

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Rocky Mountain Steel Foundations, Inc.,

Plaintiff and Appellant,

v.

SUPREME COURT NO. 20190121

Civil No. 27-2015-CV-00240

Brockett Company, LLC; Amber
Brockett; Mitchell's Oilfield Services,
Inc., aka Wood Group; and Travelers
Casualty and Surety Company of
America,

Defendants and Appellees.

**BRIEF OF APPELLEES MITCHELL'S OILFIELD SERVICES, INC. AND
TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA**

Appeal from Judgment dated January 30, 2019
District Court of McKenzie County
Northwest Judicial District
The Honorable Robin Schmidt
Civil Case No. 27-2015-CV-00240

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[1] Whether the District Court abused its discretion in declining to award Rocky Mountain Steel Foundations, Inc. attorneys' fees incurred in its first appeal to this Court when Rocky Mountain Steel Foundations, Inc. was not appealing a successful judgment before the District Court and it did not seek or request its attorneys' fees during the first appeal.

[2] Whether the District Court abused its discretion in declining to award to Rocky Mountain Steel Foundations, Inc. attorney fees against Mitchell's Oilfield Services, Inc. and Travelers Casualty and Surety Company of America under North Dakota Century Code Sections 35-24-13(5) and 35-34-19 when those fees were incurred in pursuing unrelated claims against Brockett Company, LLC and Amber Brockett.

[3] Whether the District Court abused its discretion in declining to award Rocky Mountain Steel Foundations, Inc. attorney fees incurred after remand from appeal under North Dakota Century Code Sections 35-24-13(5) and 35-34-19.

STATEMENT OF THE CASE

[4] On August 10, 2015, Rocky Mountain Steel Foundations, Inc. ("Rocky Mountain") commenced the present action to collect a debt originally owed to it by Brockett Company, LLC ("Brockett") and Amber Brockett. *Complaint*, App. 038-75. The claims against Brockett were for suit on account, breach of contract, and *quantum meruit*, while the claim against Amber Brockett was pursuant to her personal guaranty of Brockett's obligations to Rocky Mountain. Mitchell's Oilfield Services, Inc. ("Mitchell's") and Travelers Casualty and Surety Company of America ("Travelers") were included as defendants in this action. However, the claims against Mitchell's and Travelers related solely to the foreclosure of well and pipeline construction liens filed by Rocky Mountain.

[5] Rocky Mountain received a judgment against Mitchell's and Travelers after a previous appeal to this Court. The present appeal is from an award of statutory attorney fees pursuant to N.D.C.C. § 35-24-13(5) and N.D.C.C. § 35-24-19. The District Court awarded Rocky Mountain its attorney fees against Mitchell's and Travelers in the amount of \$19,025.00. Judgment was entered accordingly, and a Notice of Entry of Judgment was thereafter filed. *Amended Final Judgment*, App. 012-014; *Notice of Entry of Judgment*, App. 015. Rocky Mountain appeals, contending that the District Court erred when calculating the attorney fees awarded to it under these statutes. *Notice of Appeal to the North Dakota Supreme Court*, App. 016-017.

REQUEST FOR ORAL ARGUMENT

[6] Mitchell's and Travelers request the Court schedule oral argument in this case under N.D.R.App.P. 28(h). This matter involves purely legal issues relating to statutory interpretation and an award of attorney fees. Oral argument would be helpful in the Court's review of the District Court's decision.

STATEMENT OF THE FACTS

[7] The lawsuit underlying this appeal arose from the failure of Brockett to pay Rocky Mountain for materials provided by Rocky Mountain to Brockett. The amounts owed by Brockett were personally guaranteed by Amber Brockett. The result was Rocky Mountain filing two well and pipeline construction liens on certain oil and gas wells in McKenzie County, North Dakota. Mitchell's, the original contractor to the operators of the oil and gas wells upon which the liens were filed, issued a purchase order to Brockett, wherein it purchased certain materials from Brockett. Brockett then acquired the materials from Rocky Mountain. Mitchell's paid Brockett, in full, for the materials. However, Brockett failed to pay

Rocky Mountain, resulting in the filing of the liens. Mitchell's subsequently obtained lien bonds from Travelers.

[8] Rocky Mountain's sole claims against Mitchell's and Travelers were for "Oil and Gas Well Construction Lien Foreclosure Against Bond." Rocky Mountain brought claims against Brockett for suit on account, breach of contract, and *quantum meruit*, and against Amber Brockett for her personal guaranty of Brockett's obligations to Rocky Mountain. *Complaint*, ¶¶ 26-42 (App. 044-047).

[9] Mitchell's/Travelers and Rocky Mountain filed cross-motions for summary judgment on stipulated facts, which are found at App. 020-22. Rocky Mountain also moved for summary judgment on its claims against Brockett and Amber Brockett. *Plaintiff's Motion for Summary Judgment on All Claims*. (Index # 53). The Court granted Mitchell's and Travelers' *Motion for Summary Judgment* and denied Rocky Mountain's *Motion for Summary Judgment* on the claims against Mitchell's and Travelers, finding that the liens were invalid, and dismissing Rocky Mountain's *Complaint* against Mitchell's and Travelers. *Order Granting Mitchell's Oil Field Services, Inc. and Travelers Casualty and Surety Company of America's Motion for Summary Judgment and Denying Plaintiff Rocky Mountain Steel Foundations, Inc.'s Motion for Summary Judgment Against Mitchell's Oil Field Services, Inc. and Travelers Casualty and Surety Company of America*, (App. 091-97). The Court also awarded Mitchell's and Travelers their costs, disbursements, and attorney fees, as the prevailing parties in an action to foreclose an oil and gas well construction lien. *Order Awarding Defendants Mitchell's Oil Field Services, Inc. and Travelers Casualty and Surety Company of America Attorneys' Fees and Costs*, (App. 098-100). Subsequently, a Judgment was entered on September 26, 2017, wherein Rocky Mountain's claims against Mitchell's and Travelers were

dismissed, and Mitchell's and Travelers were awarded their attorney fees and costs. *Judgment of Dismissal and Attorneys' Fees and Costs*, (Index # 123).

[10] Brockett and Amber Brockett failed to respond to Rocky Mountain's *Motion for Summary Judgment*, and the Court granted Rocky Mountain's *Motion for Summary Judgment* on its claims against Brockett and Amber Brockett. *Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc.'s Motion for Summary Judgment Against Defendants Brockett Company, LLC and Amber Brockett*, (App. 076-077). Rocky Mountain moved for an award of its attorney fees and costs against Brockett and Amber Brockett. *Plaintiff's Motion for Reasonable Attorney Fees and Costs*. (Index # 107). The basis for an award of attorney fees and costs against Brockett and Amber Brockett was the provisions of the credit application agreement between Rocky Mountain and Brockett, which Amber Brockett personally guaranteed. *Brief in Support of Plaintiff Rocky Mountain Steel Foundations, Inc.'s Motion for Reasonable Attorney Fees and Costs*, p. 1 (App. 078). Rocky Mountain sought attorney fees in the amount of \$49,533.50 and costs in the amount of \$1,620.99 from Brockett and Amber Brockett. *Id.* Rocky Mountain partitioned the attorney fees incurred in pursuing its claims against Brockett and Amber Brockett from those incurred in pursuing its claims against Mitchell's and Travelers, stating that it incurred \$19,025.00 in fees related to pursuing Mitchell's and Travelers. *Brief in Support of Plaintiff Rocky Mountain Steel Foundations, Inc.'s Motion for Reasonable Attorney Fees and Costs*, p. 6 (App. 083). Neither Brockett nor Amber Brockett responded to Rocky Mountain's *Motion for Attorney Fees and Costs*, and the District Court awarded Rocky Mountain attorney fees in the amount of \$49,533.50 and costs in the amount of \$1,620.99. *Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc.'s Reasonable Attorneys' Fees and Costs*, (App. 086). On January 4, 2018,

judgment was entered in favor of Rocky Mountain and against Brockett and Amber Brockett in the amount of \$163,837.77. *Judgment*, (App. 088-90).

[11] Rocky Mountain appealed the District Court's grant of summary judgment in favor of Mitchell's and Travelers. *Notice of Appeal*. (Index # 128). On appeal, the North Dakota Supreme Court held that the District Court erred in determining that Rocky Mountain's liens were invalid. *Supreme Court Opinion*, (App. 101-07). Specifically, the North Dakota Supreme Court held that since the owners of the oil and gas wells, who are not parties to this lawsuit, had notice of Rocky Mountain's liens prior to making full payment to Mitchell's, the "original contractor", then the "owners remain liable for payment of the amounts secured by Rocky Mountain's liens and the district court erred in its interpretation of the statute." *Supreme Court Opinion*, ¶ 12 (App. 106-07). The North Dakota Supreme Court also found that the District Court erred in awarding attorney fees to Mitchell's and Travelers. *Id.* at ¶ 13. However, the North Dakota Supreme Court did not address Rocky Mountain's right to attorneys' fees incurred on the first appeal, presumably because they were not requested by Rocky Mountain. The North Dakota Supreme Court then reversed the judgment dismissing Rocky Mountain's liens, remanding the case "for proceedings consistent with this opinion and a proper award of attorney fees." *Id.* at ¶ 14.

[12] On remand, Rocky Mountain sought attorney fees in the amount of \$61,385. *Brief in Support of Motion for Attorney's Fees*. (App. 108-09). It allocated \$49,554 to litigation at the District Court level and \$11,831 to the first appeal. *Brief in Support of Motion for Attorney's Fees*, ¶ 17 (App. 110-116); *Affidavit of Douglas Hookland*, (App. 132-33); *Affidavit of Monte L. Rogneby*, (App. 117-18). Rocky Mountain then submitted an additional request for attorney fees in the amount of \$9,260.50. *Supplemental Affidavit of Attorney Fees and Costs*, (App.

237). These amounts were incurred after remand from the North Dakota Supreme Court following Rocky Mountain's first appeal. Mitchell's and Travelers opposed Rocky Mountain's motion. The District Court awarded Rocky Mountain attorney fees against Mitchell's and Travelers in the amount of \$19,025. *Amended Final Judgment*, (App. 012-14). This represents the amounts Rocky Mountain incurred solely in pursuing the bond claim against Mitchell and Travelers. *Id.* Rocky Mountain now appeals the District Court's decision on this attorney fee award. *Notice of Appeal to the North Dakota Supreme Court*, (App. 016-17).

LAW AND ARGUMENT

[13] North Dakota generally follows the "American Rule" of attorney fees, which "assumes that each party to a lawsuit will bear its own attorneys' fees." *Deacon's Dev., LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379. "Therefore, successful litigants are not allowed to recover attorneys' fees unless authorized by contract or statute." *Id.* (addressing the propriety of an attorney fee award pursuant to N.D.C.C. § 28-26-01(2), which requires courts to award attorney fees upon finding that a claim for relief was frivolous). This Court reviews awards of attorney fees for abuse of discretion. "A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law." *N.D. DOT v. Schmitz*, 2018 ND 113, ¶ 5, 910 N.W.2d 874 (quoting *Thompson v. Schmitz*, 2011 ND 70, ¶ 18, 795 N.W.2d 913).

[14] The statutes upon which Rocky Mountain relies are N.D.C.C. § 35-24-19 and § 35-24-13(5). Section 35-24-19 states that "in any action brought to enforce a lien prescribed by this chapter, the party for whom judgment is rendered is entitled to recover a reasonable

attorney's fee, to be fixed by the court, which must be taxed as costs in the action." Section 35-24-13(5) governs an award of attorney fees in a suit upon a bond filed to indemnify against a well and pipeline construction lien. It reads: "In case the lienholder recovers in a *suit upon the bond*, the lienholder is entitled to recover a reasonable attorneys' fee, to be fixed by the court, which must be taxed as costs in this action." (emphasis added). Rocky Mountain's claims against Mitchell's and Travelers were to foreclose the liens against the bonds filed by Mitchell's. Thus, N.D.C.C. § 35-24-13(5) governs the award of attorney fees in this case.

[15] A brief review of the rules of statutory interpretation is appropriate. In *Zajac v. Traill Cnty. Water Res. Dist.*, 2016 ND 134, ¶ 6, 881 N.W.2d 666, the North Dakota Supreme Court identified the goal, and process by which, statutes are interpreted:

"The primary purpose of statutory interpretation is to determine the intention of the legislation. *In re Estate of Elken*, 2007 ND 107, ¶ 7, 735 N.W.2d 842. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. If the language of a statute is clear and unambiguous, "the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. If the language of the statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute. N.D.C.C. § 1-02-39."

Furthermore, the rules of statutory interpretation require statutes to be "construed to avoid ludicrous and absurd results." *Winkler v. Gilmore & Tatge Mfg. Co.*, 334 N.W.2d 837, 841 (N.D. 1983). Statutory interpretation is a question of law. *Zajac*, 2016 ND 134, ¶ 6.

I. The District Court properly denied Rocky Mountain's request for attorney fees incurred in its first appeal.

[16] Of the \$61,385.00 in attorney fees that Rocky Mountain initially requested at the District Court level following remand, \$11,831.00 was for attorney fees expended by Rocky Mountain in pursuing its first appeal. *Affidavit of Attorneys' Fees and Costs*, (App. 117-118).

The District Court denied Rocky Mountain's request. *Amended Order Granting Attorney Fees After Remand*, ¶ 13 (App. 010-11).

[17] While N.D.C.C. § 35-24-13(5) allows Rocky Mountain to recover a reasonable attorney fee for its "suit upon the bond", it does not expressly provide it with the right to recover attorney fees expended on appeal. *Deacon's Dev., LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379. "Therefore, successful litigants are not allowed to recover attorneys' fees unless authorized by contract or statute." *Id.*

[18] The North Dakota Supreme Court has, in limited circumstances, awarded an appellant its attorney fees expended on appeal. In *Hoge v. Burleigh County Water Management Dist.*, 311 N.W.2d 23, 31 (N.D. 1981), the Burleigh County Water Management District obtained a deed from the Hoges that contained an agreement to indemnify the Hoges for all damages to their other land. *Id.* Following a flood that damaged the Hoges' land, the Burleigh County Water Management District did not pay the Hoges for their loss, which required the Hoges to commence suit and incur attorney fees. *Id.* The trial court entered judgment in favor of the Hoges, which included an award of attorney fees. *Id.* at 26. In determining that attorney fees on appeal may be appropriate, the North Dakota Supreme Court cited to its prior decision in *Skrove v. Heiraas*, 303 N.W.2d 526, 533 (N.D. 1981), where it held:

Skrove has requested this court to award attorney fees to him for the appeal. His argument is that if we do not award attorney fees on appeal we will dilute his recovery. That position is realistic and is substantiated by case law cited by Skrove. See *Montalvo v. Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970). But, because we have reduced the award to Skrove by the \$ 300 exemplary damages without reducing the attorney fees awarded to him by the trial court, we do not award additional fees to him on this appeal.

Hoge, 311 N.W.2d at 32. In both *Hoge and Skrove*, the party awarded attorney fees on appeal was the prevailing party at the district court level and was defending an appeal, and also made

an affirmative request to the North Dakota Supreme Court for an award of the attorney fees expended on appeal. *Skrove*, 303 N.W.2d 526, 533; *Hoge*, 311 N.W.2d 23, 31. The North Dakota Supreme Court’s rationale for awarding attorney fees on appeal was the “principle of nondilution of recovery”, which, stated otherwise, is that defending the appeal of an award of attorney fees by the trial court dilutes the recovery of the appellee unless the fees incurred on appeal are awarded.

[19] In *Troutman v. Pierce*, 402 N.W.2d 920, 925 (N.D. 1987), the plaintiff was successful at the district court level in revoking acceptance of a mobile home and was awarded attorney fees pursuant to the Magnusson-Moss-Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d), which gave the district court discretion to award attorney fees to the plaintiffs. The defendants appealed to the North Dakota Supreme Court. On appeal, the plaintiffs specifically asked the North Dakota Supreme Court to award them attorney fees expended on appeal. *Id.* at 925. The North Dakota Supreme Court agreed, finding that “[w]e do not believe a prevailing consumer’s attorney-fee award under the Magnusson-Moss Act at the trial level should be dissipated by uncompensated costs, expenses and attorney fees in successfully defending a judgment on appeal. The North Dakota Supreme Court reiterated its rationale that the attorney fee award at the trial court level should not be “dissipated by uncompensated attorney fees incurred in successfully defending a judgment on appeal” in *Carlson v. Dunn County*, 409 N.W.2d 111, 114 (N.D. 1987); *See also Schwab v. Zajac*, 2012 ND 39, ¶ 29, 823 N.W.2d 737 (awarding attorney fees incurred on appeal by the appellee who successfully defending a favorable judgment on a slander of title claim).

[20] The case law cited above stands for two propositions. First, that a party who is successful at the district court level, and who successfully defends that judgment on appeal,

may be entitled to recover its attorney fees on appeal if attorney fees were awarded by the district court. Second, that the request for attorney fees on appeal must be made to the North Dakota Supreme Court. Here, Rocky Mountain was not the successful litigant before the District Court prior to the first appeal, and it was not awarded any attorney fees by the District Court against Mitchell's or Travelers until after remand. Further, Rocky Mountain did not seek an award of its attorney fees during the first appeal. The District Court recognized this: "The North Dakota Supreme Court remanded this matter to the district court with instruction to determine a proper award of attorney fees. The remand did not indicate the district court was to award a proper amount of appellate attorney fees." *Amended Order Regarding Attorney Fees After Remand*, ¶ 13 (App. 010-011). Further, the risk of the dilution of recovery is not present in this case. Rocky Mountain was not the successful litigant prior to the first appeal, was not defending a judgment awarding it attorneys' fees, and was not at risk of diluting its recovery when it commenced the first appeal. There is no authority for awarding Rocky Mountain its attorney fees incurred on its first appeal, and the District Court's determination denying Rocky Mountain those attorneys' fees should be affirmed.

[21] This line of reasoning also applies to Rocky Mountain's request for the attorney fees incurred in the present appeal. Rocky Mountain is not defending its judgment on appeal. Rather, Rocky Mountain made the voluntary decision to contest the determination of the District Court. Thus, Rocky Mountain should be denied its attorney fees for the present appeal.

II. The District Court properly denied Rocky Mountain's request for attorney fees incurred in pursuing unrelated claims against Brockett Company, LLC and Amber Brockett.

[22] Rocky Mountain argues it is entitled to recover from Mitchell's and Travelers the attorney fees it incurred in pursuing its claims against Brockett and Amber Brockett. The

District Court determined that Rocky Mountain was only entitled to reasonable attorney fees expended in pursuing the bond claims, and not unrelated claims against Brockett and Amber Brockett. It found: “While [Rocky Mountain] is certainly allowed to bring those claims in this single civil action, the statute does not allow the award of attorney fees against Mitchell’s and Travelers for the fees [Rocky Mountain] incurred bringing claims other than claims on the bond.” *Amended Order Regarding Attorney Fees After Remand*, ¶ 2 (App. 008).

[23] Section 35-24-13(5), N.D.C.C., only allows a lienholder to recover a reasonable attorney fees in a “suit upon the bond.” It does not allow the lienholder to recover fees incurred in pursuing claims unrelated to its efforts to recover against the bond, which is exactly what Rocky Mountain is requesting. Rocky Mountain’s interpretation of this provision is overbroad.

[24] The North Dakota Supreme Court has addressed a similar argument in the context of N.D.C.C. § 35-27-24.1, the attorneys’ fees provision under the statutes governing construction liens. In *N. Excavating Co. v. Sisters of Mary of the Presentation Long Term Care*, 2012 ND 78, 815 N.W.2d 280, the Sisters of Mary of the Presentation Long Term Care’s (the “Sisters”) entitlement to attorney fees after prevailing in the contest of a construction lien was considered. In that case, the Sisters brought counterclaims for breach of contract and unlawful sales practices in addition to defending a construction lien. *Id.* at ¶ 3. The Sisters, after successfully contesting the accuracy of the construction lien, argued they were entitled to reimbursement for all attorney fees related to the litigation, not just the amounts incurred in contesting the construction lien. *Id.* at ¶ 9. The North Dakota Supreme Court disagreed. It found that “[u]nder N.D.C.C. 35-27-24.1, a party who successfully contests the accuracy or validity of a construction lien is limited to recovering only those costs and fees reasonably

expended contesting the lien.” *Id.* at ¶ 11. In other words, a litigant is not entitled to reimbursement for an attorney’s work on different claims. *Id.* at ¶ 12. This line of reasoning can, and should, be extended to the well or pipeline construction lien statutes at issue in this case.

[25] The claims against Brockett and Amber Brockett, which were for suit on account, breach of contract, *quantum meruit*, and personal guaranty (*Complaint*, ¶¶ 26-42 (App. 044-47)), were not part of the “suit upon the bond” brought against Mitchell’s and Travelers. Rather, these claims, and the prior award of attorney fees entered in favor of Rocky Mountain and against Brockett and Amber Brockett (*Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc.’s Reasonable Attorneys’ Fees and Costs*, App. 086-87), arose from the terms and conditions of the “Credit Application” between Rocky Mountain and Brockett. *Credit Application* (Index # 56). Rocky Mountain filed one *Complaint*, rather than separating the claims against Brockett and Amber Brockett from those brought against Mitchell’s and Travelers. This decision by Rocky Mountain’s counsel does not mean that Mitchell’s and Travelers are responsible to pay Rocky Mountain’s attorney fees expended in pursuing claims against Brockett and Amber Brockett that are unrelated to its claims on the bonds.

[26] Awarding Rocky Mountain its attorney fees expended in pursuing Brockett and Amber Brockett would be contrary to the plain language of N.D.C.C. § 35-24-13(5), which only allows the lienholder to recover attorney fees in the “suit upon the bond”, and not attorney fees expended in pursuing other claims, even if those claims are brought in the same action. *See N. Excavating Co. v. Sisters of Mary of the Presentation Long Term Care*, 2012 ND 78, 815 N.W.2d 280; *Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 31, 720 N.W.2d 54 (confirming a statutory award of attorney fees where the court deducted fees not relating to litigating the

statutory claim of retaliation). It would be a ludicrous and absurd result to interpret N.D.C.C. § 35-24-13(5) to award Rocky Mountain its attorney fees incurred in pursuing Brockett and Amber Brockett, especially considering that Rocky Mountain has already been awarded all of those fees. *Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc. 's Reasonable Attorneys' Fees and Costs*, (App. 086). Essentially, this interpretation would require the Court to expand the plain language of N.D.C.C. § 35-24-13(5) to allow Rocky Mountain to recover from Mitchell's and Travelers not only its attorney fees expended in pursuing the bond claims, but also the attorney fees expended in pursuing claims against Brockett and Amber Brockett that are unrelated to the "suit upon the bond." The Court should avoid such an interpretation and find that Rocky Mountain is only entitled to recover from Mitchell's and Travelers its reasonable attorney fees incurred in pursuing the lien foreclosure claims against Mitchell's and Travelers.

[27] Rocky Mountain argues that the District Court's findings and conclusions in response to Rocky Mountain's dual motions for attorney fees are contradictory. *Appellant's Brief*, ¶¶ 21-24. Further, it argues that to limit the fees against Mitchell's and Travelers is unreasonable and constitutes an abuse of discretion. *Id.* Rocky Mountain does not acknowledge that these two attorneys fees awards are distinguishable, both factually and legally. The attorney fees awarded against Brockett and Amber Brockett were contractual, rather than statutory, and were not contested by Brockett or Amber Brockett. Those fees were awarded pursuant to the conditions of a credit agreement between the parties. The credit agreement provided Brockett and Amber Brockett would "pay all charges for collection, including attorney fees and court costs . . ." *Credit Application* (Index #56). The entire District Court action was an attempt to collect the debt owed to Rocky Mountain by Brockett. This includes the claims brought

against Mitchell's and Travelers. Thus, the award of all attorney fees expended in this action is appropriate against Brockett and Amber Brockett. On the other hand, the attorney fee award against Mitchell's and Travelers is purely statutory. This statute provides recovery for attorney fees "in a suit upon the bond". The claims against Brockett and Amber Brockett are unrelated to the bond claims. As explained above, it would be inappropriate to award fees unrelated to the bond claims against Mitchell's and Travelers. Thus, these two awards may be read consistently, contrary to Rocky Mountain's argument.

[28] In sum, Rocky Mountain is only entitled to fees against Mitchell's and Travelers which are directly related to its claims on the bonds. This amount is, as determined by the District Court, \$19,025.00. *Amended Order Regarding Attorney Fees After Remand*, ¶ 12 (App. 010). The District Court's determination should be affirmed, as it did not constitute an abuse of discretion.

III. The District Court properly denied Rocky Mountain's request for attorney fees incurred on remand.

[29] Rocky Mountain argues the District Court erred when it declined to award attorney fees against Mitchell's and Travelers related to Rocky Mountain's expenses on remand. This argument must fail.

[30] Section 35-24-13(5) allows a successful litigant to recover a reasonable attorneys' fee for its "suit upon the bond." It does not expressly provide it with the right to recover attorney fees incurred in making the application for attorney fees and costs. *Deacon's Dev., LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379. "Therefore, successful litigants are not allowed to recover attorneys' fees unless authorized by contract or statute." *Id.* Further, the North Dakota Supreme Court has recognized that there is no authority supporting a mandatory award of fees for preparation of a cost-shifting motion. *N.D. DOT v. Schmitz*, 2018 ND 113, ¶ 10,

910 N.W.2d 874 (interpreting the eminent domain and inverse condemnation fee shifting statutes).

[31] The attorney fees Rocky Mountain incurred on remand were generated in connection with Rocky Mountain's *Motion for Attorney's Fees* and a dispute as to Rocky Mountain's entitlement to pre-judgment interest. *Supplemental Affidavit of Attorney Fees and Costs*, (App. 237); *Appellant's Brief*, ¶ 31. The District Court was silent as to this request in its *Amended Order Regarding Attorney Fees After Remand*, (App. 008-11). It did determine what it considered a reasonable attorney fee, and it did not include fees on remand. *Amended Order Regarding Attorney Fees After Remand*, ¶ 12 (App. 010). As in *Schmitz*, the District Court acted within its discretion in denying Rocky Mountain's request.

CONCLUSION

[32] For the reasons set forth herein, and based on all the pleadings, filings, and the record herein, the Court should affirm the District Court's attorney fee award, and refuse to award Rocky Mountain its attorneys' fees incurred in this appeal.

Dated this 20th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellees Mitchell’s Oil Field Services, Inc. and Travelers Casualty and Surety Company of America, and as author of this Appellees’ Brief, hereby certifies that the total number of pages complies with North Dakota Rule of Appellate Procedure 32(a)(8). This brief contains a total of 20 pages.

Dated this 20th day of June, 2019.

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Nicholas C. Grant, Lawyer #07102
Allison Mann, Lawyer #08435

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Rocky Mountain Steel Foundations, Inc.,

Plaintiff and Appellant,

v.

SUPREME COURT NO. 20190121
Civil No. 27-2015-CV-00240

Brockett Company, LLC; Amber
Brockett; Mitchell's Oilfield Services,
Inc., aka Wood Group; and Travelers
Casualty and Surety Company of
America,

Defendants and Appellees.

AFFIDAVIT OF SERVICE ON COUNSEL OF RECORD

STATE OF NORTH DAKOTA)

: ss.

COUNTY OF STARK)

[1] Cora Seiler, being first duly sworn upon oath, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter.

[2] That on June 20, 2019, in accordance with the provisions of the North Dakota Rules of Civil Procedure, this affiant served upon the persons hereinafter named a true and correct copy of the following document in said matter:

**BRIEF OF APPELLEES MITCHELL'S OILFIELD SERVICES, INC. AND
TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA**

by causing the same to be filed/served electronically through Odyssey, the Court's e-filing program, and addressed to the following person:

Charles L. Neff
Briana L. Rummel
Monte Rogneby

cneff@nefflawnd.com
brummel@vogellaw.com
mrogneby@vogellaw.com

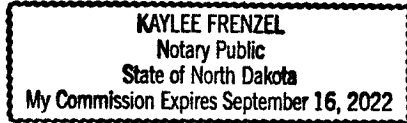
[3] That to the best of affiant's knowledge, information, and belief such addresses as given above are the actual email addresses of the parties intended to be so served.

Dated: June 20, 2019

Cora Seiler

Cora Seiler

Subscribed and sworn to before me June 20, 2019.



Kaylee Frenzel

Kaylee Frenzel, Notary Public