

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Rocky Mountain Steel Foundations, Inc.,

*Plaintiff* / Appellant,

vs.

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

*Defendant* / Appellees.

**SUPREME COURT NO. 20190121**

Civil No. 27-2015-CV-00240

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

ORAL ARGUMENT REQUESTED

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**APPELLANT'S BRIEF**

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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](mailto:mrogneby@vogellaw.com)  
[brummel@vogellaw.com](mailto:brummel@vogellaw.com)

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Did the District Court err when it failed to award the prevailing party, Rocky Mountain Steel Foundations, Inc., the attorneys' fees it incurred in pursuing its claim on appeal under Sections 35-24-19 and 35-24-13(5) of the North Dakota Century Code?
  
2. Did the District Court err when it failed to award the prevailing party, Rocky Mountain Steel Foundations, Inc., the entirety of the attorneys' fees it incurred in pursuing its claim at the district court level under Sections 35-24-19 and 35-24-13(5) of the North Dakota Century Code?

## STATEMENT OF THE CASE

[¶1] This is the second time this matter comes before this Court on appeal. Rocky Mountain Steel Foundations, Inc.’s (“Rocky Mountain’s”) first appeal involved the interpretation of Chapter 35-24 of the North Dakota Century Code and whether Rocky Mountain was entitled to an oil and gas well lien for the amount due to it for materials it supplied. *See Rocky Mountain Steel Foundations, Inc. v. Brockett Company, LLC, et al.*, 2018 ND 96.

[¶2] This Court held Rocky Mountain’s liens were valid and remanded for a proper award of attorneys’ fees to Rocky Mountain under Section 35-24-19 and 35-24-13(5) of the North Dakota Century Code. On remand, 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”) and sought both those fees incurred at the District Court level prior to appeal, fees incurred at the District Court level subsequent to the appeal, and fees incurred at the appellate court level.

[¶3] Rocky Mountain sought \$44,544.00 for its fees for prosecuting its case against Mitchell’s and Travelers before the District Court prior to the appeal. The District Court awarded Rocky Mountain \$19,025.00. (*Amended Order Regarding Attorney Fees After Remand*, App. 008-0011). Rocky Mountain also sought \$11,831.00 for its fees for successfully prosecuting its appeal. The District Court refused to award Rocky Mountain any of its appeal fees concluding it was proper for both parties to incur the expense of the appeal on their own. *Id.* App. 011, ¶ 13. Finally, Rocky Mountain sought \$9,260.50 for its fees for the proceedings before the District Court on remand. The District Court refused to award Rocky Mountain any of these fees as well.

[¶4] Judgment was entered accordingly and Notice of Entry of Judgment was made on February 11, 2019. (*Amended Final Judgment*, App. 012-014; *Notice of Entry of Judgment*, App. 015). Rocky Mountain timely appealed. (*Notice of Appeal to the North Dakota Supreme Court*, App. 016-017; *Notice of Filing the Notice of Appeal*, App. 018-19). Rocky Mountain requests oral argument given the procedural posture and complexities of this case.

### **STATEMENT OF THE FACTS**

[¶5] Mitchell's, the original contractor, issued a purchase order to Brockett Company, LLC ("Brockett Company"), a supplier, whereby Mitchell's purchased certain construction materials from Brockett Company ultimately installed on the oil wells which were the subject of Rocky Mountain's liens. (*Stipulated Facts*, App. 020-021, ¶ 1; *Purchase Order Cp50018*, App. 023). To satisfy the purchase order, Brockett Company purchased materials from Rocky Mountain. Rocky Mountain delivered the materials and the materials were subsequently installed. (*Stipulated Facts*, App. 021, ¶¶ 2 & 4; *Purchase Order #10711*, App. 024; *Invoice #14.571Brock*, App. 025).

[¶6] Brockett Company failed to pay Rocky Mountain. Rocky Mountain recorded two oil and gas well liens against the wells in McKenzie County, North Dakota. (*Lien Recording No. 473850*, App. 026-31; *Lien Recording No 473852*; App. 032-037). Mitchell's, as principal, and Travelers, as surety, recorded lien release bonds with the McKenzie County Recorder. (*Stipulated Facts*, App. 021, ¶ 6). Rocky Mountain initiated this action on August 10, 2015 and sought an award of money damages against the bonds, for the full principal amount of its two Oil and Gas Well Liens, in addition to interest, recording fees, and reasonable attorneys' fees and costs. (*Complaint*, App. 038-75).

[¶7] Rocky Mountain also asserted claims against Brockett Company and Amber Brockett for breach of contract, quantum meruit, and recovery under a personal guaranty. *Id.* at App. 044-47, ¶¶ 26-42. Rocky Mountain moved for summary judgment on its claims against Brockett Company and Amber Brockett based on the contract and personal guaranty which was subsequently granted. (*Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc.'s Motion for Summary Judgment Against Defendants Brockett Company, LLC and Amber Brockett*, App. 076-77). Rocky Mountain moved for an award of its attorneys' fees and costs against Brockett Company and Amber Brockett in the total amount of \$49,533.50. (*Brief in Support of Plaintiff Rocky Mountain Steel Foundations, Inc.'s Motion for Reasonable Attorney Fees and Costs*, App. 083). The District Court awarded Rocky Mountain the full amount it sought, \$49,533.50. (*Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc.'s Reasonable Attorney's Fees and Costs*, App. 086-87). Judgment was entered accordingly. (*Judgment*, App. 088-90).

[¶8] The District Court granted Mitchel's and Travelers' Motion for Summary Judgment concluding, Rocky Mountain's liens were invalid under Section 35-24-04 of the North Dakota Century Code. (*Order Granting Mitchell's Oilfield 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 Oilfield Services, Inc. and Travelers Casualty and Surety Company of America*, App. 091-97). The Court also awarded Mitchell's and Travelers costs and disbursements as well as attorneys' fees of \$13,130.26 as the prevailing party. *Id.* at App. 097, ¶¶ 17-18; *see Order Awarding Defendants Mitchell's Oilfield Services, Inc. and Travelers Casualty and Surety Company of America Attorneys' Fees and Costs*, App. 098-100.



[¶9] On appeal, this Court reversed, holding Rocky Mountain’s liens were valid, Rocky Mountain was entitled to payment from the bonds, and that it was entitled to attorney fees under Sections 35-24-19 and 35-24-13(5) of the North Dakota Century Code. (*Supreme Court Opinion*, App. 101-07). This Court remanded the case “for proceedings consistent with [its] opinion and a proper award of attorney fees.” *Id.* at App. 107, ¶ 14.

[¶10] On remand, Rocky Mountain filed its Motion for Attorneys’ Fees and Costs seeking an award of attorneys’ fees and costs incurred both at the district court level and on appeal. (*Motion for Attorney’s Fees*, App. 108-09). As of July 13, 2018 the total amount of attorneys’ fees incurred by Rocky Mountain in this lien foreclosure action was \$61,385.00 as was evidenced by the Affidavits submitted in support of the Motion for Attorneys’ Fees. (*Brief in Support of Motion for Attorney’s Fees*, App. 110-16; *Affidavit of Attorney Fees and Costs (Rogneby)*, App. 117-18; *Exhibit 1-Itemization for Professional Time*, App. 119-31; *Affidavit of Attorney Fees and Costs (Hookland)*, App. 132-33; *Exhibit 1-Itemization for Professional Time*, App. 134-235; *Exhibit 2-Brief Biography of Douglas Hookland*, App. 236). Specifically, Rocky Mountain sought \$49,554.00 in fees incurred at the district court level prior to the appeal and \$11,831.00 for fees incurred on appeal. *Id.* Mitchell’s and Traveler’s objected.

[¶11] A hearing was held on Rocky Mountain’s Motion for Attorney’s Fees on November 9, 2018. Prior to the hearing Rocky Mountain submitted its Supplemental Affidavit of Attorney’s Fees and supporting documentation, requesting an additional \$9,260.50 in fees, which represented the fees incurred after Rocky Mountain’s Motion for Attorney’s Fees was originally filed. (*Supplemental Affidavit of Attorney Fees and Costs*, App. 237-38; *Exhibit 1-Itemizations for All Professional Time*; App. 239-56). The District Court issued

its Amended Order Regarding Attorney Fees awarding Rocky Mountain \$19,025.00 for the fees incurred at the District Court level prior to appeal. (*Amended Order Regarding Attorney Fees After Remand*, at App. 010, ¶ 12). The District Court declined to award attorney’s fees incurred on appeal or on remand following this Court’s favorable decision. *Id.* at App. 010-11, ¶ 13. Although the District Court declined to address the fees Rocky Mountain incurred on remand entirely, it explained that the award of appellate fees was not required by this Court’s remand and that regardless of how the District Court had ruled an appeal would have resulted. *Id.* Judgment was entered accordingly and Notice of Entry of Judgment was made on February 11, 2019. (*Amended Final Judgment*, App. 012-14; *Notice of Entry of Judgment*, App. 015). Rocky Mountain timely appealed. (*Notice of Appeal to North Dakota Supreme Court*, App. 016-17; *Notice of Filing the Notice of Appeal*, App. 018-19).

## **LAW AND ARGUMENT**

### **I. Standard of Review**

[¶12] A court decides the reasonableness of fees to be awarded within its discretion. *Thompson v. Schmitz*, 2011 ND 70, ¶ 18, 795 N.W.2d 913, 919. The district court is “considered an expert in determining the amount of attorney fees.” *Wahl v. Northern Improvement Co.*, 2011 ND 146, ¶17, 800 N.W.2d 700, 704. Accordingly, a district court only “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.” *Thompson*, 2011 ND 70, ¶ 18, 795 N.W.2d at 919 (quoting *Brandt v. Somerville*, 2005 ND 35, ¶23, 692 N.W.2d 144).

[¶13] “Statutory interpretation is a question of law, which is fully reviewable on appeal.” *Zajac v. Traill Cty. Water Res. Dist.*, 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citing *Nelson v.*

*Johnson*, 2010 ND 23, ¶ 12, 778 N.W.2d 773). “Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears.” *Schmidt v. City of Minot*, 2016 ND 175, ¶ 7, 8834 N.W.2d 909 (citing N.D. CENT. CODE § 1-02-02). “If the language of a statute is clear and unambiguous, the language may not be disregarded.” *Id.* (citing N.D. CENT. CODE § 1-02-05).

**II. 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.**

[¶14] As a general rule, North Dakota follows the “American Rule” for purposes of attorney’s fees in litigation. Under the American Rule, the law assumes that each party shall bear its own attorney’s fees. *Deacon’s Development, LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379, 382. Successful litigants are only entitled to attorney’s fees when authorized by contract or statute. *Id.* The North Dakota Rules of Civil Procedure specify the manner in which a party obtains an award of attorneys’ fees:

A claim for attorneys’ fees and related non-taxable 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....

N.D. R. Civ. P. 54(e)(3).

[¶15] “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 an action brought to enforce an oil and gas construction lien.” (*Supreme Court Opinion*, App. 107, ¶ 13). Section 35-24-19 of the North Dakota Century Code 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). On remand, Rocky Mountain requested its attorney fees for its successful appeal. The District Court concluded the cost of the appeal was not authorized by Section 35-24-19 or Section 35-24-13(5).

[¶16] The District Court refused to award Rocky Mountain its attorneys' fees incurred on appeal despite this Court's clear instructions to determine a proper award of attorneys' fees. The District Court refused to award Rocky Mountain its appellate attorneys' fees because (1) this Court's remand did not specify appellate attorney fees should be awarded, (2) the issue in the underlying action would have been appealed regardless of the District Court's decision, and (3) it was proper for both parties to incur the expense of their own appeal. (*Amended Order regarding Attorneys' Fees After Remand*, App. 010-11, ¶ 13). The District Court did not analyze 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.

[¶17] The District Court misapplied the applicable statutes. As the prevailing party on appeal Rocky Mountain is entitled to recover all of its attorneys' fees for this matter and that recovery is not limited to the fees it incurred only at the district court level. The plain language of Section 35-24-13(5) does not limit the recovery of attorneys' fees to only those fees incurred before the district court.

[¶18] 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 decisions supports the award of appellate attorney's 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. Whether an appeal would have been filed regardless of which party prevailed at the District Court is not a factor under the statutes. The appeal is part of this case. It is not a separate proceeding. The District Court's conclusion that the appeal should be treated separate from the proceedings in the District Court is inconsistent with the plain language of Section 35-24-14(5) of the North Dakota Century Code and is an erroneous view of the law.

[¶19] The procedure followed by Rocky Mountain, to seek attorneys' fees after the appeal as part of the remand is consistent with this Court's precedent. Ordinarily this Court remands a matter "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). Here, this Court specifically remanded this matter for entry of judgment and a proper award of attorney fees to Rocky Mountain. (*Supreme Court Opinion*, at App. 107, ¶ 14). The North Dakota Rules of Civil Procedure anticipate that the District Court will determine fees after judgment. *See* N.D. R. CIV. P. 54(e)(3). This Court did not enter a Judgment. The case was remanded for entry of judgment; there was no opportunity for Rocky Mountain to request fees until the matter was remanded. 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.

**III. As the prevailing party, Rocky Mountain was entitled to the full amount of attorneys' fees it incurred at the district court level.**

[¶20] Rocky Mountain is entitled to the recovery of attorneys' fees against Mitchell's and Travelers for proceedings at the District Court. The District Court refused to award reasonable fees for the proceedings before and after the appeal.

**A. Rocky Mountain is entitled to all attorneys' fees incurred before the first appeal.**

[¶21] Rocky Mountain sued Brockett Company and Amber Brockett for breach of contract and quantum meruit and instituted a lien foreclosure action against Mitchell's and Travelers. The District Court entered judgment against Brockett Company and Amber Brockett in the amount of \$49,533.50, which represented all of the fees incurred by Rocky Mountain to date at that time. *See Order Granting Plaintiff Rocky Mountain Steel Foundations, Inc. Reasonable Attorneys' Fees and Costs*, App. 076-77. The District Court concluded these fees were reasonable given the issues in this case. As prior trial counsel previously explained this case "required nuanced parsing of the same statutory framework, if applied to different parties in the chain of suppliers, contractors, purchasers, and owners." (*Brief in Support of Plaintiff Rocky Mountain Steel Foundations, Inc.'s Motion for Reasonable Attorney Fees and Costs*, App. 081-82). The District Court made contradictory findings and conclusions in response to Rocky Mountain's motion for an award of attorneys' fees on remand.

[¶22] Rocky Mountain moved for an award of all fees against Mitchell's and Travelers, including those amounts awarded previously against Brockett Company and Amber Brockett. (*Motion for Attorney's Fees*, App. 108-09). Mitchell's and Travelers objected to Rocky Mountain's request and argued that the fees awarded must be separately delineated by each claim such that Mitchell's and Travelers would not be held responsible

for the full amount sought. (*Mitchell's Oil Field Services, Inc. and Travelers Casualty and Surety Company of America's response Brief in Opposition to Motion for Attorneys' Fees*, App. 257-77).

[¶23] The District Court reversed its previous position and concluded Rocky Mountain was not entitled to the full amount of fees requested from Mitchell's and Travelers. (*Amended Order regarding Attorneys' Fees After Remand*, App. 010, ¶ 12). Although the District Court considered all of the factors outlined in Rule 1.5 of the North Dakota Rules of Professional Conduct, it determined Rocky Mountain was not entitled to the full \$49,554.00 it requested for fees incurred prior to the appeal. Instead, the District Court awarded only \$19,025.00. The District Court determined Rocky Mountain was only entitled to this amount as these fees were specifically associated to Rocky Mountain's pursuit of its lien claims against Mitchell's and Travelers. *Id.*

[¶24] The District Court erred and its decision is an abuse of discretion as there is no rational explanation for why the full fees Rocky Mountain sought against Brockett Company and Amber Brockett were found to be reasonable and were awarded, yet the District Court apparently concluded those same fees Rocky Mountain sought against Mitchell's and Travelers were not reasonable. The District Court's inconsistent conclusions is an abuse of discretion.

[¶25] "The factors listed in N.D. R. PROF. CONDUCT 1.5(a) are intended to guide a district court in determining the reasonableness of an award of attorney fees." *Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 30, 720 N.W.2d 54. "When determining the reasonableness of attorney fees, all factors must be considered," including,

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2)

The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fee customarily charged in the locality for similar legal services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the client or by the circumstances; (6) The nature and length of the professional relationship with the client; (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) Whether the fee is fixed or contingent.

*Id.*; see N.D. R. PROF. CONDUCT 1.5(a). A court deciding a motion for an award of fees should consider all eight factors and no single factor is dispositive. *Heng*, 2006 ND 176, ¶ 30, 720 N. W.2d at 65. The degree of success obtained, however, is the “most critical factor.” *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983); *Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

[¶26] “The result is what matters.” *Hensley*, 461 U.S. at 435. In *Thompson*, the plaintiffs asserted claims for conversion, breach of fiduciary duties, misappropriation of corporate funds, fraud, and misappropriation of corporate opportunities. 2011 ND 70, ¶ 3, 795 N.W.2d at 916. The district court awarded the plaintiffs \$225,000 in damages and \$511,066.16 in attorneys' fees. *Id.* at ¶¶ 7-8, 795 N.W.2d at 917. This Court affirmed the reasonableness of the awarded attorneys' fees. *Id.* at ¶¶20-21, 795 N.W.2d at 920-21. In *Heng*, the plaintiff asserted three claims, one of which the district court dismissed and another one of which the plaintiff voluntarily dismissed. 2006 ND 176, ¶ 7, 720 N.W.2d at 59. Ultimately, the plaintiff obtained an award of \$35,195 on her final remaining claim. *Id.* The district court awarded her \$207,147.70 in attorneys' fees and this Court affirmed that award. *Id.* at ¶31, 720 N.W.2d at 65.

[¶27] The requested fees are reasonable. As prior trial counsel stated “the services provided to [Rocky Mountain] by counsel were thorough, complex and involved novel legal issues not addressed by the North Dakota Court. Counsel not only litigated multiple



claims for summary judgment against multiple parties, but also performed all pre-litigation lien work necessary for the eventual litigation against the defendants.” (*Brief in Support of Plaintiff Rocky Mountain Steel Foundations, Inc.’s Motion for Reasonable Attorney Fees and Costs*, App. 080). The case involved a matter of first impression with little case law or other authoritative materials available for guidance. *Id.* at App. 081. Trial counsel is an experienced attorney, particularly in the field of mechanics lien laws. (*Affidavit of Douglas R. Hookland in Support of Plaintiff’s Motion for Reasonable Attorney Fees and Costs*, App. 279, ¶ 7). Trial counsel’s experience, abilities, and skill in this particular practice area further validate the award requested by Rocky Mountain.

[¶28] Similarly, the different claims 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). 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. The issues required to be addressed by prior trial counsel were virtually identical, requiring thoughtful parsing of the same statutory scheme with only slight factual differences.

[¶29] The fees incurred against Brockett Company and Amber Brockett were necessary as part of this action against Mitchell’s and Travelers. Accordingly, these fees are recoverable against Mitchell’s and Travelers. As was evidenced in Rocky Mountain’s first successful Motion for Attorneys’ Fees against Brockett Company and Amber Brockett, the work associated with pursuing Rocky Mountain’s claims against all of the Defendants, including Brockett Company, Mitchell’s, and Travelers was the functional equivalent despite slight factual distinctions. Although the basis of Rocky Mountain’s Motion for

Attorneys' Fees and Costs against Brockett and Amber Brockett was premised upon the contractual right to recover attorneys' fees, 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. *See* N.D. CENT. CODE §§ 35-24-19 & 35-24-13(5).

[¶30] It is undisputed Rocky Mountain was the successful party here. To foreclose its perfected Oil and Gas Well Liens, Rocky Mountain started by preparing and filing a detailed Complaint. Rocky Mountain's counsel also briefed cross-motions for summary judgment. Finally, Rocky Mountain timely appealed the District Court's judgment entered against it. Rocky Mountain's requested fees incurred prior to the appeal were reasonable in light of the seriousness and importance of the issues and the procedural posture of the case. The District Court failed to explain why the fees requested in Rocky Mountain's Motion for Attorneys' Fees against Brockett Company were reasonable, yet unreasonable when requested against Mitchell's and Travelers. The District Court's decision awarding Rocky Mountain \$19,025.00 for fees incurred at the district court level of the \$49,554.00 requested was arbitrary and should be reversed with direction from this Court to enter an award of \$49,554.00 in attorneys' fees in Rocky Mountain's favor for the fees incurred at the District Court prior to appeal.

**B. Rocky Mountain is entitled to all attorneys' fees incurred on remand after the first appeal.**

[¶31] For similar reasons, the District Court's failure to award Rocky Mountain its attorneys' fees incurred on remand was also an abuse of discretion. The additional fees incurred on remand were caused by a dispute over whether Rocky Mountain was entitled to pre-judgment interest. Rocky Mountain submitted a Proposed Order for Judgment and

Proposed Judgment Following Appeal on remand from this Court. (*Proposed Order for Judgment*, App. 281-83; *Judgment Following Appeal*; App. 284-86). Consistent with North Dakota law, Rocky Mountain outlined that it is entitled to the full principal amount on each lien in addition to interest from the date of recordation. *Id.* Mitchell's and Travelers objected to the award of pre-judgment interest. (*Mitchell's Oil Field Services, Inc. and Travelers Casualty and Surety Company of America's Objections to Proposed Order for Judgment and Judgment*, App. 287-92). Rocky Mountain submitted a Brief in Response and the District Court held a hearing on the issue of pre-judgment interest on November 9, 2018. (*Rocky Mountain Steel Foundations, Inc.'s Response to Mitchell's Oil Field Services, Inc. and Travelers Casualty and Surety Company of America's Objection to Proposed Order for Judgment and Judgment*, App. 293-98). The District Court issued an Order for Judgment, awarding Rocky Mountain the pre-judgment interest requested. (Order for Judgment, App. 299-301). Again, Rocky Mountain was the prevailing party.

[¶32] The District Court failed to address the additional \$9,260.50 in fees Rocky Mountain requested for this work. This Court should, therefore, reverse and remand with instruction from this Court 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**

[¶33] The District Court erred when it failed to award Rocky Mountain the entirety of the fees it requested for work done at the trial court level. The District Court offered no explanation as to why when Rocky Mountain first requested its full fees the District Court found the amount requested to be reasonable, but that when deciding whether the exact same amount was reasonable on Rocky Mountain's second Motion for Attorneys' Fees, the District Court reduced the award by more than half. The District Court also failed to

offer any analysis as to the recovery or reasonableness of fees Rocky Mountain incurred subsequent to its first successful appeal. Those fees are not addressed at all in the District Court's Order.

[¶34] As the prevailing party in this action, Rocky Mountain is entitled to recover its full fees under the plain language of Ch. 35-24 of the North Dakota Century Code. Under the plain language of the relevant statutes, Rocky Mountain's recovery is not limited to those fees incurred at the District Court. The District Court erroneously declined to award Rocky Mountain any of its attorneys' fees incurred on appeal. This Court should reverse and remand to the District Court with instruction to enter an award of attorneys' fees in the amount of \$70,645.50 which number represents the fees incurred at the District Court level prior to appeal (\$49,554.00), the appellate fees incurred (\$11,831.00), and the fees incurred on remand (\$9,260.50). 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 supportive documentation on remand.

Respectfully submitted May 21, 2019.

**VOGEL LAW FIRM**

By: /s/ Briana L. Rummel

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 21 pages, including the Certificate of Compliance.

Dated this 21 day of May, 2019.

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ATTORNEYS FOR APPELLANT

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

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Rocky Mountain Steel Foundations, Inc.,

Appellant,

vs.

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

Appellees.

**SUPREME COURT NO. 20190121**

Civil No. 27-2015-CV-00240

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

ORAL ARGUMENT REQUESTED

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**AFFIDAVIT OF SERVICE**

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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        )

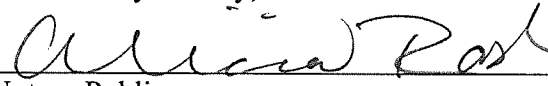
Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on May 21, 2019, **Appellant's Brief and Appellant's Appendix** were filed electronically with the Clerk of Court of the North Dakota Supreme Court 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 21 day of May, 2019.

  
\_\_\_\_\_  
Notary Public

