size, to run a conflicts check with little to no effort.³ Third, the arbitrator's duty to investigate and disclose depends on the circumstances at hand and not upon extreme and rhetorical examples. Mr. Bruner does not have 100 lawyers in his firm; he has nine other lawyers. Finally, the relationship is not between distant cousins, aunts, and uncles; Mr. Bruner's law partner is the brother to GS2's operations manager.

II. THE LOWER COURT CORRECTLY VACATED THE AWARD WHERE THE ARBITRATOR'S FAILURE TO DISCLOSE CREATED AN IMPRESSION OF POSSIBLE BIAS, WHERE THE ARBITRATOR SHOWED FAVORITISM TO GS2, WHERE THE ARBITRATOR IMPROPERLY ATTEMPTED TO INFLUENCE THE LOWER COURT TO AFFIRM THE ARBITRATION AWARD, AND WHERE THE ARBITRATOR GAVE CONFLICTING REASONS REGARDING HIS FAILURE TO DISCLOSE.

Schmitz was one of the earliest federal cases holding that an arbitrator must investigate potential conflicts. "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 Schmitz, one of the parties discovered after

³ Mr. Bruner claimed to use TABS to conduct his conflicts check. There are several dozen other software products that perform conflicts checking including Needles, Amicus Attorney, AbacusLaw, Clio, Overseer, GoMatters, LegalKey, PracticeMaster, PerfectLaw, and ProLaw.

arbitration that the law firm of one of the arbitrators had represented the parent company of a party to the arbitration. The arbitrator failed to run a conflicts check regarding the parent company and he did not disclose this relationship. The court vacated the award because the arbitrator failed to make a reasonable investigation and failed to disclose a conflict that gave a reasonable impression of partiality.

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 Morelite, 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 an organization involved in the arbitration. In vacating the award although no actual bias was shown, the court discussed the nearly impossible task of somehow proving 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.

Here, despite the difficulty in proving bias, there is evidence in the record to substantiate the lower court's finding of bias. Mr. Bruner permitted GS2 to prepare expert testimony for arbitration by allowing GS2 to inspect the property despite Respondents' pending motion in the underlying litigation seeking sanctions that may have prohibited GS2 from returning to the property. Also, Mr. Bruner refused to consider evidence material to Respondents' claims when

Mr. Bruner refused to look at the damage caused by GS2 vis-à-vis the foundation's deflection. Finally, the lower court expressed its concern that Mr. Bruner "perpetuated his impartiality" by submitting an affidavit to the lower court. Canon VI.C of the South Carolina Code of Ethics for Arbitrators provides 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." Although the lower court did not ask for Mr. Bruner's assistance, Mr. Bruner sent the court his affidavit "in an apparent attempt to persuade this court to confirm the arbitration award." [Order filed May 19, 2011]

Regarding Mr. Bruner's affidavit, Appellant argues that pursuant to Rule 6(d), SCRCivP, Mr. Bruner's affidavit was "procedurally correct to support or oppose a motion." Appellant's argument lacks merit. Rule 6(d) did not authorize Mr. Bruner to submit an affidavit. Rather, Rule 6(d) addresses the timing of the submission of an affidavit by the parties to the proceeding. Just as surely as it would be inappropriate for the Honorable R. Ferrell Cothran, Jr. to submit an affidavit to this Court to uphold Judge Cothran's decision, Mr. Bruner acted inappropriately by submitting a supporting affidavit to Judge Cothran to uphold the arbitration award.

In determining whether Mr. Bruner acted with partiality, the lower court ostensibly questioned the veracity of Mr. Bruner's account of events and discounted the weight, if any, the court gave to Mr. Bruner's explanation. For example, Mr. Bruner gave conflicting reasons as to why he did not disclose the familial relationship. In an email, Mr. Bruner wrote that his "conflicts system did not reveal a hit for GS2", thereby suggesting that he actually ran a conflicts check on GS2. [Email from James L. Bruner dated March 3, 2011, 10:09 am] Yet, in his affidavit, Mr. Bruner contradicted himself by asserting that he did not include GS2 in his conflicts check. Also, the court noted that despite Mr. Bruner's claim that he did not recall a

lawsuit wherein he was involved with Margaret Morrison, the partial transcript of the arbitration hearing reveals that Mr. Bruner did indeed recognize this witness when Mr. Bruner stated to her, "It is nice to see you again Margaret" and he asked her "How have you been?" Considering all of the circumstances, the lower court was correct in refusing to enforce an award that was clearly repugnant to the court's sense of fairness even if there was no direct proof of bias. Further, by vacating the award, the lower court correctly enforced the duties to investigate and disclose conflicts, even if no actual bias was present, to ensure that Respondents and others involved in the arbitration are the judges of their arbitrator's partiality.

Appellant argues that pursuant to the companion cases of Consolidation 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), Respondents must essentially prove partiality. The lower court correctly distinguished these cases. Consolidation and Hobet do not involve similar factual circumstances such as the inspection of the property over Respondents' objection, the arbitrator's refusal to consider material evidence, the arbitrator's submission of an affidavit, and the questionable veracity of the arbitrator's explanation of events. Additionally, in Consolidation and Hobet, the arbitration procedure was significantly different from the present case. In Consolidation and Hobet, the parties did not select their arbitrators. Instead, the arbitrators were 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. Here, unlike Consolidation and Hobet, Appellant and Respondents selected their arbitrators, and Appellant was given the opportunity to reject Mr. Smith whereas Respondents were denied the opportunity to reject Mr. Bruner. Additionally, as held by the lower court, in Consolidation and Hobet, the arbitrators were not bound by the codes of the American Arbitration Association or

any other similar organization. Consolidation, 48 F.3d at 128. Moreover, in Consolidation and Hobet, “[r]ecusal, disclosure, and other ethical issues are left to the discretion of each arbitrator.” Consolidation, 48 F.3d at 128. Finally, the parties in those arbitrations are permitted to review the arbitrators’ résumés and make inquiries through the Bituminous Coal Operators Association (BCOA) about the arbitrator’s “family relations beyond the questions asked in the Prescribed Resume.” Consolidation, 48 F.3d at 130 n. 5.

Unlike the arbitrators in Consolidation and Hobet, Mr. Bruner was obligated 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. Also, unlike the parties in Consolidation and Hobet, Appellant and Respondents could seek the recusal of their arbitrator, as Appellant did with Mr. Smith. Finally, unlike the parties in Consolidation and Hobet, there is no organization, such as BCOA, or procedure by which the parties could have made inquiries into the background of Mr. Bruner, his business associates, and their relationships.

Lastly, Appellant argues that this Court should reverse the lower court 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. ANR, however, is distinguishable from this appeal. In ANR, one member of an arbitration panel did not disclose that his law firm represented a company that sold electric power to one of the parties. 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. During the merger, the arbitrator was ill with leukemia and was neither actively practicing law nor involved with 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).

Like Consolidation and Hobet, ANR did not involve any facts similar to this appeal such as a refusal to consider material evidence, concerns regarding the arbitrator’s veracity, or post-arbitral assistance by the arbitrator. Also, in ANR, the AAA rule required the arbitrator to disclose only “any circumstance likely to affect impartiality” Id. at 497 (emphasis added). In other words, the arbitrator had to disclose matters that would probably influence the arbitrator’s impartiality. Here, however, Mr. Bruner was required to disclose any circumstance “likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence.” R-19(a). In other words, Mr. Bruner had to disclose the appearance of partiality. Moreover, the arbitrator in ANR was not subject to the requirements of Canon II to discover conflicts, to examine familial relationships between his business partners and witnesses, and to disclose the same to the parties.

Although ANR is clearly distinguishable from the facts and circumstances of the present case, Appellant nevertheless urges this court to adopt the four factor analysis set forth in ANR. The four factors are: “(1) any personal interest, pecuniary or otherwise, the arbitrator has in the proceeding; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of the relationship to the arbitration; and (4) the proximity in time between the relationship and the arbitration proceeding.” Consolidation, 48 F.3d at 130.

This court should decline to follow ANR stringent approach for the following three reasons. First, by applying ANR’s factors, the Court would be increasing its role in arbitration by becoming the judges of the arbitrator’s impartiality, which is a role “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.” Commonwealth at 151; 89 S. Ct. at 340; 21 L. Ed. 2d at 306.

Second, despite the court’s concern in ANR that disclosure could make it impractical for persons in the business world to be arbitrators, there is not a single state or Federal decision demonstrating that this concern is valid. In reality, there should be no such concern as demonstrated by how easily full investigation and disclosure was performed by Frank Smith, Esquire. Moreover, instead of placing emphasis on whether parties can intelligently choose an impartial arbitrator, the court in ANR appears more concerned with whether parties have enough experienced arbitrators to choose from.

Third, and most importantly, ANR undermines the entire policy and purpose behind an arbitrator’s disclosure. In concept, ANR correctly provides that a “party need not prove that the arbitrator, in fact, had improper motives. To do so would make the standard for evident partiality equivalent to proving actual bias.” Id. at 500-501. However, in application, ANR places a burden on the aggrieved party to investigate, to uncover, and to provide more details of what the arbitrator failed to disclose. Such a burden is totally impractical, completely inequitable, and highly prejudicial to the aggrieved party. In many cases, including the present appeal, the parties have little means to inquire as to matters that an arbitrator fails to disclose whereas the duty to investigate and to disclose, and the ability to carry out those duties, rests entirely with the arbitrator. Respondents could not independently investigate by subpoenaing Mr. Bruner’s records and taking the depositions of Mr. Bruner, his law partner, and the operations manager of GS2 to further probe their veracity and the extent of their connections to this arbitration. Instead, Respondents can only rely on the integrity of the process and the belief that Mr. Bruner would

adhere to the inquiry and disclosure requirements set forth in the AAA rules and the ethical canons.

The unique facts and circumstances of the present case, including matters of veracity and post-arbitral assistance, demonstrate why this Court should follow the “appearance of bias” approach as set forth in Schmitz, 20 F.3d at 1046-47. To follow the analysis set forth in ANR, this Court would have to disregard those matters that should be of the greatest concern to this Court including the protection of the integrity of the arbitration process and preserving the public’s confidence that arbitrators will act impartially.

Even if this Court considers the four factors in ANR, this Court should affirm the lower court’s decision to vacate the arbitration award. Regarding the first factor, Mr. Bruner expressed his personal interest in the outcome of this proceeding when he personalized his role by writing to the parties and to the court to “defend” himself. Additionally, as Respondents pointed out to Mr. Bruner, it was inappropriate for him to submit an affidavit to the court to support confirmation of the award when Mr. Bruner had a pecuniary interest in the proceeding. Specifically, Mr. Bruner awarded himself \$11,880.50 in fees for conducting the arbitration. If the award is vacated, then Mr. Bruner must return these fees to Respondents. As for the second and third factors, Mr. Bruner’s law partner is the brother of GS2’s operations manager, the bulk of the dispute hinged upon the work performed by GS2, Mr. Bruner appeared to favor GS2 by allowing inspection of the property and by refusing to consider the damage caused by GS2, and Appellant directly benefited from the favoritism shown by Mr. Bruner to GS2. As for the fourth factor, it is undisputed that Joey Floyd, Esq. was Mr. Bruner’s law partner before, during, and after the arbitration. It is also undisputed that Jason Floyd was the operations manager during

the time that Mr. Bruner conducted the arbitration. Accordingly, even under ANR, the lower court correctly vacated the arbitration award.

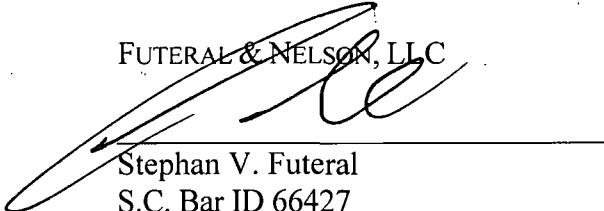
CONCLUSION

Respondents respectfully request that this Court affirm the decision of the lower court to vacate the arbitration award. The enforcement of full disclosure reinforces the parties' expectations that arbitrators will abide by the rules applicable to arbitrators and the proceedings. This Court should enforce the arbitrator's duties to investigate and disclose conflicts regardless of whether this Court finds no actual bias. This Court should ensure that parties remain the architects of their own arbitration process and that parties be the judges of an arbitrator's impartiality. Enforcing disclosure minimizes the role of the courts in weighing arbitrators' potential conflicts, and at the same time, minimizes the discretion of arbitrators in determining what to reveal. As a matter of sound public policy, enforcing an arbitrator's duty to inquire and disclose permits parties and arbitrators to resolve any possible conflict prior to an arbitration hearing. By enforcing inquiry and disclosure, resort to the courts is obviated, and this is, after all, the purpose of arbitration.

signature on following page

Respectfully submitted,

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
sfuteral@charlestonlaw.net

ROGERS, TOWNSEND & THOMAS, PC
Gary Pickren
220 Executive Center Drive
Columbia South Carolina 29210
Telephone (803) 744-5312
Facsimile (803) 744-3644
gary.pickren@rtt-law.com

Attorneys for Respondents

Dated: 11/14/11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

Crouch Construction Company, Inc., ...Appellant,

v.

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

v.

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

RESPONDENTS' DESIGNATION OF MATTER

Respondents hereby designate the following matter to be included in the record on
appeal, excluding Summons, Coversheets, and Proofs of Service:

1. 7/9/08 Agreement for Services
2. 3/10/09 Complaint
3. 4/1/09 Answer and Counterclaim
4. 5/7/09 Appellant's Reply to Counterclaim
5. 10/14/10 Respondents' Amended Answer and Counterclaim
6. 11/3/10 Partial Transcript of Arbitration

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SC Court of Appeals

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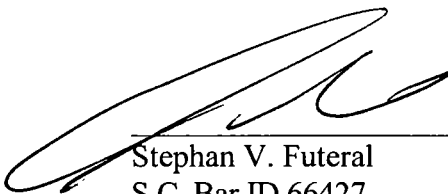
7. 11/15/10 Arbitration Award
8. 11/18/10 Respondents' Motion to Change and/or Clarify the Arbitration Award
9. 1/6/11 Modified and Amended Arbitration Award
10. 2/3/11 Respondents' Motion to Vacate Amended Arbitration Award
11. 3/2/11 Respondents' Supplemental Motion to Vacate the Arbitration Award
12. 3/18/11 Email from James Bruner to Judge Cothran at 12:43 pm
13. 3/3/11 Email from James Bruner to Stephan Futeral at 6:30 pm
14. 3/18/11 Letter from James Bruner to Judge Cothran
15. 3/18/11 Respondents' Supplemental Memorandum in Support of Motion to Vacate the Arbitration Award and Motion for Relief from Order Pursuant to Rule 60 SCRCivP
16. 3/21/11 Respondents' Second Supplemental Memorandum in Support of Motion to Vacate the Arbitration Award and Motion for Relief from Order Pursuant to Rule 60, SCRCivP
17. 5/19/11 Order Vacating Arbitration Award
18. 6/15/11 Respondents' Memorandum in Reply to Appellant's Motion to Alter/Amend
19. 7/1/11 Order Denying Appellant's Motion to Alter or Amend

RULE 209 CERTIFICATION

I certify pursuant to Rule 209(c), SCACR that this designation contains no matter which is irrelevant to this appeal.

Attorney's Signature on Following Page

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

ROGERS TOWNSEND & THOMAS, PC
Gary A. Pickren, Esquire
S.C. Bar ID 8899
220 Executive Center Drive
Columbia, South Carolina 29210
Telephone (803) 744-5312
Facsimile (803) 744-3644
email to: gary.pickren@rtt-law.com

Dated: _____

11/14/11

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

Crouch Construction Company, Inc., ...Appellant,

v.

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

v.

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

**PROOF OF SERVICE OF
RESPONDENTS' INITIAL BRIEF AND RESPONDENTS' DESIGNATION OF
MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

I certify that I have served the Initial Brief of Respondents and Respondents' Designation of Matter to be Included in the Record on Appeal by delivering a copy via United States Mail, postage pre-paid, on November 14th, 2011, addressed to Appellant's counsel at the following address:

Ms. Jean P. Derrick
205 West Main Street
Post Office Box 929
Lexington South Carolina 29072.

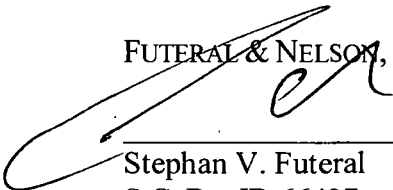
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SC Court of Appeals

Attorney's Signature on Following Page

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

ROGERS TOWNSEND & THOMAS, PC

Gary A. Pickren, Esquire

S.C. Bar ID 8899

220 Executive Center Drive

Columbia, South Carolina 29210

Telephone (803) 744-5312

Facsimile (803) 744-3644

email to: gary.pickren@rtt-law.com

Dated: 11 / 14 / 11

Attorneys for Respondents



Attorneys Serving the Lowcountry

November 11, 2011

The Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Crouch Construction Company, Inc. v. Bryan Causey, Celebrations of Columbia, LLC, and Causey Consulting, LLC
Case No. 09-CP-32-00973
Matter ID: 9124016

Dear Ms. Gee:

Please find enclosed an original and one copy each of (1) Respondents' Initial Brief, (2) Respondents' Designation of Matter to be Included in the Record on Appeal, and (3) Proof Service for the above-referenced case. Please file the originals and return the clocked copies to our office in the enclosed envelope.

By copy of this letter, I am serving Appellant with the same.

Sincerely,

Kelsey Gilmore-Futeral

Encl. as stated

cc: Jean Derrick, Esq.
Gary Pickren, Esq. via email
Bryan Causey via email

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SC Court of Appeals

Local 843-284-5500 Toll Free 877-913-5500 Fax 843-284-5501

1004 Anna Knapp Blvd., 2nd Floor • Mount Pleasant, South Carolina 29464
Reply to: P. O. Box 1543 • Mount Pleasant, South Carolina 29465-1543

www.charlestonlaw.net

The South Carolina Court of Appeals

Crouch Construction Company, Inc., Appellant,

v.

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

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

The Honorable R. Ferrell Cothran, Jr.
Lexington County
Trial Court Case No. 2009-CP-32-00973

ORDER

For good cause having been shown, the time for serving and filing the Respondents' Initial Brief and Designation of Matter in the above entitled matter is hereby extended until November 11, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc: Jean Perrin Derrick, Esquire
Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire

FILED
9/26/11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

Crouch Construction Company, Inc., ...Appellant,

v.

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

v.

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

**MOTION FOR ENLARGEMENT OF TIME TO FILE RESPONDENTS' BRIEF AND
DESIGNATION OF MATTER**

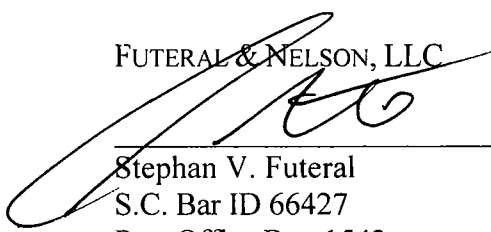
Respondents, by and through undersigned counsel, respectfully move this Honorable Court for an Order granting an extension of time to file the Respondents' Brief and Designation of Matter to be Included in the Record on Appeal. The grounds for this motion are that the Respondents' counsel's schedule has not allowed adequate time to complete the brief, and counsel needs additional time to do so. Therefore, Respondent requests a 30-day extension. No extension to file the initial brief or designation of matter has been previously requested or granted.

Attorney Signature on Following Page.

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SC Court of Appeals

10-12-11
11-11-11
151

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

ROGERS TOWNSEND & THOMAS, PC

Gary A. Pickren, Esquire

S.C. Bar ID 8899

220 Executive Center Drive

Columbia, South Carolina 29210

Telephone (803) 744-5312

Facsimile (803) 744-3644

email to: gary.pickren@rtt-law.com

Dated: 9/21/11

Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Case No. 09-CP- 32-00973

Crouch Construction Company, Inc., ...Appellant,

v.

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

v.

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

**PROOF OF SERVICE OF
MOTION FOR ENLARGEMENT OF TIME**

I certify that I have served the Motion for Enlargement of Time by depositing a copy of it
in the United States Mail, postage pre-paid, on September 22, 2011, addressed to Appellant's
attorney: 205 West Main Street, Post Office Box 929, Lexington, South Carolina 29072.

Signature on Following Page.

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SEP 23 2011
SC Court of Appeals

September 21, 2011

The Honorable Tanya Gee
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Crouch Construction v. Causey et al.
Case No. 09-CP-32-973
Case Tracking No.: 2011195510

Dear Ms. Gee:

Please find enclosed an original and seven (7) copies of Respondents' Motion for Enlargement of Time for the above-referenced case. Please also find an original and one (1) copy of a Proof of Service regarding the same. Please file the originals and return one clocked copy of each document to our office in the enclosed envelope. I have enclosed this firm's check in the amount of \$25.00 to satisfy the filing fee.

Sincerely,



Kelsey Gilmore-Futeral

Enc.

cc: Jean Derrick, Esq.
Gary Pickren, Esq. via email

RECEIVED

SEP 23 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

September 20, 2011

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

Re: Crouch Construction v. Causey, Brian
Case Tracking #: 2011195510

Dear Ms. Derrick:

We have received the Appellant's Initial Brief and Designation of Matter in regards to the above appeal. Unfortunately, you sent a copy of the brief and designation rather than the originals.

Therefore, within ten days of the date of this letter, you are requested to provide the original Appellant's Initial Brief and the original Designation of Matter or the brief and designation will not be considered by this Court.

All parties are advised that the correct caption for this matter is:

Crouch Construction Company, Inc.,

v.

Appellant,

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

v.

Respondents,

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

Third Party Defendants.

All future filings by any of the parties must feature the correct caption as shown above.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire

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-Plaintiff

vs.

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

APPELLANT'S INITIAL BRIEF

RECEIVED
SEP 22 2011
SC Court of Appeals

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

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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. (Complaint)

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. (Order) Respondent Causey Consulting also agreed to be a party to the arbitration. (Emails) 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. (Motion;emails) 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. (Award) 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. (Amended Award)

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. (Motions)

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). (Motion) The motion was argued before Judge Cothran March 22, 2011. Judge Cothran issued his Order Vacating Arbitration Award, filed May 19, 2011. Appellant moved to alter or amend the award, and this motion was denied by Order filed July 1, 2011. (Motion, Order)

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. (Order)

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. (emails)

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. (Motion) Appellant suggested five names, including Mr. Bruner, as replacement arbitrators. Respondents suggested Frank Cissa, of the Charleston County Bar, to whom Appellant was agreeable. However, Respondents were unable to confirm Mr. Cissa's availability, and therefore chose to use Mr. Bruner as arbitrator. (emails)

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. Mr. Bruner himself reviewed these lists of witnesses, Appellant listing eighteen potential witnesses and Respondents listing thirty-three potential witnesses. (Affidavit) 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.

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. (Motion)

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. 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. Respondents had sued GS2 as a third party defendant, along with the counterclaims against Appellant Crouch (Pleading), 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. Counsel for Respondents responded "Personally, I accept your explanation. Nonetheless, you should have included the fact and expert witnesses in your conflicts check..." (email) 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. 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 or the parties. (Affidavit)

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." 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. 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. 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.2nd 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 (Ct.App.2002)(cert. denied)

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. [Order]

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. Kabe Home of South Carolina, Inc., (Opinion number 4851, filed July 13, 2011) (Ct.App.)

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 F3d at 500. Citing Consolidation Coal Company Local 1643, United Mine workers of America, 48 F.3d 125,130 (4th 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 F3d 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 (6th 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 Hobe 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. (Affidavit) 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 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. (Email)

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.

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 (Amended Arbitration Award). 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 (email from Futeral), 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 page 13 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. [arbitration award] 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 (4th Cir. 1993); Smith vs. Kerrville Bus. Co., 709 F.2d 914, 918, Fn 2 (5th Cir. 1983) (Courts are not bound by arbitral rulings); Little Six Corporation vs. United Mine Workers, Local Union 8332, 701 F.2d 26, 29 (4th 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 foundations 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.
(page 4 order)

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 "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." (page 6 of Order) 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 note 19 (6th Cir. 1989); Int'l Produce, Inc. vs. A-Srosshavet, 638 F.2d 548, 531 (2nd Cir. 1981). See also Schmitz vs. Zilvetti, 20 F.3d 1043, 1047 ("The majority did not articulate at 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 page 9:

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 (7th Cir. 1992); Apperson, 879 F.2d at 1358; Morelite Constr. Corporation vs. New York City Carpenter's Benefit Funds, 748 F.2d 79, 83 (2nd 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 (7th 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, on page 7, 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 on page 7 of the Order, is a decision in an arbitration case governed by the arbitration procedure of the National Association of Securities Dealers (NASD), which require arbitrators to make an investigation of “any personal relationships with any party, its counsel, or witnesses.” 20 F.3d 1043 (9th 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 sufficient 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 Postive Software Solutions, Inc., vs. New Century Mortgage Corporation, 436 F.3d 495 (5th 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 (4th, 6th, 7th and 10th 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 5th, 11th and 9th 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 on page 14 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 who 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. (Order)

Next, Respondents assert that "over Defendant's objections the arbitrator permitted GS2 and its counsel to view the subject property..." (Order page 14) 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 already 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, PE, 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. (Affidavit) After Respondents' brought this remote and attenuated connection to light, there was an exchange of emails between counsel and the arbitrator (Emails) 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. Both parties also submitted other affidavits, all of which are included in this Record on Appeal. The Order on appeal on page 14 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." (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 (4th Cir. 1993) wherein 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." (Email) 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." (Email) 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." (Affidavit) 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 on page 15 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. Mrs. Morrison was not listed by Appellant on the witness list submitted to the arbitrator (Affidavit of Arbitrator) 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 (Affidavit), 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 trivial.

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..." (Motion) 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, on page 12, 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 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?

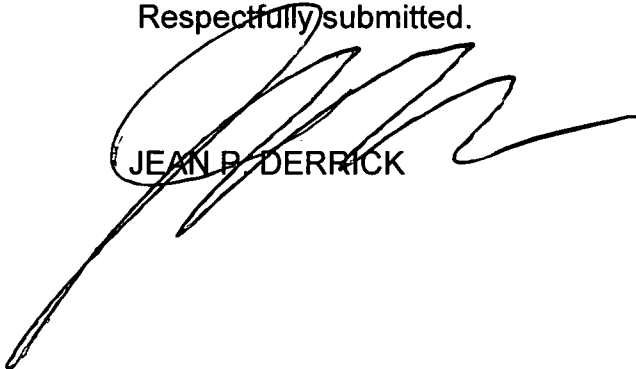
Clearly, the common sense answer, which is dictated by court cases as well as AAA and ADR Rules, is that the focus is on an affirmative duty to investigate and reveal connections with the parties and the lawyers, supplemented with whatever direct knowledge the arbitrator actually has about the witnesses 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...." (Page 9 of the 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 trivial. 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.



JEAN B. DERRICK

September 12, 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

RECEIVED

SEP 22 2011

SC Court of Appeals

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

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

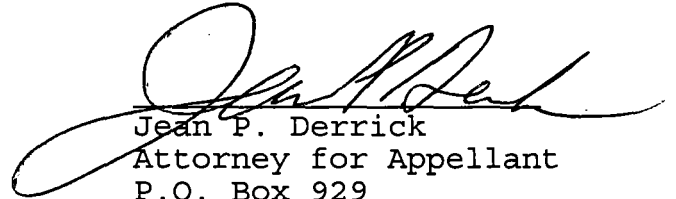
Appellant hereby designates the following matter to be included in the record on appeal, excluding Summons, Coversheets, and Proof of Service:

1. Order Vacating Arbitration Award filed May 19, 2011.
2. Order Denying Plaintiff's Motion to Alter or Amend filed July 1, 2011.
3. Order regarding Plaintiff's Motion to Compel Arbitration filed March 17, 2011.
4. Arbitration Award filed November 15, 2010.
5. Modified and Amended Arbitration Award filed January 6, 2011.
6. Lis Pendens filed February 3, 2009.
7. Complaint filed March 10, 2009.
8. Answer and Counterclaim filed April 1, 2009.
9. Reply filed May 7, 2009.

10. Motion to Compel Arbitration and to stay litigation dated July 2, 2009.
11. Motion to Compel choice of arbitrator filed June 4, 2010, with attachments.
12. Notice of Motion and Motion to Confirm Award in Arbitration filed November 16, 2010.
13. Defendants/Third Party Plaintiffs' Motion to Vacate Amended Arbitration Award dated February 3, 2011.
14. Defendants/Third Party Plaintiffs' Supplemental Motion to Vacate the Arbitration Award filed March 2, 2011, with all attachments.
15. Motion to Alter or Amend filed June 2, 2011
16. Affidavit of James L. Bruner dated March 18, 2011 with cover letter and all attachments.
17. Affidavit of Roger R. Crouch dated March 17, 2011.
18. Affidavit of George A. Sembos dated March 17, 2011.
19. Email from Stephen V. Futeral to Frank Smith sent April 29, 2010 at 2:57 p.m.
20. Email from Stephen V. Futeral to Jim Bruner sent October 25, 2010 at 3:19 p.m.
21. Email from Stephen V. Futeral to Jean Derrick sent June 15, 2010 at 12:11 p.m.
22. Email from Jim Bruner to Futeral and Derrick dated March 3, 2011 10:09 a.m.
23. Email from Futeral to Bruner dated March 3, 2011 11:45 a.m.
24. Email from Derrick to Futeral dated March 3, 2011.
25. Email from Futeral to Bruner dated March 3, 2011 11:45 a.m.
26. Email from Bruner to Futeral dated March 3, 2011 1:09 p.m.
27. Email Bruner to Futeral dated March 3, 2011 6:30 p.m.
28. Appellant's witness list.
29. Respondents' updated witness list with cover letter October 14, 2010.

CERTIFICATION

Pursuant to Rule 209(c), SCACR I hereby certify that this Designation contains no matter which is irrelevant to this appeal.



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

September 12, 2011

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
jderrick@windstream.net

September 21, 2011

V. Claire Allen, Deputy Clerk
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

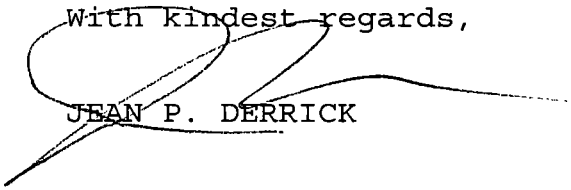
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SEP 22 2011
SC Court of Appeals

Re: Crouch Construction Company, Inc.
vs. Bryan Causey, Celebrations of Columbia, LLC
And Causey Consulting, LLC
97-CP-32-00973
Case Tracking #:2011195510

Dear Clerk Allen:

Enclosed please find the originals of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal. This replaces the copies that were inadvertently sent to you instead of the originals.

With kindest regards,


JEAN P. DERRICK

JPD/ss
Enclosures
cc: Stephen Futeral, Esq.
Gary A. Pickren, Esq.

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-Plaintiff

vs.

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

APPELLANT'S INITIAL BRIEF

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SC Court of Appeals

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

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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. (Complaint)

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. (Order) Respondent Causey Consulting also agreed to be a party to the arbitration. (Emails) 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. (Motion;emails) 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. (Award) 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. (Amended Award)

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. (Motions)

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). (Motion) The motion was argued before Judge Cothran March 22, 2011. Judge Cothran issued his Order Vacating Arbitration Award, filed May 19, 2011. Appellant moved to alter or amend the award, and this motion was denied by Order filed July 1, 2011. (Motion, Order)

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. (Order)

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. (emails)

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. (Motion) Appellant suggested five names, including Mr. Bruner, as replacement arbitrators. Respondents suggested Frank Cissa, of the Charleston County Bar, to whom Appellant was agreeable. However, Respondents were unable to confirm Mr. Cissa's availability, and therefore chose to use Mr. Bruner as arbitrator. (emails)

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. Mr. Bruner himself reviewed these lists of witnesses, Appellant listing eighteen potential witnesses and Respondents listing thirty-three potential witnesses. (Affidavit) 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.

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. (Motion)

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. 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. Respondents had sued GS2 as a third party defendant, along with the counterclaims against Appellant Crouch (Pleading), 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. Counsel for Respondents responded "Personally, I accept your explanation. Nonetheless, you should have included the fact and expert witnesses in your conflicts check..." (email) 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. 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 or the parties. (Affidavit)

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." 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. 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. 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 (Ct.App.2002)(cert. denied)

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. [Order]

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. Kabe Home of South Carolina, Inc., (Opinion number 4851, filed July 13, 2011) (Ct.App.)

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 (4th 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 (6th 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 Hobe 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. (Affidavit) 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 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. (Email)

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.

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 (Amended Arbitration Award). 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 (email from Futeral), 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 page 13 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. [arbitration award] 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 (4th Cir. 1993); Smith vs. Kerrville Bus. Co., 709 F.2d 914, 918, Fn 2 (5th Cir. 1983) (Courts are not bound by arbitral rulings); Little Six Corporation vs. United Mine Workers, Local Union 8332, 701 F.2d 26, 29 (4th 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 foundations 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.
(page 4 order)

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 "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." (page 6 of Order) 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 note 19 (6th Cir. 1989); Int'l Produce, Inc. vs. A-Srosshavet, 638 F.2d 548, 531 (2nd Cir. 1981). See also Schmitz vs. Zilvetti, 20 F.3d 1043, 1047 ("The majority did not articulate at 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 page 9:

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 (7th Cir. 1992); Apperson, 879 F.2d at 1358; Morelite Constr. Corporation vs. New York City Carpenter's Benefit Funds, 748 F.2d 79, 83 (2nd 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 (7th 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, on page 7, 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 on page 7 of the Order, is a decision in an arbitration case governed by the arbitration procedure of the National Association of Securities Dealers (NASD), which require arbitrators to make an investigation of “any personal relationships with any party, its counsel, or witnesses.” 20 F.3d 1043 (9th 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 sufficient 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 Postive Software Solutions, Inc., vs. New Century Mortgage Corporation, 436 F.3d 495 (5th 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 (4th, 6th, 7th and 10th 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 5th, 11th and 9th 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 on page 14 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 who 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. (Order)

Next, Respondents assert that "over Defendant's objections the arbitrator permitted GS2 and its counsel to view the subject property..." (Order page 14) 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 already 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, PE, 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. (Affidavit) After Respondents' brought this remote and attenuated connection to light, there was an exchange of emails between counsel and the arbitrator (Emails) 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. Both parties also submitted other affidavits, all of which are included in this Record on Appeal. The Order on appeal on page 14 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." (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 (4th Cir. 1993) wherein 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." (Email) 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." (Email) 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." (Affidavit) 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 on page 15 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. Mrs. Morrison was not listed by Appellant on the witness list submitted to the arbitrator (Affidavit of Arbitrator) 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 (Affidavit), 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 trivial.

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..." (Motion) 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, on page 12, 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 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?

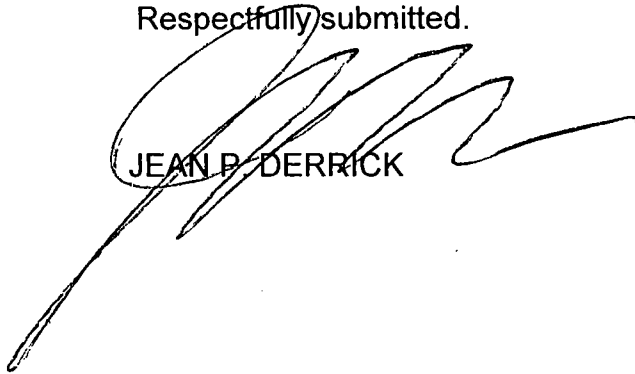
Clearly, the common sense answer, which is dictated by court cases as well as AAA and ADR Rules, is that the focus is on an affirmative duty to investigate and reveal connections with the parties and the lawyers, supplemented with whatever direct knowledge the arbitrator actually has about the witnesses 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...." (Page 9 of the 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 trivial. 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.


JEAN P. DERRICK

September 12, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 15 2011

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Hon. R. Ferrell Cothran, Jr., Judge

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

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant hereby designates the following matter to be included in the record on appeal, excluding Summons, Coversheets, and Proof of Service:

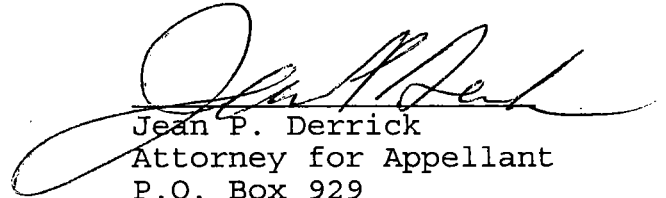
1. Order Vacating Arbitration Award filed May 19, 2011.
2. Order Denying Plaintiff's Motion to Alter or Amend filed July 1, 2011.
3. Order regarding Plaintiff's Motion to Compel Arbitration filed March 17, 2011.
4. Arbitration Award filed November 15, 2010.
5. Modified and Amended Arbitration Award filed January 6, 2011.
6. Lis Pendens filed February 3, 2009.
7. Complaint filed March 10, 2009.
8. Answer and Counterclaim filed April 1, 2009.
9. Reply filed May 7, 2009.

COPY

10. Motion to Compel Arbitration and to stay litigation dated July 2, 2009.
11. Motion to Compel choice of arbitrator filed June 4, 2010, with attachments.
12. Notice of Motion and Motion to Confirm Award in Arbitration filed November 16, 2010.
13. Defendants/Third Party Plaintiffs' Motion to Vacate Amended Arbitration Award dated February 3, 2011.
14. Defendants/Third Party Plaintiffs' Supplemental Motion to Vacate the Arbitration Award filed March 2, 2011, with all attachments.
15. Motion to Alter or Amend filed June 2, 2011
16. Affidavit of James L. Bruner dated March 18, 2011 with cover letter and all attachments.
17. Affidavit of Roger R. Crouch dated March 17, 2011.
18. Affidavit of George A. Sembos dated March 17, 2011.
19. Email from Stephen V. Futeral to Frank Smith sent April 29, 2010 at 2:57 p.m.
20. Email from Stephen V. Futeral to Jim Bruner sent October 25, 2010 at 3:19 p.m.
21. Email from Stephen V. Futeral to Jean Derrick sent June 15, 2010 at 12:11 p.m.
22. Email from Jim Bruner to Futeral and Derrick dated March 3, 2011 10:09 a.m.
23. Email from Futeral to Bruner dated March 3, 2011 11:45 a.m.
24. Email from Derrick to Futeral dated March 3, 2011.
25. Email from Futeral to Bruner dated March 3, 2011 11:45 a.m.
26. Email from Bruner to Futeral dated March 3, 2011 1:09 p.m.
27. Email Bruner to Futeral dated March 3, 2011 6:30 p.m.
28. Appellant's witness list.
29. Respondents' updated witness list with cover letter October 14, 2010.

CERTIFICATION

Pursuant to Rule 209(c), SCACR I hereby certify that this Designation contains no matter which is irrelevant to this appeal.



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

September 12, 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

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

vs.

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

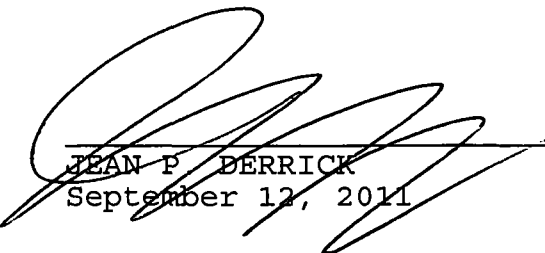
CERTIFICATE OF SERVICE

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 Initial Brief and Designation of Matter to be Included in the Record on Appeal, dated September 12, 2011.

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

Gary A. Pickren
220 Executive Center Drive
Columbia, SC 29210

RECEIVED
SEP 15 2011
SC Court of Appeals



JEAN P. DERRICK
September 12, 2011

LAW OFFICES OF

Jean Perrin Derrick, LLC

ATTORNEY AT LAW

205 WEST MAIN STREET
P.O. BOX 829
LEXINGTON, SOUTH CAROLINA 29072

TELEPHONE
(803) 359-6189
FAX NO. 808-1657
jderrick@windstream.net

September 12, 2011

Hon. Tanya A. Gee
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

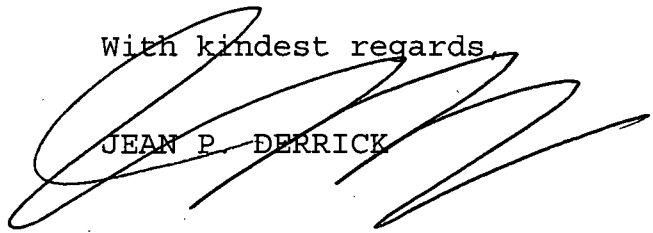
Re: Crouch Construction Company, Inc.
vs. Bryan Causey, Celebrations of Columbia, LLC
And Causey Consulting, LLC
97-CP-32-00973

Dear Clerk Gee:

Enclosed please find a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal, together with proof of service of this Brief and Designation on opposing counsel.

Under cover of copy of this letter, I am serving each opposing counsel with a copy of this Initial Brief and Designation of Matter to be Included in the Record on Appeal.

With kindest regards,


JEAN P. DERRICK

JPD/ss
Enclosures
cc: Stephen Futeral, Esq., w/Encls.
Gary A. Pickren, Esq., w/Encls.

RECEIVED

SEP 15 2011

SC Court of Appeals

The South Carolina Court of Appeals

Crouch Construction Company, Inc., Appellant,

v.

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

v.

GS2 Engineering and Environmental
Consultants, Inc., Gist, Inc., 3rd Party Defendants.

The Honorable R. Ferrell Cothran, Jr.
Lexington County
Trial Court Case No. 2009-CP-32-00973

ORDER

For good cause having been shown, the time for serving and filing the Appellant's Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 12, 2011.

IT IS SO ORDERED.

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY


CLERK

Columbia, South Carolina

cc: Jean Perrin Derrick, Esquire
Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire

FILED
8/22/11

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
jderrick@windstream.net

August 10, 2011

RECEIVED

AUG 11 2011

SC Court of Appeals

Hon. Tanya A. Gee
Clerk of Court
Court of Appeals
P. O. Box 11629
Columbia, SC 29211

RE: Crouch Construction Company, Inc. vs. Bryan Causey, Celebrations
of Columbia, LLC, and Causey Consulting, LLC

Dear Clerk Gee:

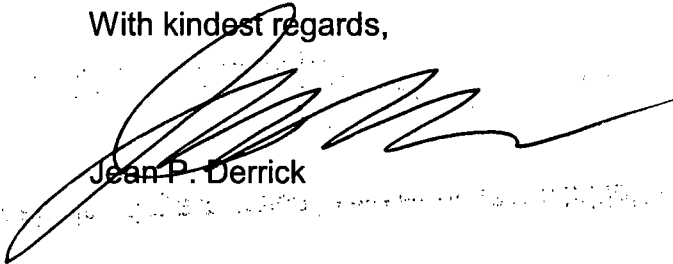
This is to request an additional thirty days in which to file Appellant's Initial Brief and Designation of Matter.

There is no transcript required to be ordered in this appeal, so I should be prepared to file the Brief and Designation within the next thirty days.

I am enclosing my check in the amount of \$25 as a filing fee. By copy of this letter to opposing counsel, I am advising him of this request.

Thank you for your consideration in the matter.

With kindest regards,


Jean P. Derrick

JPD/shl

Enclosure

cc: Stephan V. Futerall, Esquire
Gary Pickren, Esquire

8-11-11
9-12-11
151



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

July 21, 2011

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

Re: Crouch Construction v. Causey, Brian
Case Tracking #: 2011195510

Dear Ms. Derrick:

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address: 1015 Sumter Street, Columbia, S.C. 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

NOTE: If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S.C. Code Ann. Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases:

- 1) any final judgment from the circuit court which includes a sentence of death;
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58;
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance;
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state;
- 5) any final judgment from the circuit court pertaining to elections and election procedure;
- 6) any order limiting an investigation by a State Grand Jury under S.C. Code Ann. Section 14-7-1630;
- 7) any order of the family court relating to an abortion by a minor under S.C. Code Ann. Section 44-41-33.

Very truly yours,
Tanya A. Gee
CLERK

TAG/ec

cc: Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire
The Honorable Beth Carrigg



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
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July 21, 2011

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

Re: Crouch Construction v. Causey, Brian
Case Tracking #: 2011195510

Dear Ms. Derrick:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc: Gary A. Pickren, Esquire
Stephan Victor Futeral, Esquire
The Honorable Beth Carrigg

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. R. Ferrell Cothran, Jr., Judge

RECEIVED

JUL 14 2011

SC Court of Appeals

Case No.: 2009-CP-32-00973

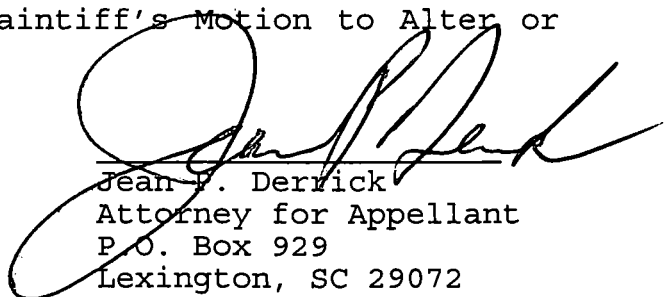
Crouch Construction Company, Inc.....Appellant-Plaintiff

vs.

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

NOTICE OF INTENT TO APPEAL

Crouch Construction Company, Inc., appeals the Order Vacating Arbitration Award filed May 19, 2011 and Order Denying Plaintiff's Motion to Alter or Amend filed July 5, 2011, both orders issued by the Honorable R. Ferrell Cothran, Jr. Appellant received written notice of the entry of the Order Vacating Arbitration Award on May 25, 2011, and the Order Denying Plaintiff's Motion to Alter or Amend on July 6, 2011.


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

July 17 2011.
Other counsel of record:

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

Other counsel of record:

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

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JUL 14 2011

SC Court of Appeals

Case No.: 2009-CP-32-00973

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

vs.

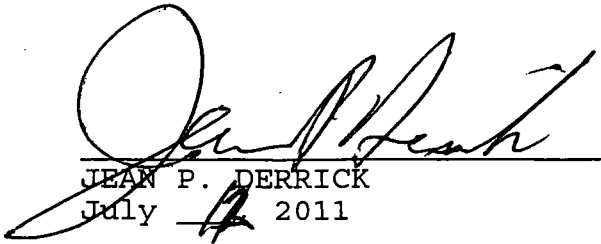
Bryan Causey, Celebrations of Columbia, LLC, and
Causey Consulting, LLC.....Respondents-Defendants

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 Notice of Intent to Appeal, on July 12, 2011.

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

Gary A. Pickren
220 Executive Center Drive
Columbia, SC 29210



JEAN P. DERRICK
July 12 2011

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
jderrick@windstream.net

July 12, 2011

Hon. Tanya Gee
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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JUL 14 2011

SC Court of Appeals

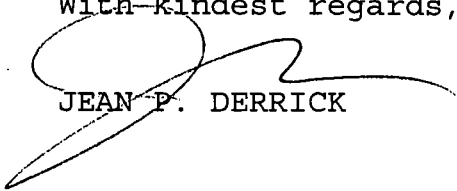
Re: Crouch Construction Company, Inc.
vs. Bryan Causey, Celebrations of Columbia, LLC
And Causey Consulting, LLC
97-CP-32-00973

Dear Clerk Gee:

Enclosed please find the original and a copy of the Notice of Intent to Appeal, together with my original Certificate of Service and my check in the amount of \$100 filing fee, in the above captioned case. I would appreciate your forwarding back to me the clocked-in copy in the enclosed, self-addressed envelope.

It is unnecessary to order any transcript, so I will be filing an Initial Brief and Designation of Matter shortly.

With kindest regards,


JEAN P. DERRICK

JPD/sss

Enclosures

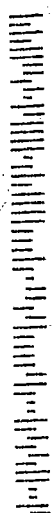
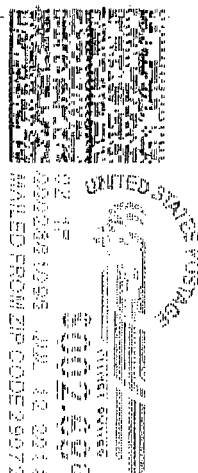
cc: Stephen Futeral, Esq., w/Encls.
Gary A. Pickren, Esq., w/Encls.

Jean P. Derrick
P.O. Box 929
Lexington, SC 29071

Jean Perrin Derrick, LLC
ATTORNEY AT LAW
205 WEST MAIN STREET
P.O. BOX 929
LEXINGTON, S.C. 29072

Hon. Tanya Gee
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES



STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP3200973

Crouch Construction Co Inc vs. Bryan Causey

RECEIVED

JUL 14 2011

SC Court of Appeals

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the n/a, and a copy mailed first class this 5th day of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Jean P Derrick
PO Box 929
Lexington, SC 29071

James Edward Bradley
PO Box 5709 West Columbia, SC 29171
M Alan Peace
PO Box 11656 Columbia, SC 29211
Stephan Victor Futeral
1004 Anna Knapp Blvd., 2nd Floor Mt.
Pleasant, SC 29464
Gary Allen Pickren
P O Box 8382 Columbia, SC 29202
S R Anderson Law
PO Box 12188 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/lc

Beth A. Carrigg - Clerk of Court

SCRPC APP-24/FORM 4

COPY

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
3rd Party Plaintiffs,

vs.

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

3rd Party Defendants.

IN THE COURT OF COMMON PLEAS

11th JUDICIAL CIRCUIT

CASE NO.: 09-CP-32-00973

RECEIVED

JUL 14 2011

SC Court of Appeals

ORDER DENYING
PLAINTIFF'S MOTION
TO ALTER OR AMEND

RECEIVED
CLERK OF COURT
LEXINGTON SC

2011 JUL -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 issued 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, 11th Judicial Circuit

6-28-, 2011

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP3200978

RECEIVED

JUL 14 2011

Crouch Construction Co Inc vs. Bryan Causey

SC Court of Appeals

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Court Reporter: _____

PRESIDING JUDGE -

This judgment was entered on the n/a, and a copy mailed first class this 24th day of May, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Jean P Derrick
PO Box 929
Lexington, SC 29071

James Edward Bradley
PO Box 5709 West Columbia, SC 29171
M Alan Peace
PO Box 11656 Columbia, SC 29211
Stephan Victor Futeral
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464
Gary Allen Pickren
P O Box 8382 Columbia, SC 29202
S R Anderson
PO Box 12188 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/lc

SCRPC APP-24/FORM 4

Beth A. Carrigg - Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Crouch Construction Company, Inc.,

Plaintiff,

vs.

Bryan Causey, Celebrations of Columbia,
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Defendants and
3rd Party Plaintiffs,

vs.

GS2 Engineering and Environmental
Consultants, Inc.,

3rd Party Defendant.

COPY
IN THE COURT OF COMMON PLEAS
11th JUDICIAL CIRCUIT
CASE NO.: 09-CP-32-00973

RECEIVED

JUL 14 2011

SC Court of Appeals

**ORDER VACATING
ARBITRATION AWARD**

ETHA CARRICO
CLERK OF COURT
LEXINGTON, SC

2011 MAY 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, 3rd 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 3rd 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.¹

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.)

¹ 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.²

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

² 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.³ 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).

2904
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

³ 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

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.

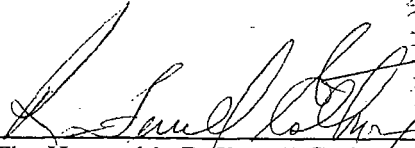
As set forth in Defendants' supporting affidavit, if the arbitrator had disclosed the relationship between his law partner and GS2's Operations Manager, Defendants would never have agreed to the arbitrator in issue. The full disclosure rule of Commonwealth reinforces the parties' expectations that arbitrators 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, 11th Judicial Circuit

May 16, 2011