

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM Horry COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case Tracking No. 2012209227

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Joseph N. Grate

Appellant,

v.

Waccamaw EOC, Inc.,

Respondent.

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**BRIEF OF APPELLANT**

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September 14, 2012

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**RECEIVED**  
SEP 17 2012  
**SC Court of Appeals**

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## **I. STATEMENT OF ISSUES ON APPEAL**

1. DID THE JURY ERR IN FINDING FOR RESPONDENT, GIVEN THE GLARING EVIDENCE OF RESPONDANCE'S TOTAL FAILURE AND NEGLIGENCE, REGARDING THE CONTRACT?
2. SHOULD NOT THE JURY HAVE FOUNDED FOR APPELLANT, GIVEN THE ABUNDANCE OF CONCISE EVIDENCE SUPPORTING APPELLANT'S POSITION?

## **II. STATEMENT OF THE CASE.**

1. This Breach of Contract action was commenced: December 20, 2010;
2. The Defense responded by denying the complaint and counter sued for breach of contract, including allegation of unclean hands.
3. A jury trial was held January 10 & 11, 2012, and it found for the defense and awarded a \$2,090.00 actual damages judgment.
4. The amount involved on appeal is as it was at the trial, which was \$ 68,000 plus all cost and other damages as the Court find Equitable; to include computation for elevation to the current Tribunal.
5. The appeal is from the jury verdict, 1-12-2010 (1-12-2012).
6. The notice of appeal was served: March 7, 2012.
7. Appellant's Motions for Summary Judgment and to Compel Discovery: June 8, 2011, should illuminate the questions involved and may have some affect on this appeal.

### III. ARGUMENT

#### 1. RESPONDENT FAILED TO SUBSTANTIATE ITS BREACH OF CONTRACT COUNTERCLAIM; THEREFORE THE JURY VERDICT WAS IN ERROR.

Appellant is contesting the breach the contract verdict. Appellant was committed to the contract. He was ready, available and was proactive towards the accomplishment of the contracted elements. (R. pp. 215- 247; - pp. 329-349) To that end, Appellant acted alone; totally without any input or feedback from Respondent; Respondent's position clearly and totally prevented Appellant's performance. (R. p. 369, lines10-25; – p. 370, lines 1-19; – p. 308, lines 14-23) Consequently, Respondent pushed forward with the Choppee Head Start Center, in total disregard for Appellant's initial input and ended up with a Government shut down of the Construction within two month of its start. (R. pp. 350 - 351; – p. 289, lines 17 – 25; – p. 290, lines 1 – 14; - p. 385, lines 22 – 25; p. 387, lines 1 - 19)

**Borough of Ridley, 506 A 2<sup>nd</sup> 862 (Pa. 1986)**

**George A. Fuller Co. v United States, 69 F. Supp., 409 (Ct. Cl. 1947)**

#### 2. RESPONDENT BREACHED THE CONTRACT AND APPELLANT SHOULD BE COMPENSATED. THE JURY VERDICT WAS IN ERROR.

Contractually, Respondent had a duty to participate towards the performance of the contract. (R. p. 47, paragraph III). The very act of not doing anything at all towards the performance, constitute a hindrance of the performance thereto but given that Appellant was ready and available to perform his contractual obligations, even while under extreme, adverse circumstances, he should be compensated at the contracted rate. (R. p. 49, last 2 paragraphs; - p. 50, lines 1 – 9 ; - pp. 53 - 57).

**CEM v. United States, 59 Fed Cl. 168 (2003)**

**IV. SEPARATE STATEMENT OF FACTS**

Respondent refused to permit discovery of invoices of Ralph Wilson, Sr. and of The Sasser Law Firm of Montgomery, Alabama, which sheds a curious yet revealing light upon Respondent's Counsel and the path leading to the commencement of this action and to the present skirmish. (R. p. 48, Item V; - p. 21, Item 3; - p. 22; - p. 170, lines 10-17)

Respondent was totally ignorant of contractual matters; although, it had at its disposal several attorneys: Emma Britton its General Council, Dan Stacey as Attorney for the Choppee Head Start Center, Richard Smith on Respondent's Board of Directors and Ralph Wilson Sr. who brought in The Sasser Law Firm, in a suspicious manner. (R. p. 110, lines 3-15, last paragraph; - p. 147, lines 9 - 27; - p. 162, last 2 paragraphs; -p. 163, paragraphs 1, 2 & 3; - p. 164, last 3 paragraphs; - pp. 167 -168; - p. 169, line 8; - p. 170, lines 11-34) The discovery of the invoices would have highlighted the unclean hands in this whole situation; in this case, Ralph Wilson's and possible could have allowed for the opening of a clean avenue towards understanding the contractual issues involved. (R. pp. 39 - 44; - p 170, lines 10 - 17; - p 173, lines 7 - 17; - p. 178, lines 20 - 25; - p. 179, lines 17 25)

During this litigation process, Respondent introduced the contention of unclean hands. (R. p. 18, line18; - p. 56, lines 1-13) Those invoices would have assisted in the identification of the body to which those hands were attached; moreover, it would have exposed the identity of the fox in the chicken house and this matter would have taken an entirely different tack. (R. p. 171, last paragraph; - p. 171, lines 11-25; - p. 246, lines 6 - 11; - p. 21, item 3.; -p. 22)

Competent legal counsel would have benefited all, especially the end users: The Choppee Head Start Center. (R. p. 282, lines 10 – 25; - pp. 283 – 284; - p. 285, lines 1 - 9) The invoices would have shown that the ultimate beneficiary was the Sasser Law Firm of Alabama, a non South Carolina Bar Entity, facilitated in this capacity by Ralph Wilson. Ralph Wilson bridged the gap between the Sasser Law Firm of Alabama and Respondent which does not appear to be legal or maybe at least unethical. (R. p. 170, line 11 -34; – p. 171, paragraph 8; – p. 51 item XII; – p. 48 item V)

Had this information been discovered, it could have also been used to supplement Appellant's prior complaint to LLR and to the Attorney General's office regarding Ralph Wilson and the Sasser Law Firm of Alabama. An investigation by these entities would have discovered the suspicious advent of the Sasser Law Firm and that, ironically, the Sasser Law Firm, although not a legal S.C. entity, did benefit Respondent although at a substantial cost; whereas Ralph Wilson only benefited Ralph Wilson's bank account. As for the relevancy of that to the current matter, seemingly Ralph Wilson and unclean hands would have been dealt with appropriately and competent Counsel could have appraised Respondent of the issues thus this litigation could have been avoided. (R. p. 18, line 18; - p. 21, item 3; - p. 22; - p. 25, item 18; - p. 31; - p. 39 ; - p. 40, paragraph 2; - p. page 48, paragraph V; - p. 50, item IX; - p. 51, item XI; - p. 55, items 9 & 11; - pp. 56 -57)

#### **FACTS RELATING TO THE CONTRACT WITH THE FOCUS ON EXHIBIT B**

Originally, Exhibit A and B were drafted by Appellant and Attorney Dan Stacey. (R. pp. 138 – 139; – pp. 141-142) Appellant signed it but after one month Respondent still had

not signed. That led to a meeting between Respondent and Appellant and the Fee was negotiated to 9 %. After that point it was just a matter of that information being forwarded to Dan Stacey, for the Final Draft of the contract. (R. pp. 70 – 72; - p. 117)

After much delay concerning the contract, Appellant was finally notified that the contract was ready to be signed. (R. pp. 115 – 116) Appellant went to Respondent's office to execute the contract. Upon arrival, Janice Wideman indicated that she was in contact with the Attorney's Office and was waiting for the Final Draft of Exhibit B to be faxed to her. After Appellant waited more than two hours, Janice Wideman presented Exhibit B of the contract and the contract was executed; one month after Appellant's original signing. (R. p. 140)

At the trial, it was revealed that Janice Wideman drafted the Exhibit B, at issue; hence the mass confusion. (R. p. 297, lines 7 – 25; - p. 298) She was also the source of the confusion concerning 45 CFR however, a competent Attorney would have been able to advise Respondent regarding Procurement matters as they pertain to Architectural Related Services, after having had his attention called to it; and not blindly holding on for dear life to something that was passed on to him from Janice Wideman, who received it from someone whose procurement acumen is lacking at best. (R. pp. 97 – 101; - p. 309, lines 6 - 12) Appellant presented Ralph Wilson with sufficient verifiable information such that much of Respondent's problems (including some future ones) and this litigation could have been avoided. (R. pp. 280 - 284)

As for That Exhibit, Appellant indicated his position within days of execution of the contract but there was no reply from Respondent. (R. pp. 119 – 131; - p. 140 - 142)

As drafted, it is in conflict with Exhibit A but to date Respondent's Attorney remains blinded regarding this issue and has never responded to Appellant's presentment thereto. (R. pp. 120 – 124)

For this contract, Project Management encompasses the tasks of Contract Administrator and Construction Manager; all of which comes under the umbrella of Architectural Related Services. Typically, these are integral Elements of Architectural Services. (R. pp. 120 – 124). They also are encompassed in the A.I.A Document A-101, the Contract between Respondent and Earthworks, the designer of the Choppee Head Start Center. (R. p. 70, @ 4.2)

The Project Manager was hired to provide Respondent with an independent perspective of the venture. (R. p. 65, last paragraph; - p. 156, last 4 lines; - p. 166, last paragraph; - p. 167, lines 1 – 10; - p. 168; - p. 169, lines 7 – 8; - p. 170, lines 11 – 24; - p. 171, paragraph 5)

Exhibit A of the contract outlined Appellant's responsibilities. However, those elements were entirely contingent upon Respondent's performance of its implied responsibilities. Respondent completely abdicated its responsibilities by doing absolutely nothing. (R. p. 170, lines 22 – 24; - p. 173, lines 5 – 6; - p. 175, last 2 lines)

Appellant repeatedly wrote to the assumed contact persons of Respondent's Organization but there was never a reply from anyone in that organization. It was not until during the trial that Appellant discovered that no one at the Organization knew who was in the position of contact person between Appellant and Respondent. (R. p. 334, lines 1 – 23; - p. 380, lines 1 – 15; - p. 385, line 25) At one point there had been communication but that was discontinued with the departure of Executive Director, Fryar, who was removed

because she was a Competent Professional and she understood the process. (R. p. 147, first paragraph; - pp. 156-157; - p. 67; - pp.106 -109; - pp. 110-118)

Seemingly, everything concerning Costs and Fees is a matter of permanent confusion for respondent and there seem to be a strong desire to remain in that condition. (R. p. 64, paragraph 5; - p. 104, paragraph3)They have exhibited this in their habit of removing or eliminating from around them, those people who possess the knowledge of properly directing them while at the same time, drawing to themselves those who only have the knowledge and abilities to help them to remain in their state of ignorance and confusion. (R. p. 182, lines 11-25; - pp. 283 - 285) They removed Executive Fryar; they gravitated towards Ralph Wilson and Earthworks ( Steve Strickland). (R. p. 26; item VI; -P. 27, lines 1 - 8; - p. 48, item 8; - p. 51, item XII, item XIII; - pp. 80 - 81; - p. 84; - p. 86; - p.90; - p. 92; - p. 93, item B (2); - p. 94 item 8; -p. 150, last paragraph;- pp. 151 - 152; - p. 153, first paragraph; - p. 173, lines 7 - 17)

#### **I. RESPONSE TO RESPONDENT'S ARGUMENT - I.**

APPELLANT'S INITIAL BRIEF IS IN COMPLIANCE with SCAC RULE 208

#### **II. RESPONSE TO RESPONDENT'S ARGUMENT -II.**

APPELLANT DID NOT BREACH THE CONTRACT.

There have never been any directives from Respondent to Appellant. (R. pp. 206 - 293)

Therefore, it is impossible for Appellant to have refused any directives. Appellant has never neglected to perform on any aspect of the contract to which he had access.

Respondent has not permitted any such access; access was completely blocked by

Respondent's lack of action. Given these absences it is legally impossible for breach by

Appellant to have occurred. (R. pp. 176 - 204)

Regarding 45 CFR § 74.44 (c) Appellant did not need to know anything about that CFR but Respondent should have known that it is a part of its procurement regulations; nevertheless, it does not apply with the type of contract at issue. (R. pp. 119 – 130; - p. 152; - p. 153, lines 1 - 24) Any mistake made regarding this regulation has to be owned by Respondent and its Attorney. (R. pp. 98 -99; – p. 293, lines 23 -25; –p. 294, lines 17 - 20) The contract at issue is not, by definition, a cost; - plus-a-percentage-of-cost contract. (R. p. 49, last paragraph) Janice Wideman and Ralph Wilson relentlessly repeating it does not make it so.

The Fee arrangement is in compliance with State and Federal Regulations. (R. p. 49, last paragraph; – p. 50, lines 1-10 – p. 70, @ 4.2 – p. 71) This situation was explained to Ralph Wilson on several occasions. He indicated that he would appraise the Respondent of Appellant’s Position and inform Appellant accordingly. Evidently that did not occur. The elements of Exhibit A clearly defines Architectural Related Services; in particular, Services as defined at 48 CFR Subpart 16.1 (b).

The State of South Carolina also addresses the issue of Architectural Related Services. S.C. Code § 11-35-2910. (1); (4)

This contract type is appropriate for the services involved. 10 USC § 2306 (d); 41 U.S.C. 254(b); (A); (B) and (C); 48 CFR § 36.601–4 (a);(1); (2) and (3) and SC Code § 11-35-2910 (4) are applicable, exclusively; irrespective of Janice Wideman’s and Ralph Wilson’s insistence to the contrary. (R. pp. 408 - 419)

### **III. RESPONSE TO RESPONDENT’S ARGUMENT – III.**

**APPELLANT PROVIDED PROOF THAT RESPONDENT BREACHED THE CONTRACT.**

Exhibit A of the contract outlined Appellant's responsibilities. However, those elements were entirely contingent upon Respondent's performance of its implied responsibilities.

Respondent completely abdicated its responsibilities by doing absolutely nothing.

Appellant repeatedly wrote to the assumed contact persons of Respondent's Organization but there was never a reply from anyone in that organization, concerning the issue presented. (R. p. 369, lines 10 – 25; –p. 390, lines 1 – 19) It was not until during the trial that Appellant discovered that no one at the Organization knew who was in the position of contact person between Appellant and Respondent. (R. p. 298, lines 8 – 13; –p. 310, lines 5 – 18; –p. 318, lines 19 –25; – p. 19, lines 1 – 3; – p. 286, lines 4 - 14) At one point there had been communication but that was discontinued with the departure of Executive Director, Fryar.

The submitted documentation clearly indicates Appellant's push towards the execution of the contract as well as Respondent's total lack of action. (R. p. 67; –p. 96, third paragraph – to end of page; – pp. 104 – 105; –p. 107; –pp. 110 –112; –p. 114; – pp.116 - 117; – pp. 120-122; -pp. 126 – 128; – p. 130)

When Respondent moved forward with the Project, it contracted with Earthworks for the Design of the Project and with a Contractor to Construct the Facility. (R. p. 55, lines 1 - 14) Appellant was not notified of nor involved with either contract. However, Appellant had advised Respondent against contracting Earthworks for design of the project. (R. pp. 74 – 77; – pp. 80 – 82 ; - p. 90 ; - p. 92; – pp. 94 – 95 ; - p. 108; – p. 112) Additionally, and obviously to no avail, Appellant appraised Ralph Wilson of the situation; at one session spending about two hours with him, specifically dealing with the elements of the A.I.A. Document, A-101; the American Institute of Architect's document used for the

contract between an Owner and an Architect for Architectural Design Services. (R. p. 131)

Eventually, construction commenced on the Facility. Well within sixty days of its commencement, the Federal Government stopped work on the Project due to Respondent neglecting to secure Matching Funds for the Project, as required. At the Trial date, work was still stopped on the Project. (R. p. 289, lines 17 – 25; –p. 290, lines 1 – 14) This situation could have been avoided but it is not a life safety matter. (R. p. 112; – p. 116; – pp. 118 - 119 ; - p. 64 lines 1 – 4) On the other hand, the Government attempts to provide for Life Safety, in this instance, by Legislating how and by whom buildings are designed and constructed. (R. p. 74, paragraph 2; – pp. 80 - 81) In this instance Ralph Wilson aided in circumventing the process, thereby introducing unnecessary risk to Life. Additionally, when work on the Choppee Head Start Center, under the initial contract that Ralph Wilson precipitated, is concluded, the project will not be issued a Certificate of Occupancy (C.O.) and will remain unoccupied until corrective measures are taken. If somehow a C.O. is issued, the Facility still will not be Code Compliant. Earthworks accepted the contract on Respondent's confused terms regarding Fees; the fact is, Earthworks was not a legitimate Architectural entity and would not have been in any State in the U.S. Additionally, Steve Strickland was not an Architect in any State in the U.S. This information was made known to Respondent and to Ralph Wilson. (R. p. 69; - pp. 73 -75; - pp. 80 – 81; - p. 84; – p. 86)

## **V. Conclusion**

From inception of the Project, to date, Respondent remains clueless of the process.

It is evident in Minutes. They had no clue regarding hiring an Architect or a Contractor

nor did they know anything about the starting point for acquiring the Facility. (R. p. 147, first paragraph; -p. 160; - p. 181, lines 1 – 14) Appellant tried to provide assistance in all matters concerned in the process. (R. pp. 59 – 64; - pp. 67 – 96; - pp. 104 – 107; - pp. 110 - 114; - p. 116; - p. 118 ; - pp. 120 -124; - p. 162, last 2 paragraphs)

Respondent failure to cooperate with Appellant is problematic for them. (R. p. 386, lines 10 – 25) That failure to cooperate led to them contracting with Earthworks for the design of the Facility; which is a problem. (R. pp. 73 – 75; - pp. 80 - 81; - p. 84; - pp. 92 – 96; - p. 107; - p. 110; - p. 112; - p. 150, last paragraph; - p. 151; -- p. 153, first paragraph; - pp. 155 – 158; - p. 164, paragraph 3; - p. 165, lines 10 -15) That failure to cooperate also led to them contracting for construction of the facility; yet another problem.

Construction was terminated, through no fault of the Contractor; therefore, it cost Respondent for delaying the construction activities. (R. p. 278, lines 8 – 12) In this case it was incumbent upon Respondent to have complied with the procedures leading up to the point of Contracting for construction of the Facility. . (R. pp. 122-124) Once again, they would not listen and would not cooperate; no matter the amount of effort Appellant expended. (R. pp. 53 -57; - pp. 58 64; - pp. 68 - 96; - pp. 104 – 105; - p. 107; - pp. 110 – 112; - p. 114; - p. 116; - p. 118; - pp. 119 - 131) Appellant tried, repeatedly; Respondent followed suit and resisted, repeatedly. I both instances: Contracting for Project Management and for Facility Construction, The Spearin Doctrine is applicable; Respondent is responsible for knowing what is involved with its Contract Documents. Any claim not to have known is not legally acceptable. In this circumstance, the information was available for all contracting issues it encountered, as indicated in

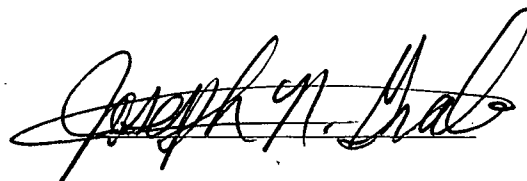
Appellant submitted qualifications for the Project Management Position. (R. pp. 59 – 63;  
- p. 64, lines 1 - 4)

In the final analysis, Respondent will have to go back to the drawing board, in order to eventually have a useable product. Appellant tried, unsuccessfully, to apprise them of that potential. (R. pp. 63 – 64; - p. 64, lines 1 – 8; - p. 66; – p. 96) For the current situation, Respondent breached the contract by having been non-cooperative. Appellant did not breach the contract and the Jury's finding represents a very serious error.

Respondent failed its duty an obligation to perform. The availability of funds to compensate Appellant was not an issue. (R. p. 198, lines 14 - 15) Appellant should be compensated at the contracted rate of 9% of the estimated \$1,300,000.00 Project Cost but not less than \$68,000.00 in actual damages plus other damages as allowable by the courts; also to include an amount as the court sees fit to award for the psychological strife, trauma and physical losses endured during this arduous journey to this point, with the current Tribunal.

Respectfully submitted,

September 14, 2012

A handwritten signature in black ink, appearing to read "Joseph N. Grate". The signature is written in a cursive style with a large, sweeping initial "J".

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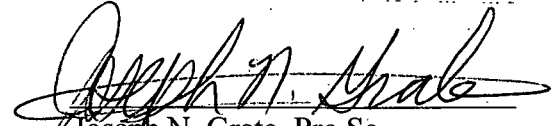
Waccamaw EOC, Inc.,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief is in compliance with Rule 21 (b).

September 16, 2012



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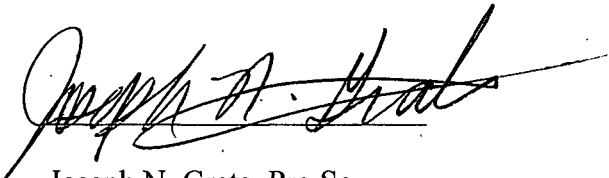
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**PROOF OF SERVICE**

I certify that a copy of the Brief was personally delivered, to Respondent's Attorney, on the date and at the address indicated below.

September 14, 2012



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