

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

Rocky Mountain Steel Foundations, Inc.,

Plaintiff and Appellant,

vs.

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

Defendants and Appellees.

SUPREME COURT NO. 20190121

Civil No. 27-2015-CV-00240

ON APPEAL FROM JUDGMENT DATED JANUARY 30, 2019
MCKENZIE COUNTY DISTRICT COURT
NORTHWESET JUDICIAL DISTRICT
HONORABLE ROBIN SCHMIDT

ORAL ARGUMENT REQUESTED

APPELLANT'S REPLY BRIEF

Monte L. Rogneby (#05029)
mrogneby@vogellaw.com
Briana L. Rummel (#08399)
brummel@vogellaw.com
VOGEL LAW FIRM
Attorneys for Appellant
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899

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STATEMENT OF THE CASE

[¶1] Following Rocky Mountain Steel Foundations, Inc.'s ("Rocky Mountain") first successful appeal in this matter in which this Court remanded for a proper award of statutorily-mandated attorneys' fees in Rocky Mountain's favor, Rocky Mountain moved for attorneys' fees against Mitchell's Oil Field Services, Inc., aka Wood Group ("Mitchell's) and Travelers Casualty and Surety Company of America ("Travelers") under Sections 35-24-19 and 35-24-13(5) of the North Dakota Century Code.

[¶2] As the undisputed prevailing party, Rocky Mountain sought an award of attorneys' fees in the total amount of \$70,645.50. The amount requested represented fees incurred at the District Court prior to the first successful appeal (\$49,554.00), fees incurred on appeal (\$11,831.00), and fees incurred on remand following the first successful appeal (\$9,260.50). The District Court awarded Rocky Mountain \$19,025.00 for fees incurred prior to the first successful appeal and declined to award both the fees Rocky Mountain incurred on the first successful appeal as well as those incurred on remand after the first successful appeal.

[¶3] The District Court's failure to award the full amount of fees sought is an abuse of discretion and inconsistent with both this Court's direction on remand and the plain language of Section 35-24-13(5) of the North Dakota century Code. This Court should reverse the District Court's decision and direct the District Court to award Rocky Mountain all of its attorneys' fees incurred in this action, including fees for this second appeal.

LAW AND ARGUMENT

I. The District Court erred when it failed to award Rocky Mountain the attorneys' fees it incurred on appeal pursuant to Section 35-24-13 of the North Dakota Century Code.

[¶4] Mitchell's and Travelers contend Rocky Mountain is not entitled to recover the fees it incurred on the first appeal in this matter for two reasons. First, Mitchell's and Travelers suggest that only those parties who successfully defend a judgment on appeal may be entitled to recover appellate attorneys' fees. Second, Mitchell's and Travelers assert that the award of attorneys' fees could only be made by this Court. However, to limit the recovery of appellate attorneys' fees only to those parties who successfully defend a judgment on appeal would dilute the right of recovery provided to prevailing parties under Sections 35-24-19 and 35-24-13(5) of the North Dakota Century Code. Moreover, after finding that the District Court erred in invalidating Rocky Mountain's liens, this Court reversed the judgment and remanded for proceedings consistent with its opinion, including a proper award of all of Rocky Mountain's attorneys' fees. (*Supreme Court Opinion*, at App. 107, ¶ 14).

[¶5] Mitchell's and Travelers cite *Deacon's Dev., LLP v. Lamb* for the proposition that because Section 35-24-13(5) does not expressly provide for the recovery of attorneys' fees on appeal Rocky Mountain is not entitled to recover its appellate attorneys' fees. However, *Deacon* merely stands for the general rule that parties are to bear their own attorneys' fees unless successful litigants are afforded the right of recovery under either a contract or a statute. *Deacon's Dev., LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379. As this Court held previously in this matter, "Sections 35-24-19 and -13(5), N.D.C.C, permit recovery of reasonable attorney fees by the party for whom judgment is rendered in action brought to enforce an oil and gas construction lien." (*Supreme Court Opinion*, at App. 107, ¶ 13). As

the prevailing party on appeal, Rocky Mountain was entitled to recovery its attorneys' fees incurred on its first appeal and those fees incurred on the present appeal. There is nothing in the statute that limits Rocky Mountain's recover of attorneys' fees to only those fees incurred before the District Court.

[¶6] Other cases cited by Mitchell's and Travelers support an award of fees incurred at the appellate level to successful litigants. Specifically, this Court articulated in *Troutman* and again in *Schwab* that a prevailing party's judgment should not be dissipated by uncompensated costs, expenses and attorney's fees, including those incurred on appeal. *Troutman v. Pierce, Inc.*, 402 N.W.2d 920, 925 (N.D. 1987); *Schwab v. Zajac*, 2012 ND 239, ¶ 27, 823 N.W.2d 737. Although it is true that the parties in *Troutman* and *Schwab* were defending a judgment on appeal, the rationale underlying this Court's decision supports the award of appellate attorneys' fees to Rocky Mountain in this case. Under Ch. 35-24 of the North Dakota Century Code, Rocky Mountain, as the prevailing party, is entitled to recover its attorneys' fees. The fact that the first appeal was necessary to vindicate Rocky Mountain's rights supports an award.

[¶7] The procedure Rocky Mountain followed on remand with respect to its request for attorneys' fees is also consistent with this Court's precedent. Although under unique facts and circumstances this Court has itself awarded an amount of attorneys' fees on appeal, ordinarily a matter is remanded "to the trial court for a determination of the amount of attorney fees to be allowed for the appeal." *Carlson v. Dunn Cty.*, 409 N.W.2d 111, 114-15 (N.D. 1987). This procedure is further supported by the North Dakota Rules of Civil Procedure which anticipate a District Court will determine fees following the entry of judgment. N.D. R. CIV. P. 54(e)(3) ("A claim for attorneys' fees and related nontaxable

expenses not determined by the judgment must be made by motion. The motion must be served and filed within 21 days after notice of entry of judgment.”).

[¶8] Here, this Court reversed the District Court’s decision and remanded for proceedings consistent with its opinion, including the entry of judgment in Rocky Mountain’s favor and for the proper award of attorneys’ fees in Rocky Mountain’s favor. (*Supreme Court Opinion*, App. 107, at ¶ 14). Consistent with this Court’s opinion Rocky Mountain filed its Motion for Attorneys’ Fees and Costs, seeking an award of attorneys’ fees and costs incurred both at the district court and appellate stages of the proceedings. Rocky Mountain followed the procedure which is supported by this Court’s precedent, the applicable Rules, and this Court’s direction on remand.

[¶9] Yet, the District Court refused to award Rocky Mountain its attorneys’ fees incurred despite this Court’s clear instructions. The District Court did not consider the factors outlined in Rule 1.5(a) of the North Dakota Rules of Professional Conduct and did not make a specific finding that the appellate attorneys’ fees requested were unreasonable. The District Court’s decision is contrary to the plain language of Section 35-24-13(5) and this Court’s direction on remand. Accordingly, this Court should reverse the District Court’s decision and remand with instructions to enter an award of appellate attorneys’ fees incurred on appeal, including the \$11,831.00 incurred during Rocky Mountain’s first successful appeal as well as the fees Rocky mountain incurred in bringing this appeal.

II. As the prevailing party, Rocky Mountain was entitled to the full amount of attorneys’ fees incurred prior to the first appeal.

[¶10] The District Court offered no explanation as to why Rocky Mountain was entitled to recover the full amount of its attorney’s fees against Brockett Company and Amber Brockett, finding that the requested fees were reasonable in the first instance, but Rocky

Mountain is not entitled to recover some or all of those fees against Mitchell's and Travelers. Previously, in awarding fees against Brockett the District Court recognized the fees incurred overlapped the separate claims. Yet, subsequently, the District Court reversed its conclusion without explanation. No explanation exists. The fees incurred were reasonable in light of the Rule 1.5(a) factors as the case involved novel legal issues, trial counsel was experienced in this particular field, and Rocky Mountain ultimately prevailed. See N.D. R. PROF. CONDUCT 1.5(a); *Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 30, 720 N.W.2d 54. Moreover, the work associated with pursuing Rocky Mountain's causes of action against Brockett Company was relevant to its pursuit of its cause of action against Mitchell's and Travelers and the separate claims are not unrelated.

[¶11] Mitchell's and Travelers maintain the District Court's decision was correct and Rocky Mountain is not entitled to recover those amounts incurred in pursuing its claims against Brockett Company and Amber Brockett despite the fact the work associated with pursuing Rocky Mountain's claims against all of the Defendants was the functional equivalent. Although the basis of Rocky Mountain's Motion for Attorneys' Fees and Costs against Brockett Company and Amber Brockett was premised upon the contractual right to recover attorneys' fees under the credit application agreement entered into between the parties, Rocky Mountain is similarly entitled to recover its attorneys' fees against Mitchell's and Travelers under Sections 35-24-19 and 35-24-13(5) of the North Dakota Century Code. Section 35-24-19 provides "[i]n 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 fees, to be fixed by the court, which must be taxed as costs in the action." N.D. CENT. CODE § 35-24-19. Section 35-24-13(5) also provides for the recovery

of reasonable attorney's fees "[i]n case the lienholder recovers in a suit upon the bond."
N.D. CENT. CODE § 35-24-13(5).

[¶12] Mitchell's and Travelers suggest this Court should read Section 35-24-13(5) as limiting Rocky Mountain's recovery of attorneys' fees to only those fees incurred in pursuing its claims directly against Mitchell's and Travelers. It is accurate to say Rocky Mountain sued Brockett Company and Amber Brockett for breach of contract and quantum merit and instituted a lien foreclosure action against Mitchell's and Travelers. The different claims, however, do not make fees spent pursuing claims against Brockett Company and Amber Brockett unrecoverable against Mitchell's and Travelers nor is this limitation imposed by the plain language of Section 35-24-13(5) as Mitchell's and Travelers propose. Rather, the work required in litigating Rocky Mountain's claims against the differing Defendants, while broken up in billing records, was effectively the same for both claims as the issues were virtually identical. As this Court previously explained, prevailing parties are entitled to recover attorneys' fees incurred in litigating separate claims and/or issues where they are inextricably interwoven with claims and/or issues on which the recovery of attorneys' fees is clear. *Northern Excavating Co., Inc. v. Sisters of Mary of Presentation Long Term Care*, 2012 ND 78, ¶ 12, 815 N.W.2d 280. Consistent with that analysis, the District Court in this case previously held, Rocky Mountain was entitled to recover the full amount of attorneys' fees it incurred at the district court level. *See Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc. Reasonable Attorneys' Fees and Costs*, App. 076-077.

[¶13] The District Court's decision awarding Rocky Mountain only \$19,025.00 of the \$49,554.00 requested for fees incurred at the district court level prior to appeal was

arbitrary and should be reversed. This Court should reverse and remand with direction to enter an award of \$49,554.00 in attorneys' fees in Rocky Mountain's favor for those fees incurred at the District Court prior to appeal or a reasonable amount, recognizing the overlap in claims.

III. As the prevailing party, Rocky Mountain was entitled to all attorneys' fees incurred on remand after the first successful appeal.

[¶14] Mitchell's and Travelers contend Rocky Mountain is not entitled to recover the attorneys' fees it incurred on remand following the first successful appeal as they claim Section 35-24-13(5) limits a successful litigant to recovery of reasonable attorneys' fees incurred in a "suit upon the bond." The additional fees incurred on remand were due in large part to a dispute over whether Rocky Mountain was entitled to pre-judgment interest, an issue on which Rocky Mountain ultimately prevailed. (*Order for Judgment*, App. 299-301). Despite the fact Rocky Mountain specifically requested an additional \$9,260.50 in fees, which represented the fees incurred on remand and raised the issue at the hearing held before the District Court on November 9, 2018, the District Court declined to address the fees Rocky Mountain incurred on remand entirely. Although Mitchell's and Travelers concede that the District Court was silent as to this request, Mitchell's and Travelers would have this Court read into the District Court's decision a determination that the fees on remand were unreasonable. There is nothing to suggest, however, that the District Court even considered the reasonableness factors outlined in Rule 1.5(a) in failing to address Rocky Mountain's fees incurred on remand.

[¶15] Even under Mitchell's and Travelers narrow reading of Section 35-24-13(5), Rocky Mountain is entitled to an award of reasonable attorneys' fees related to its pursuit of pre-judgment interest as that request was part in parcel with Rocky Mountain's claims against

Mitchell's and Travelers. As this Court previously articulated, as a subcontractor under an original contractor, Rocky Mountain is entitled to a lien to the same extent as an original contractor. (*Supreme Court Opinion*, App. 105, at ¶ 7). Original contractors are entitled to recover pre-judgment interest. N.D. CENT. CODE § 35 -24-02. "[A] subcontractor under an original contractor, is entitled to a lien upon all the property upon which the lien of an original contractor may attach to the same extent as the original contractor," including the recovery of pre-judgment interest. N.D. CENT. CODE § 35-24-04. This argument was but a mere extension of the initial claim Rocky Mountain made against Mitchell's and Travelers in the first place. This Court should, therefore, reverse and remand with instruction to enter an award of \$9,260.50 in attorneys' fees in Rocky Mountain's favor for the fees incurred at the District Court subsequent to the appeal.

CONCLUSION

[¶16] For the foregoing reasons and those reasons set forth in the Appellant's Brief, this Court should reverse and remand to the District Court with instruction to enter an award of attorneys' fees in Rocky Mountain's favor in the full amount of \$70,645.50. This Court should also instruct the District Court to award Rocky Mountain attorneys' fees incurred in conjunction with the present appeal in an amount to be determined after the submission of affidavits and supporting documentation on remand.

Respectfully submitted July 2, 2019.

VOGEL LAW FIRM

/s/ Briana L. Rummel

BY: Monte L. Rogneby (#05029)
Briana L. Rummel (#08399)
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899
Email: mrogneby@vogellaw.com
brummel@vogellaw.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 12 pages.

Dated this 2 day of July, 2019.

VOGEL LAW FIRM

/s/ Briana L. Rummel

BY: Monte L. Rogneby (#05029)
Briana L. Rummel (#08399)
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899
Email: mrogneby@vogellaw.com
brummel@vogellaw.com
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AFFIDAVIT OF SERVICE

Monte L. Rogneby (#05029)

Briana L. Rummel (#08399)

Vogel Law Firm

Attorneys for Appellant

US Bank Building

200 North 3rd Street, Suite 201

PO Box 2097

Bismarck, ND 58502-2097

Telephone: 701.258.7899

Email: mrogneby@vogellaw.com

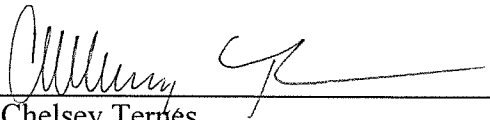
brummel@vogellaw.com

STATE OF NORTH)
DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on July 2, 2019, **Appellant's Reply Brief** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

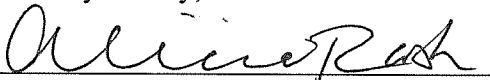
Charles Neff
cneff@nefflawnd.com

Nicholas Grant
ngrant@ndlaw.com

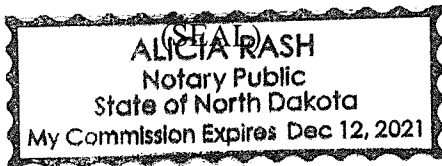


Chelsey Ternes

Subscribed and sworn to before me this 2 day of July, 2019.



Notary Public



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ORAL ARGUMENT REQUESTED

AFFIDAVIT OF SERVICE

Monte L. Rogneby (#05029)
Briana L. Rummel (#08399)
Vogel Law Firm
Attorneys for Appellant
US Bank Building
200 North 3rd Street, Suite 201
PO Box 2097
Bismarck, ND 58502-2097
Telephone: 701.258.7899

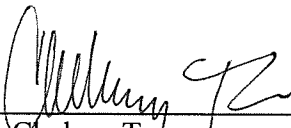
Email: mrogneby@vogellaw.com
brummel@vogellaw.com

STATE OF NORTH)
DAKOTA)
COUNTY OF BURLEIGH) ss.

Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on July 8, 2019, **Corrected Table of Contents** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

Charles Neff
cneff@nefflawnd.com

Nicholas Grant
ngrant@ndlax.com


Chelsey Ternes

Subscribed and sworn to before me this 8 day of July, 2019.


Notary Public

