STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON Bundy McDonald, LLC Plaintiff, v. WECO River District, LLC Defendant.	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT Case No.: 2022-CP-32-01932 **ORDER**

This matter is before the Court under a breach of contract claim alleging Defendant failed to pay a portion of a reverse contingency fee. A bench trial was held on September 26, 2024. Closing arguments were heard on October 17, 2024. The Plaintiff, Bundy McDonald, LLC ("Plaintiff") was present and represented by Walter Bundy, Esq. and Brent McDonald, Esq. Defendant, WECO River District, LLC ("Defendant") was present and represented by Hank Wall, Esq. Following the bench trial, the parties requested a transcript of the prior proceedings and submitted proposed orders on February 5, 2025. After consideration of the evidence, the arguments of counsel, and the record, the Court finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Defendant engaged Plaintiff through a written hourly fee agreement on December 4, 2018 (Def. Ex. 1). The scope of the representation included "legal counsel for purposes in connection with a project known as Brookland in West Columbia, South Carolina that is under construction by Carter and Carter Construction, LLC." Plaintiff prepared the fee

agreement and Plaintiff set the hourly rates. The hourly rates of $400.00 for W.H. Bundy, $300.00 per hour for M. Brent McDonald and $100.00 for "their paralegals" were reasonable and fair hourly rates.

2. In January, 2019, Plaintiff proposed a revision to the fee agreement which was a hybrid fee agreement based on the same hourly rates but subject to an hourly fee cap of $100,000.00 with an additional "contingency fee of 25% any reduction of the total amount of claims made by Contractor and 25% of any amount of in kind settlement or relief obtained and the same percentage of any funds actually collected, whether by settlement or judgment arising out of client's claims against Contractor or other parties to any proceeding covered by this fee agreement" (Def. Ex. 3). Plaintiff proposed this amendment in a letter of explanation dated January 24, 2019. (Def. Ex. 2; Tr. P. 88).
3. The parties executed an amended fee agreement with the foregoing conditions on November 15, 2019. During the representation, Defendant paid hourly fees to Plaintiff in the amount of $105,558.00, exceeding the "cap" by $5,558.00. (Def. Exs. 33 & 37).
4. According to Plaintiff, Contractor asserted a total claim of $4,029,749.43 against Defendant in a private arbitration proceeding and the arbitrator awarded the Contractor $2,640,715.64 (Def. Ex. 11). Plaintiff claims 25% of the difference of $1,389,033.64 or $347,258.45 as an additional contingent fee beyond the hourly fees previously paid. According to Defendant, Plaintiff did not meet the contingency because the Plaintiff did not complete the full scope of the services promised and undertaken in the legal matter. Defendant contends its prior payments of $105,558.00 and a subsequent payment of $150,000.00 (Def. Exs. 30 & 31) was the reasonable value of the legal services Plaintiff provided, and no further sums are due because Plaintiff never met the contingency.

Defendant argues that Plaintiff has been paid in full for the reasonable value of the legal services provided.

5. Plaintiff represented Defendant in a private arbitration against a Contractor. The subject of that proceeding included various contract claims and counterclaims between the Defendant Owner and the Contractor including unresolved change orders, contract balances, delays, and claims of defective and incomplete work. Defendant's counterclaim initially included the "SCDOT" claims (Tr. P. 90, 93-96). As the case unfolded, the SCDOT repairs were not yet complete, and Plaintiff advised Defendant to "carve out" those issues from the arbitration proceeding as not yet ripe for determination so that the issues could be reserved for future resolution. Plaintiff did not advise Defendant at that time that the bifurcation of the SCDOT issues would result in the SCDOT issues no longer being within the scope of the Defendant's representation in the arbitration (Tr. P. 90, 93-96)

6. During the arbitration, Plaintiff also recommended, prepared, and filed, on Defendant's behalf, a multi-party declaratory judgment action in Lexington County Common Pleas, Case No. 2020-CP-32-00580, against Contractor and a substantial number of subcontractors, including all known subcontractor lien claimants. The parties did not execute a separate fee agreement for this work. (Def. Ex. 33)(Tr. P. 53-55). Instead, it was included in the scope of services covered by the fee agreement because Plaintiff billed Defendant for this work under the hybrid fee agreement and Defendant paid Plaintiff for a portion of this work under the hourly component of the hybrid fee agreement (Def. Ex. 33)(Tr. P. 53-55). Defendant also posted millions of dollars to bond off various lien claims in the Civil Action. Resolution of the Civil Case was necessary not only for the final resolution of all known lien claims, including the merits of Contractor's lien which would

be determined in arbitration, but also the release of the cash collateral posted as lien bonds (Def. Exs. 5 & 34).

7. The lien claim of the Contractor was at issue in the Civil Action and the arbitration, but the Civil Action was stayed pending the outcome of the arbitration case and the arbitration case proceeded first.

8. The arbitrator heard evidence in the case between Defendant and Contractor in July 2020 and Plaintiff represented Defendant in that hearing. The arbitrator did not issue an award until January 4, 2021 (Def. Ex. 6). In the meantime, on September 22, 2020, Plaintiff filed a motion to lift the stay and confirm the anticipated arbitration award, a necessary step to transforming an arbitration award to a final judgment in the Declaratory Judgment case. In the motion, Plaintiff acknowledged there would be no "final" arbitration award until the arbitrator determined the issue of the "prevailing party" as between Defendant and Contractor so that statutory claims for attorney's fees arising from South Carolina's mechanic's lien law could be determined with finality (Def. Ex. 4). The ensuing written award of January 4, 2021, held that the SCDOT claims were not yet "ripe" for review and held that there would be future consideration on the question of attorney's fees. Therefore, this award, on its own terms, was not a final decision; it ended neither the arbitration case nor the underlying Civil Case.

9. Contractor submitted a request for attorney's fees to the arbitrator, claiming to be the "prevailing party" on January 25, 2021 (Def. Ex. 8). Within 90 days of the first arbitration award, Contractor also filed a motion to vacate the arbitration award in the underlying Civil Action (Def. Ex. 17).

10. On February 15, 2021, the arbitrator issued a clarification to the January 4, 2021, award, again confirming that the SCDOT issue was not ripe for review and was undecided (Def. Ex. 10).

11. At about this same time, Plaintiff advised Defendant that Plaintiff would not further assist Defendant in the arbitration matter concerning the SCDOT issues. Plaintiff told Defendant it would need a new attorney for the SCDOT matters and a new arbitrator would need to be appointed for that matter (Def. Ex. 35, Tr. P. 97-98). This was the first notice Defendant received that Plaintiff considered the SCDOT issues to be outside of the scope of Plaintiff's engagement (Tr. P. 97-100). On February 16, Defendant sought further guidance from Plaintiff on the arbitration ruling. Plaintiff responded, calling the SCDOT matter a "new claim" and advising client to retain a "new attorney." Plaintiff stated: "our fee agreement does not include another arbitration/litigation on any issue, including but not limited to, the SCDOT, warranty, deficient construction work or any other issues not adjudicated in the completed July 2020 arbitration, as set forth in the award and Clarification thereof." In this same communication, Plaintiff acknowledged it had a remaining obligation to continue representing Defendant in: 1) the attorney fee issue in the arbitration, and 2) the DJ action (Def. Ex. 35) (see also Tr. P. 100-101).

12. The arbitrator issued another minor clarification on February 17, 2021 (Def. Exs. 10 & 12). On that same day, Plaintiff sent Defendant an invoice for the full contingent fee in the amount of $347,258.45 (Def. Ex. 11). This Court finds as a matter of fact that on February 17, 2021, neither the arbitration case nor the Declaratory Judgment case was concluded on that date. According to Defendant, Plaintiff sent the invoice early because "a paid invoice would "make it easier to get attorney's fees in the end" (Tr. P. 114).

13. At this point Defendant had also engaged additional legal counsel, Henry Brown, to evaluate the case status at Defendant's sole expense. Mr. Brown took a contrary view to the status of the case. He did not consider the SCDOT issue to be a "new claim" requiring a "new" arbitrator. Mr. Brown believed the empaneled arbitrator had authority and jurisdiction to address the SCDOT issue which had, by this time become "ripe." Plaintiff disagreed with Mr. Brown and advised Defendant differently. Plaintiff suggested that the SCDOT matter should proceed separately because the arbitration was "over" (Def. Supplemental Exhibit Audio Recording of call date February 23, 2021).
14. The parties had a contentious phone conversation on February 23, 2021, which was recorded and is a part of the record. During the call, Mr. Bundy and Mr. Brown expressed their conflicting views regarding the continuing authority of the arbitrator in the ongoing arbitration and the appropriate legal strategy. Plaintiff clearly and plainly refused to agree to continue with representation of the Defendant in the SCDOT matter but acknowledged the attorney fee petition and the declaratory judgment case remained open and unresolved. The lawyers had different opinions as to whether the current arbitrator would agree to further entertain the unresolved SCDOT claims. Defendant Client did not discharge or terminate Plaintiff's services during the call, but the relationship was clearly strained. (Def. Supplemental Exhibit Audio Recording of call date February 23, 2021) (Tr. P. 101-103).
15. After the call, Mr. Brown advised the arbitrator that he would assume responsibility for the arbitration with limited continued involvement of Plaintiff by letter dated February 24, 2021 (Def. Ex. 13).
16. On March 2, 2021, Plaintiff responded to Mr. Brown's letter to the arbitrator, taking exception to Mr. Brown's statement to the arbitrator concerning Plaintiff's continuing

involvement (Def. Ex. 14). Plaintiff reiterated "the arbitration is over. The only remaining issue in the arbitration is the award of attorney's fees, if any.... I agree I will continue to be involved with that issue." Plaintiff hardly communicated with Defendant after this letter in 2021 (See also Tr. P. 104-107).

17. The arbitrator ultimately determined that the arbitration was not over. (Tr. P. 100-111). Mr. Brown pressed the arbitrator for further clarification of the scope of the arbitrator's continuing jurisdiction on March 12, 2021 (Def. Ex. 15). On April 14, 2021, the arbitrator notified the parties that he had continuing jurisdiction to hear the now ripened SCDOT claims, and the prior award of January 4, 2021, was "not final" (Def. Ex. 39). The arbitrator further held that "any determination of the prevailing party and award of attorney fees necessarily relies in part upon the determination of and outcome of the SCDOT claim."

18. This Court finds that this determination by the arbitrator rendered the arbitration award of January 4, 2021, which is the basis for the contingency fee claim, to be a preliminary and tentative decision rather than the outcome of the arbitration case. This Court further finds that as of the date of the invoice from Plaintiff, the Defendant did not receive the benefit of any settlement, judgment, outcome, or result. At that time, there was no final award. The attorney fee question which was within Plaintiff's scope of representation remained undecided. Similarly, the declaratory judgment Civil Action, also within Plaintiff's scope of representation, remained pending and unresolved (Tr. P. 53-55).

19. Within ninety days of the preliminary arbitration award, Contractor filed a timely motion to vacate the award in the Civil Action (Def. Ex. 17). Plaintiff's sole witness admitted that if the motion to vacate the award were granted, no contingency fee would earned at that time (Tr. P. 74-75).

20. For health reasons, Mr. Brown was unfortunately unable to conclude the arbitration. Defendant engaged a third lawyer on an hourly basis, Henry P. Wall, to conclude the arbitration and the declaratory judgment action in July of 2021.

21. After the engagement of Mr. Wall, Plaintiff notified Defendants he wished to be relieved as counsel of record in the Civil Action and requested "payment on the debt" or a lawsuit for the fees would ensue (Def. Ex. 18). By consent order, Plaintiff withdrew as counsel in the Civil Action on September 3, 2021 (Def. Ex. 19).

22. On November 12, 2023, Defendant reached a final settlement agreement with Contractor (Def. Ex. 21). This agreement became the final arbitration award in the case by stipulation and with the consent of the arbitrator. This agreement addressed and revised the first arbitration award, the SCDOT claims, the attorney's fee issue, and settled of the Declaratory Judgment Case.

23. Plaintiff filed this suit for breach of contract on November 17, 2021 (Def. Ex. 20).

24. The final resolution of the Declaratory Judgment Action occurred on February 8, 2022, by entry of an order of this Court (Def. Ex. 27).

25. Plaintiff performed no services in connection with the continuing arbitration proceedings, the attorney fee issue, or the declaratory judgment case from February, 2021, through the final resolution of the Civil Case twelve months later. During that time, Defendant incurred and paid hourly attorney fees of $46,907.50 to Mr. Brown's law firm and $49,166.00 to Mr. Wall's law firm (a total of $95,073.50 in legal fees to complete the arbitration and the Civil Action). Hourly rates for the new lawyers were $300.00 per hour and $360.00 per hour, respectively. (Def. Exs. 32 & 38).

26. Plaintiff stopped billing hourly fees to Defendant in June of 2020, just before the first arbitration hearing. Up until that time, Defendant had previously paid Plaintiff the hourly cap of $100,000.00 plus $5,558.00 in legal fees. (Def. Exs. 33 & 37) (Tr. P. 127).

27. During this case, Plaintiff produced a summary of unbilled hours which it claims had an hourly rate value of $117,960.00 (Def. Ex. 26) (Tr. P. 116-117). Plaintiff kept accurate records for this time. After October 2020, Plaintiff kept no time records, but Plaintiff estimated it is spent "at least 100 hours" in "additional time" during between October 2020 and March 2021 (Def. Ex. 26). I take this evidence as an admission of the total time Plaintiff expended for which it did not bill and was not paid on an hourly basis. No member of Plaintiff offered any testimony in this case in contradiction of Exhibit 26.

28. On May 24, 2022, eighty-five (85) days after the resolution of the case, Defendant paid Plaintiff $150,000.00, without requiring a release or dismissal of this lawsuit to be credited against the Plaintiff's claim (Def. Ex. 30) (Tr. P. 116-117). The Defendant's intent was to reach a fair approximation of Plaintiff's reasonable hourly rates for the unbilled work at fair and customary hourly rates in lieu of the claimed contingent fee. Defendant estimated the amount due as $117,960.00 at the Plaintiff's regular hourly rate, plus the estimated 100 additional hours at the same ratio/hourly rate of Bundy and McDonald (Tr. P. 119-120). Defendant has thus far paid Plaintiff a total of $255,558.00 in legal fees for its services in the arbitration and the Civil Case. Plaintiff has acknowledged these payments.

29. Plaintiff's expert witness agreed that a rate of $400.00 per hour for Mr. Bundy's time and $300.00 per hour for Mr. McDonald's time was a reasonable rate for those lawyers during the course of their representation (Tr. P. 51). Plaintiff claims, however, it is due the full

reverse contingent fee based on the invoice of February 17, 2021 ($347,258.45 less $150,000.00) plus prejudgment interest on the unpaid amounts from February 17, 2021.

30. Based on all this evidence and testimony I have concluded that the preponderance of the evidence is:

    a. Plaintiff did not fully complete the arbitration or obtain a final result in the arbitration. Plaintiff's scope included representation in the attorney fee claims, and defending the contractor's motion to vacate the arbitration award. Plaintiff never finished this work. Plaintiff did not complete the SCDOT portion of the arbitration which was a matter of contested scope but was initially asserted in the arbitration before it was carved out of the case. Defendant was not notified that acquiescence to the decision to carve out the SCDOT claims would limit Plaintiff's scope of representation in the future.

    b. Plaintiff did not complete the Civil Action, which was admittedly in their scope of work (Tr. P. 53-55).

Therefore, the primary issue in the case is whether or not Plaintiff has earned the full contingent fee, and if not, whether Plaintiff is due any additional reasonable attorney fees beyond the amount already paid under the facts of this case.

ANALYSIS

I. A Lawyer's Contingency Fee is Earned Upon a Successful Result or Outcome.

To earn a contingency fee, a lawyer must conclude a case by settlement or judgment; an interim, preliminary, or tentative determination does not suffice. Plaintiff's written fee agreement (Defense Trial Exhibit 3 (Def. Ex. 3)), the letter of explanation from Plaintiff (Def. Ex. 2), and the

body of case law, in South Carolina and elsewhere, mandate that a final result, by settlement or judgment, is a condition precedent to the Client's obligation to pay a contingent fee.

Justice Toal defined the essence of a contingent fee agreement in Estate of Jones v. Leatherwood 329 S.C. 97, 495 S.E.2d 450 (S.C. 1998) as, "one which is made to depend upon the success or failure in the effort to enforce a right, whether doubtful or not."[1]

Plaintiff drafted the Amended Fee Agreement, and it incorporates this requirement. The contingent fee is based upon 25% of a reduction of the "claim(s) made by Contractor" and 25% of "any amount of in kind *settlement or relief obtained* and the same percentage of any funds actually collected, whether by *settlement or judgement*" (emphasis added). The trigger for the Client's obligation to pay is the *achievement of a successful result or outcome for the client*. Nowhere does the Fee Agreement suggest that the fee is earned without final relief or outcome by settlement or judgment.

The letter of explanation from Plaintiff to Defendant Client (Def. Ex. 2) included this illustration: "if an arbitrator awards or a settlement is reached *so that client must pay"* and if the Client makes a claim "and the arbitrator awards or a settlement is reached.... then attorney will be entitled to.... 25% of the of the *recovered claim."* The contingency stated here is *an obligation to pay* or a *recovered claim.* The Amended Fee Agreement, the letter of explanation, and the law in

[1] Adair v. First Nat. Bank, 139 S.C. 1, 5, 137 S.E. 192, 193 (1927); *see also* City of Burlington v. Dague, 505 U.S. 557, 560–61, 112 S.Ct. 2638, 2640, 120 L.Ed.2d 449, 455 (1992) ("Fees for legal services in litigation may be either 'certain' or 'contingent' { or some hybrid of the two} . A fee is certain if it is payable without regard to the outcome of the suit; it is contingent if the obligation to pay depends on a particular result being obtained."); Alexander v. Inman, 903 S.W.2d 686, 696 (Tenn.Ct.App.1995) ("Most jurisdictions would agree that a contingent fee arrangement is an agreement for legal services under which the amount or payment of the fee depends, in whole or in part, on the outcome of the proceedings for which the services were rendered."); Martin v. Buckman, 883 P.2d 185, 192 (Okla.App.1994) ("In simple terms, a contingent fee contract is one in which a client engages an attorney to represent her in the recovery of, say, a certain sum of money she claims is owed to her, and the attorney agrees to accept for his services a certain percentage of what he recovers either by settlement or by judgment."); Black's Law Dictionary 614 (6th ed. 1990) (defining "contingent fees" as "[a]rrangement between attorney and client whereby attorney agrees to represent client with compensation to be a percentage of the amount recovered ...."). As the above authorities explain, *a contingent fee agreement necessarily requires that a successful result be achieved before the fee is paid...* (emphasis added).

South Carolina all require a final result before a contingent fee is due. Lawyer contingent fees do not receive a preferential payment status before the client receives the benefit of the case outcome.

According to Plaintiff's sole witness, Tom Pope, the scope of the fee agreement covered "an arbitration" (i.e., one appearance in a single hearing without any further representation for the Project[2]). This Court does not concur in that interpretation considering the express language of the fee agreement for "legal counsel for purposes in connection with a project" and which covers "any proceeding" all of which Plaintiff wrote. Assuming however, for the sake of argument, the Amended Fee Agreement could be construed to so limit the scope of representation to a single arbitration hearing, the initial arbitration award (Def. Ex. 6) and subsequent clarification (Def. Ex. **10**) was not a final result or "recovery" by "settlement or judgment" as required in the fee agreement. The initial award did not end the existing arbitration case nor provide the client with a final outcome. The preponderance of the evidence is that Plaintiff never met the contingency, even under the very limited scope of representation Plaintiff now suggests.

On cross examination, Plaintiff's sole witness confirmed that the Claimant in the initial arbitration filed a motion to vacate the arbitration award in the Declaratory Judgment action (Def. Ex. 17). Plaintiff's witness agreed that if the Court granted that motion, there would be no successful outcome, no contingent fee would be earned, and no contingent fee would be due.

[2] The actual scope of representation, as Plaintiff's sole witness admitted on cross examination, included representation in both the Arbitration and the Declaratory Judgment case, including the attorney fee award, if any in the initial arbitration (Tr. P. 53-55). Plaintiff concluded none of these matters. Defendant-Client's expectation that the representation included the SCDOT matters is reliable and credible and fully consistent with the expectations of a lay person who engages legal counsel for representation in connection with a Construction Project. The evidence is uncontradicted Plaintiff did not explain to Defendant that the decision to table the SCDOT claims in the arbitration would limit Defendant's representation. See note 5 on Model Rule 1.5: "An agreement may not be made whose terms might induce the lawyer to improperly curtail services or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided up to a stated amount when it is foreseeable that more extensive services probably will be required unless that situation is adequately explained to the client. otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction."

Therefore, resolution of the motion to vacate the award was a condition precedent to achieving a result in the case, even under Plaintiff's interpretation of the scope of legal services in the fee agreement. Plaintiff withdrew from both the arbitration (Def. Ex. 35)[3] and the Declaratory Judgment Action (Def. Exs. 18 &19) *before the resolution of the Motion to Vacate* which resulted in the final resolution by consent award and confirmation by the Court on November 12, 2021, by final settlement (Def. Ex. 21) through the efforts of different lawyers, all at substantial cost to the client.

The arbitrator's first award (Def. Ex. 6) was, by its own terms, a temporary result subject to further modification and adjustment. It did not resolve the issue of the "prevailing party" for purposes of making a final monetary award and it required future argument, briefing, submissions by the parties, consideration, deliberations, and proceedings.[4] The Award states: "[a]ny award of attorney fees and costs to the prevailing party is expressly reserved *for future consideration*." (emphasis added). Plaintiff and opposing counsel in the arbitration both acknowledged the fee issue was within the scope of the arbitration, and a matter for further attention before the empaneled and appointed arbitrator could issue a final award (see Def. Exs.7,8, 14, 15,16 & 35). The arbitrator specifically and expressly retained jurisdiction over the award to clarify it (Def. Exs. 10 & 12) interpret its scope, and issue a final award.

[3] Plaintiff notified Client it would need to retain new counsel (Ex. 35) within days of sending the contested invoice for legal services based on the initial arbitration decision (Ex. 11), February 17, 2021. In the notice, Plaintiff agreed to "continue to handle the DJ action" and continue to represent Weco on the attorney's fee issue. (see also Ex. 14 "the arbitration is over"). Plaintiff did not conclude the DJ Action or Fee petition for the client.

[4] On September 22, 2020, Plaintiff filed a Motion to Confirm an Arbitration Award that had not yet been issued in the Declaratory Judgment case (**Ex. 4**). Setting aside the question of whether such a motion was ripe for consideration, the Motion acknowledged and conceded that: a) Plaintiff knew that the anticipated initial award would not be "final", b) the attorney fee issue would remain undecided, and c) "This Court has the authority and jurisdiction to confirm the final award once it is issued by the Arbitrator". Plaintiff, by these written admissions, was well-aware of the statutory procedure necessary to convert an arbitration award into a final judgment for the benefit of the client.

On April 12, 2021, the Arbitrator issued a supplemental order: "I conclude that the Award is *not final* … (see Def. Ex. 39, p. 2) …. "I therefore further clarify the January 4, 2021, Award to expressly reserve jurisdiction over the DOT claim…jurisdiction exists to adjust the amount of the Award, if appropriate, *based on a final determination*…" (see Def. Ex. 39, p. 4 (emphasis added)). Months after Plaintiff ceased their work on behalf of the client, the arbitrator executed a final award, based on a settlement by and with the consent of all parties on November 12, 2021 (Def. Ex. 21). This final award was entered and confirmed by the court order and, upon confirmation and entry of judgment, became the final outcome in the case. This Court finds that the outcome in the case occurred more than 9 months after the Plaintiff effectively withdrew from representing the Defendant in the arbitration and declared the arbitration "over". Plaintiff did not meet the required contingency or complete the full scope of services, even under the narrowest view of their scope of services. This Court finds Plaintiff did not meet the contingency because Plaintiff did not obtain a final outcome or result for the client in the initial arbitration or the Declaratory Judgment Civil Action.

The uncontradicted testimony in the case is that Defendant never terminated or discharged Plaintiff (Tr. P. 101-104). Had Plaintiff remained in the case, the final arbitration award and judgment of November 12, 2021, and February 8, 2022, respectively, would have met the trigger for any contingent fee, but Plaintiff effectively withdrew one year prior to the last of these events. Significant additional work remained in the case to reach that end and alternate legal counsel was necessary. Defendant's witness testified that Defendant had no expectation or understanding that Plaintiff would refuse to proceed with the arbitration until after the initial award or that reserving and postponing the SCDOT claims which were in the original claim would result in Plaintiff's abrupt refusal to proceed with the arbitration or the Declaratory Judgment Action (Tr. P. 115).

Defendant represented that it would have been pleased to complete the case with Plaintiff as its advocate. This Court finds that Defendant did not discharge Plaintiff, constructively or otherwise, and even if Plaintiff had been discharged, only a reasonable fee would be due under the circumstances presented here.

This Court finds that the clear and unequivocal statement from Plaintiff in Def. Exhibit 35 that Client would need a "new attorney" placed Client in the unfortunate position of needing to retain new counsel at considerable expense during a complicated and ongoing case. The refund of a cash lien bond in excess of one million dollars depend upon the outcome of the Declaratory Judgment case, an action which Plaintiff had recommended (see Def. Ex. 34). Indeed, the ultimate costs to complete the representation, after Plaintiff's withdrawal, was more than $95,000.00. (see Def. Exs. 32 & 38).

The invoice for legal services, created on February 17, 2021, does not accurately compute the final outcome of the case. Plaintiff calculated the fee based on the interim and incomplete ruling from the arbitrator. The interim ruling was not only subject to adjustment and modifications, but it was under legal challenge in the Civil Action, and it was later modified and adjusted, diminishing the benefit to the Client[5]. The invoice was both premature and inaccurate.

Furthermore, even if the award stood without alteration or amendment, the preliminary award was not a settlement or judgment as a matter of law. Plaintiff does not acknowledge this objective legal reality. An arbitration award, by itself, *is not a self-executing final judgment or settlement*. Under the South Carolina Uniform Arbitration Act, a decision of an arbitrator may be a) confirmed, b) vacated, or c) modified. It is not a judgment of the court until a timely motion to

[5] Client settled the first portion of the arbitration and paid $2,950,000 to the arbitration claimant, not the $2,640,715, upon which Plaintiff calculated the "savings" for its reverse contingency fee computation. Clearly the claim was unliquidated at the time Plaintiff submitted the premature invoice. (see interest discussion, infra.)

vacate or modify the award is denied, the award is confirmed as a judgment by a court of law, or the award is paid by settlement.[6] The applicable statutory provisions provides multiple avenues to confirm the award. Once a party applies for confirmation, the award shall be confirmed by the court "unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140." S.C. Code Ann. § 15-48-120. An award shall be vacated on a series of grounds such as corruption, fraud, undue means, arbitrator exceeding their powers, and others. S.C. Code Ann. § 15-48-130. Further, "[i]f the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award." S.C. Code Ann. § 15-48-130(d). An arbitration award shall be modified in instances of (1) "a miscalculation of figures or an evident mistake in the description," (2) an award has been made "upon a matter not submitted to them," or (3) "the award is imperfect in a matter of form, not affecting the merits of the controversy." S.C. Code Ann. § 15-48-140(a)(1)-(3). If any of these criteria are met then the court will modify the award, otherwise, the award will be confirmed by the court. S.C. Code Ann. § 15-48-140(b). Once an award is confirmed, modified, or corrected, a "judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree." S.C. Code Ann. § 15-48-150.

Here, Plaintiff moved for confirmation of the award per §15-48-120. Opposing counsel filed a timely motion to vacate per §15-48-130. Plaintiff withdrew from the case before the resolution of either motion. No judgment or obligation could ensue as a matter of law until resolution of the competing motions. Yet, Plaintiff sent an invoice to the client based upon an incorrect computation

[6] The Federal Arbitration Act has similar provisions. See 9 U.S.C §9-12. Of course, the parties could willingly settle and pay an award without this formality, but settlement did not occur until months after the Plaintiff withdrew from the DJ action and refused to proceed further in the arbitration.

before the resolution of either motion. Replacement counsel completed the arbitration and the pending motions in the Civil Action many months after Plaintiff issued the invoice for the full contingent fee.

Assuming Plaintiff was engaged on a limited scope for "an arbitration", Plaintiff's unfinished business included: a) the remaining issues in the arbitration case: the final award of attorney's fees and costs, b) the resolution of the pending motions to vacate and/or confirm the award, and c) the DJ action in which the arbitration motions were embedded. Client resolved all of these issues without Plaintiff's further representation with alternate legal counsel.

Plaintiff's scope of work included completion of the Declaratory Judgment Action. Defendant's testimony on this point is completely uncontradicted. Plaintiff's expert also acknowledged that Plaintiff billed hourly fees to the DJ action and Plaintiff was paid for the work and the records in evidence prove this (see time entries on Def Ex. 33 pages 00246-261) (Tr. P. 53-55). Plaintiff acknowledged its responsibility for the work, even after it claimed the arbitration was "over" (see Ex. 35). Plaintiff remained sole counsel of record in the DJ action, fully responsible for that scope of work as a matter of law, until it demanded to be relieved as counsel.[7]

[7] While Plaintiff claims it was constructively discharged from the work based on claims that Henry Brown agreed to assume responsibility for the case, neither Mr. Brown nor his firm ever made a formal appearance in the DJ case. Until formally relieved, Plaintiff in fact remained fully responsible to client regardless of any statements from Mr. Brown who would ultimately leave the case for health reasons (to have a heart transplant). See Ex Parte Strom 334 S.C. 257, 539 S.E. 2d 699 ((2000). Furthermore, Mr. Brown's email suggesting he would assume responsibility for the DJ case occurred after Plaintiff's refusal to participate further in the arbitration case and incorrect assumption that the arbitration was "over." (see Pl. Ex. 16). Additionally, Client and attorney did not reach any agreement on the remaining scope of Plaintiff's responsibilities during that call. (see page 25: "Bundy: So, you're going to take over the arbitration, whatever is left of it and whatever follows. What about the current case in Common Pleas. Mundy: I don't think that's what's been agreed to, and its still on the table. So, I'll interject there.... the arbitration is not over yet.... Bundy: Well, I'm certainly not going to do it....". The parties were at impasse: "Bundy: ...if we have a dispute later about whether I'm in breach of contract for failing to do what I said I was going to do, then that's just what we'll have." The full context of the Brown communication is also found in Def. Ex 24 pages 126-129. In the full context, Plaintiff unilaterally declared the arbitration over, leaving the Client with a need to retain new counsel to finish the arbitration. The arbitrator in fact determined the arbitration was not "over." Thus, client was placed in the awkward position of finishing at least part of the arbitration Plaintiff started with new counsel. Meanwhile, client had, upon the advice and recommendation of Plaintiff, posted cash bonds in the Declaratory Judgment Action more than seven million dollars. (see Ex. 34).

Based on the foregoing, this Court finds that:

1. Plaintiff did not participate or complete the remaining arbitration which involved the same parties, same project, same arbitrator, same witnesses, and same issues. The arbitration was not in fact "over" but rather continuing, and the Client had no appreciation or understanding that Plaintiff would declare an end to the case in February 2021. Plaintiff made a business decision to terminate representation of the Client in the arbitration on February 17th stating that "[o]ur fee agreement does not include another arbitration…". While Plaintiff believed the arbitration was over, that was not the case. This plainly occurred prior to meeting the contingency.[8]
2. Plaintiff did not complete the Companion Proceeding (the Declaratory Judgment Action) which was within Plaintiff's scope of work and for which Plaintiff had been compensated in part. Plaintiff insisted that it be relieved as counsel in that Action. Furthermore, the outcome of the Arbitration was inextricably tied to the outcome of the Civil Action. Without resolution of the Civil Action, the arbitration could not become final, and the Client could not extricate its assets from the Clerk of Court.
3. The final settlement and outcome of the Arbitration and Declaratory Judgment Action occurred through alternate representation at considerable additional cost to Client (see Ex. 32)
4. Plaintiff withdrew from both the Arbitration and the Declaratory Judgment Action before the matters were complete in the sense of settlement, judgment, or recovery.

[8] Even if Client constructively terminated client, it would not change the result. Under the rules, Client may discharge a lawyer at any time, subject to the obligation to pay reasonable fees. If termination occurred prior to the contingency, a law firm's fees must be "reasonable." See South Carolina Rules of Appellate Procedure, Rule 407. Model Rule 1.5 comment.

5. Within 90 days of the final resolution of the Civil Action, Client paid Plaintiff an additional $150,000.00 computed based on Plaintiff's initial hourly rates computed from Plaintiff's estimated hours. Plaintiff has been compensated more than $250,000.00 for legal fees in this case. The uncontradicted testimony is that Client accepted Plaintiffs's estimated hours (see Def. Ex 25). According to Plaintiff: "$117,960.00 of billable hours was spent…essentially preparation for and attendance at the Arbitration hearing…. further at least 100 hours in additional hours were spent in additional time." Client paid $117,960.00 at face value based on the time records. Client then paid, based on the ratio of hours between Mr. Bundy and Mr. McDonald additional sums to Plaintiff's law firm.[9] The additional payment was based on Plaintiff's time records and normal hourly fees.

II. Reasonable Fee Determination

When a lawyer who is engaged for a contingency fee withdraws or is terminated before recovery by settlement or judgment, the lawyer is entitled to either no fees at all or the reasonable value of the services rendered on a *quantum meruit valuation* or lodestar method of determination. Case law is uniform that a lawyer who does not meet the contingency may not recover a full contingent fee. The reason for this is manifest and obvious. If lawyers may abandon clients before obtaining a result, clients would be at the mercy of the legal profession.

In Lofton v. Fairmont Specialty Ins. 367 S. W. 3d 593 (Ky. 2012), a lawyer withdrew from a contingent fee case before settlement or recovery and later sued his client to recover fees. After noting that a lawyer who withdraws with or without just cause may not enforce a contract for a full contingent fee, the court addressed the circumstances of what compensation is

[9] See Section IV for an exact accounting and payment reconciliation of the final payment and means of determining the payment.

appropriate. The court concluded when the withdrawal is without cause, no fee may be recovered. When the withdrawal is justified, the recovery is limited to a *quantum meruit* measure.

Kannewurf v. Johns 632 N.E. 2d 711 (Ill. App. 1994) further explains this principle. There, the lawyer withdrew because of a difference of opinion with client. The client refused to follow the advice of the attorney, and the attorney withdrew. The court recognized that while a client may discharge their attorney at any point, with or without cause, an attorney will still be entitled to a "quantum meruit compensation for all work reasonably performed for the client prior to the discharge. Kannewurf v. Johns 632 N.E. 2d 711, 714-715 (citing Rhoades v. Norfolk & Western Ry. Co., 78 Ill.2d 217, 35 Ill.Dec. 680, 399 N.E.2d 969 (1979)). The court reasoned that trust is essential to the attorney-client relationship, and the client must be given an opportunity to find a new lawyer when that trust is absent. Id. Even with this freedom, the attorney will still be entitled to the reasonable value of these services. Id, at 715. (citing Leoris & Cohen, P.C. v. McNiece, 226 Ill.App.3d 591, 168 Ill.Dec. 660, 589 N.E.2d 1060 (1992)).

The Court of Appeals also noted other prior decisions of the court where an attorney hired on a contingent fee basis and withdrew was still entitled to a reasonable calculation of their fee because they withdrew for good cause. Id. (Reed Yates Farms, Inc. v. Yates, 172 Ill.App.3d 519, 122 Ill.Dec. 576, 526 N.E.2d 1115(1988)). Similarly, in Leoris & Cohen, the court found that "a complete breakdown in the attorney-client relationship is a justifiable basis for allowing an attorney to withdraw from a contingent fee case and still receive his fees on a quantum meruit basis." Id. (citing 226 Ill.App.3d 591, 168 Ill.Dec. 660, 589 N.E.2d 1060 (1992)). See also 7A CJS Attorney & Client §360 (2004) and 53 ALR 5th 287 Circumstances Under Which Attorney Retains Right to Compensation Notwithstanding Voluntary Withdrawal from Case. Although in some jurisdictions Plaintiff would be entitled to no fee whatsoever, see Faro v. Romani, 641 So. 2d 69

(Fl. 1994), Defendant has never contended total forfeiture would be appropriate here. Instead Defendant contends the appropriate measure is the reasonable calculation of the fee earned. See Rose v. Penn and Seaborn, 295 So. 3d 94 (Ct. App. Al 2019).

Eight factors should be considered in the evaluation of reasonableness in the award of attorney fees pursuant to Model Rule 1.5:

1. *Time and Labor required, and the novelty difficulty and skill needed to properly perform the services.*

The records support that this is a matter of some complexity and difficulty which would involve a substantial investment in time. This factor weighs in favor of a premium hourly rate as might be charged for a lawyer with a substantial amount of experience in construction matters and arbitration.

2. *The likelihood that acceptance of the employment will preclude other employment.*

Given the necessary time required to handle this case to conclusion, even in an expedited forum such as arbitration, it is likely that counsel would be required by necessity to decline other large matters and cases. This factor likewise weighs in favor of a premium hourly rate.

3. *The customary fees in the venue for similar services.*

Mr. Bundy's regular hourly rate at the time of $400.00 per hour and Mr. McDonald's rate of $300.00 per hour were substantial premium hourly rates. Plaintiff's expert could point to no examples of counsel with similar experience who charge more per hour (Tr. P. 51). and Plaintiff's expert admitted the rates charged were initially established by Plaintiff and were reasonable and appropriate hourly rates for exceptional construction lawyers in the South Carolina market at the time the case was proceeding. The Court notes that two other qualified

and capable counsel in the same practice area, both with substantial experience, charged Defendant lower hourly rates of $300.00 and $360.00 per hour, respectively, to complete the case.

4. The amount involved and the results obtained.

The case involved claims and counterclaims of several million dollars, weighing in favor of a high hourly rate; yet, as is discussed in detail above, Plaintiff did not obtain the result or outcome on behalf of the client. Without completing the work fully, not only did Plaintiff not meet the contingency, but it cannot be overlooked that Defendant incurred more than $95,000.00 in additional legal fees from other firms after Plaintiff stopped work on the case. The total costs to the client in obtaining the outcome should be considered in making any final reasonable fee determination; particularly when the Plaintiff does not fully complete the scope of its services.

5. The time limits imposed by the client or circumstances.

Arbitration proceeds at a faster rate than litigation and in this instance, there was both an arbitration and an underlying civil case. Again, this weighs in favor of a high hourly rate.

6. The nature and length of the professional relationship.

This was Plaintiff's first engagement with Defendant therefore, this factor is of limited weight.

7. The experience and ability of the Lawyer.

The court concurs in the testimony of Plaintiff's expert that Mr. Bundy is an exceptional and gifted trial advocate and that his partner, Mr. McDonald, is an experienced and gifted attorney too. This weighs in favor of a high hourly rate.

8. Whether the fee is fixed or contingent.

Here there is a hybrid fee structure. Notably, Plaintiff did not assume the full risk of the outcome of the case as would be typical in a fully contingent matter. Yet, the percentage is relatively high 25% of the gross savings or recovery in addition to a minimum fee of $100,000.00. Further, the contingent aspect is both positive (for counterclaims) and negative (for savings from Plaintiff's demand). The Court notes that Plaintiff's expert identified that reverse contingent fee cases put the attorney at additional risk of collection and therefore should drive a much higher than normal fee, but evidence of risk of non-payment is not here. Defendant paid more than the hourly cap of $100,000.00 and sent a payment of $150,000.00 to Plaintiff within 90 days of the outcome. Doubtful collectability of the fee does not impose a disproportional risk on counsel in the case at hand. On the other hand, Plaintiff's risk was significantly capped by the minimum hourly fee and hybrid nature of the amended fee agreement. Additionally, it is important to note that the agreement changed at attorney's suggestion and request and that attorney originally undertook the case a per se reasonable hourly rate set by attorney in the marketplace.

Under these circumstances, this Court finds that the substantial hourly rates set by counsel of $400.00 and $300.00, respectively, are reasonable and fair based on the foregoing criteria. The skill of counsel and the complexity of the case, in particular weigh in favor of counsel being awarded no less than their going and established premium rates for their work on this matter. More problematic and troubling, however, would be to award an additional or higher bonus or adjusted fee given that the work was not completed, and client was required to engage new counsel to complete Plaintiff's scope of work at substantial additional costs. It is not reasonable to grant a higher fee award than the substantial hourly rates already adopted and accepted by the parties when

the contingency was not met. This Court finds that Defendants paid a total reasonable fee in the case for the unbilled fees, even giving Plaintiff the benefit of time for which there are no records.

I therefore find Defendant owes no additional fees to Plaintiff, as Defendants paid Plaintiff a reasonable fee for the work at a fair and premium hourly rate even though Plaintiff's work was incomplete. The payments made are reasonable pursuant to the criteria of South Carolina Rules of Appellate Procedure, Rule 407. Model Rule 1.5., which the Court has the power and discretion to approve. Plaintiff's claim for interest on the invoice is denied because: 1) the invoice was premature, 2) the invoice was an unliquidated and unjustified claim, and 3) the invoice was based on an award that was subsequently revised and amended through a final award and settlement in which Plaintiff had no involvement or participation.

Defendant has never pressed for a forfeiture of all legal fees (Tr. P. 115). Defendant has paid Plaintiff $255,558.00 for its services to compensate Plaintiff based upon the total hours Plaintiff devoted to the case multiplied by a reasonable hourly rate which Plaintiff established in the initial fee agreement. Therefore, Plaintiff is not, as a matter of law, entitled to recover a full contingent fee for the services associated with the incomplete work and has been reasonably compensated in full for its services in this case.

CONCLUSION

For these reasons, the claims are denied, and this Court finds in favor of the Defendant.

IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]

Lexington Common Pleas

Case Caption: Bundy McDonald Llc VS WECO River District Llc

Case Number: 2022CP3201932

Type: Order/Judgment For Relief

It Is So Ordered

s/ Walton J. McLeod