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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas for the Fifth Judicial Circuit

The Honorable William W. Wheeler, III, Circuit Court Judge

Appellate Case No.: 2026-001127
Trial Court Case No.: 2020-CP-40-03915

ATC Site Construction, LLC, Respondent,

v.

NKD, Inc., Appellant,

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. **DID THE CIRCUIT COURT ERR IN CONFIRMING THE ARBITRATION PANEL'S FINAL AWARD WHERE THE PANEL AWARDED ATTORNEY'S FEES TO ATC UNDER S.C. CODE § 29-5-10(B) AS THE "PREVAILING PARTY," DESPITE FINDING THAT NKD WAS ENTITLED TO A NET AWARD OF $785,717.93, THAT ATC'S CONTRACT CLAIM WAS COMPLETELY OFFSET AND FAR EXCEEDED BY NKD'S DAMAGES, AND THAT NO AMOUNT REMAINED UPON WHICH ATC COULD ENFORCE OR FORECLOSE ITS MECHANIC'S LIEN WHICH WAS LATER DISSOLVED BY CONSENT?**

2. **DID THE CIRCUIT COURT ERR BY REFUSING TO AWARD NKD ITS ATTORNEY'S FEES AND COSTS INCURRED IN SUCCESSFULLY DEFENDING AGAINST THE ENFORCEMENT OF THE MECHANIC'S LIEN, WHEN NKD WAS THE PREVAILING PARTY UNDER THE APPLICABLE STATUTE AND CASE LAW AND THE ARBITRATION PANEL MANIFESTLY DISREGARDED AND PERVERSELY MISCONSTRUED THE LAW ON THIS ISSUE?**

3. **DID THE CIRCUIT COURT ERR IN CONFIRMING THE FINAL AWARD WHERE THE ARBITRATION PANEL AWARDED $228,600.00 IN ATTORNEY'S FEES TO ATC PURSUANT TO A DEFICIENT FEE PETITION WITHOUT ITEMIZED TIME RECORDS OR OTHER EVIDENCE TO SUBSTANTIATE REASONABLENESS OF THE FEE AWARD?**

STATEMENT OF THE CASE

This appeal arises from the Order of the Honorable William W. Wheeler, III granting Respondent ATC Site Construction, LLC's ("ATC") Motion to Confirm the Arbitration Award, and denying NKD's Motion to Vacate, Modify in part, and Confirm in part, the Award (the "Order").

The underlying dispute relates to a residential development project in Richland County known as "River Shoals." (NKD's Omnibus Mem. on Pending Mots., p. 4.) NKD, a South Carolina corporation, was the owner and developer of River Shoals. ATC, a South Carolina limited liability company that has ceased operations, was the site contractor hired to clear and grade the property, install water and sewer lines, and construct roads and sidewalks. (NKD's Omnibus Mem. on Pending Mots., p. 4.) NKD and ATC entered a site work construction contract (AIA A101-2007) and general conditions of contract (AIA A201-2007) on May 16, 2017 (the "Contract"). Under the Contract, ATC was to achieve Substantial Completion of the project on or before the Substantial Completion Date, which was extended to August 1, 2018. On February 24, 2020, which was 573 days after the Substantial Completion Date had passed, ATC abandoned the project. Due to ATC's defective work and the accrual of liquidated damages, NKD did not believe further payment was due to ATC because NKD's damages far exceeded the amount claimed by ATC and continued to grow each day. NKD's position was correct, as the Arbitration Panel confirmed that ATC breached the contract and owed NKD a net amount of $785,717.93 in damages. This included damages for defective work as well as liquidated damages.

ATC initially claimed a mechanic's lien against NKD's property in the amount of $884,473.84 and denied that it owed NKD any damages.[1] (NKD's Omnibus Mem. on Pending Mots., pp. 4 – 5.) The mechanic's lien imposed a cloud over NKD's title and forced NKD to

[1] Upon motion by NKD, the lien amount claimed was reduced by consent to $847,236.20.

refinance the construction loan to resolve the default triggered by the filing of the lien. (NKD's Omnibus Mem. on Pending Mots., p. 5.) To mitigate damages and allow for finished lots in River Shoals to be sold, NKD filed a Cash Bond to Release Mechanic's Lien pursuant to S.C. Code § 29-5-110, by delivering a certified check payable to the Register of Deeds for Richland County in the amount of One Million One Hundred Twenty-Nine Thousand Six Hundred Forty-Eight and 27/100 Dollars ($1,129,648.27). (Ex. A to Mot. to Release Mechanic's Lien Bond.) By filing the cash bond, NKD agreed to become bound to ATC for payment of any sum, not to exceed the amount of the cash bond, as may be recovered or found due and owing to ATC by virtue of any action to foreclose the mechanic's lien. Ultimately, the Arbitration Panel determined that ATC owed a substantial net amount to NKD, which precluded ATC from having any entitlement to a lien or a recovery of attorney's fees. (NKD's Omnibus Mem. on Pending Mots., p. 5)

The matter was mediated unsuccessfully on two occasions. The progress of the litigation was affected by a number of factors, including the need to devote attention to identifying, correcting and quantifying the actual damages that resulted from ATC's defective work, the COVID-19 Pandemic, the joinder of two additional parties to the litigation proceeding, and delays encountered with the circuit court. (NKD's Omnibus Mem. on Pending Mots., p. 5.) In 2024, the parties agreed to submit the matter to arbitration before the Panel of three (3) arbitrators (the "Arbitration Panel"). (Consent Order to Stay Pending Arbitration.) The arbitration hearing took place in Columbia, South Carolina over four (4) days beginning Tuesday, November 19, 2024 and concluding Friday, November 22, 2024. At the time of the arbitration hearing, ATC asserted a mechanic's lien in the amount of $847,236.20. (Final Award p. 4.)

The Arbitration Panel issued an Interim Award dated January 21, 2025. (Interim Award pp. 1 – 11.) The Arbitration Panel found that ATC breached the Contract and breached its warranties to NKD. The Arbitration Panel found that "ATC was behind schedule from the beginning of the project" and "did not progress the work in a diligent manner." (Interim Award p. 6.) The "installation performed by ATC did not meet [C]ontract requirements." (Interim Award p. 7.) NKD "discovered certain defects in the work performed by ATC and proceeded to correct those defects and complete the project without ATC." (Interim Award p. 6.) It was confirmed during the arbitration proceedings that NKD suffered damages as a proximate result of "ATC's breach of contract and/or breach of warranty for failing to meet the project requirements and failing to correct the issue when it was discovered." (Interim Award pp. 8 – 9.) Regarding the defective work, the Arbitration Panel awarded NKD approximately 98% of its requested repair costs. (NKD's Mot. to Correct Interim Award, p. 2 (Ex. 3 to ATC's Mem. in Supp. of Mot. to Confirm Award).) Furthermore, to provide for liquidated damages during the remedial period, the Arbitration Panel found that "ATC is responsible for 365 days of delay which would have been a reasonable amount of time to complete the remedial work." (Interim Award p. 7.) The Arbitration Panel concluded that "the total Interim Award against ATC and in favor of NKD is $785,717.93." (Interim Award p. 10.) NKD's total damages were $1,476,787.83, against which the Arbitration Panel applied an offset for the contract balance and unsigned change orders. (Interim Award p. 10.) Based on the Interim Award in favor of NKD and against ATC, NKD submitted a Petition for Attorney's Fees and Costs to be awarded to the "prevailing party" in a mechanic's lien action. (Ex. 1, Notice of Filing of NKD's Fee Petition in Arbitration Action.) *See* S.C. Code § 29-5-10(a) (authorizing the prevailing party to recover the costs which may arise in defending against the mechanic's lien, including a reasonable attorney's fee). ATC also submitted a fee petition despite being the party liable to NKD and notwithstanding the fact that there was no amount remaining upon which the mechanic's lien could be foreclosed. (Ex. 6 to ATC's Mem. in Supp. of Mot. to Confirm Award.)

Separately, NKD submitted a Motion to Correct the Interim Award pursuant to R-52 of the AAA Construction Industry Arbitration Rules to address miscalculations and inconsistencies by the Arbitration Panel as to the amounts awarded to NKD. (NKD's Mot. to Vacate, in part, Modify, in part, and Confirm, in part, pp. 11 – 12; Ex. 3 to ATC's Mem. in Supp. of Mot. to Confirm Award.) The Interim Award omits liquidated damages for the 573-day period during which ATC performed delayed and defective work prior to abandoning the project on February 24, 2020, by awarding only the one-year remedial period despite the Arbitration Panel's own finding that ATC was behind schedule from the beginning of the project. Furthermore, the one-year remedial period cannot run concurrently with the defective performance period because remediation cannot begin until defective work is completed and defects become manifest. The Arbitration Panel miscalculated prejudgment interest by reducing the damages for the Gearig settlement before, rather than after, calculating interest, resulting in $34,701.40 of additional interest that should have been added to the Interim Award. (NKD's Mot. to Vacate, in part, Modify, in part, and Confirm, in part, pp. 11 – 12.)

On April 9, 2025, the Arbitration Panel issued the Final Award, which reduced the total award to NKD from $785,717.93 to $568,437.71 when it awarded attorney's fees to a party that had no entitlement to a lien and no ability to enforce a lien after causing damages that ran into seven figures.[2] (Final Award pp. 1 – 6.) The Arbitration Panel's decision to reduce the amount awarded to NKD by $228,600.00 was based upon the arbitrators' finding that "ATC is the 'prevailing party' pursuant to the South Carolina Mechanic's Lien statute" such that "a reasonable amount of attorneys' fees to be awarded to ATC as the prevailing party is $228,600.00." (Final

[2] The Final Award incorporates the Arbitration Panel's findings and conclusions set forth in the Interim Award.

Award pp. 3, 5.) The Arbitration Panel also adjusted its interest calculation, which resulted in the final award amount of $568,437.71 in NKD's favor. However, based on the "one verdict" in the action, the amount owed to ATC was nothing and the amount of ATC's lien was nothing.

On May 2, 2025, as ATC had no right to enforce a lien when no debt was owed to ATC, NKD filed a Motion to Release the Mechanic's Lien Bond to recover the $1,129,648.27 in cash that NKD had been forced to deposit with the circuit court. Because nothing was owed to ATC, ATC could not enforce a lien and had no entitlement to a lien. (Mot. to Release Mechanic's Lien Bond.) This motion was ultimately granted by consent order, as ATC recognized that it was not owed anything. Thereafter, on May 13, 2025, NKD filed a Motion to Vacate, in part, Modify, in part, and Confirm, in part, the Arbitration Award on the grounds that the Arbitration Award: (i) is based upon a manifest disregard or perverse misconstruction of applicable law; (ii) involves an evident miscalculation of figures; and (iii) rules on an issue over which the Arbitration Panel lacked subject matter jurisdiction. (NKD's Mot. to Vacate, in part, Modify, in part, and Confirm, in part.) On May 30, 2025, ATC filed its Motion to Confirm the Final Award. An in-person hearing was held on March 19, 2026 on NKD's Motion to Vacate, in part, Modify, in part, and Confirm, in part, the Arbitration Award and ATC's Motion to Confirm the Arbitration Award and Motion for Attorney's Fees. (Form 4 Judgment p. 1; Hr'g Tr.) The court took the matter under advisement and allowed the parties to submit additional memoranda. (Form 4 Judgment p. 1.) Thereafter, the circuit court granted ATC's Motion to Confirm the Final Award and denied NKD's Motion to Vacate, in part, Modify, in part, and Confirm, in part, the Arbitration Award. (Order pp. 1 – 18.) NKD filed a timely Notice of Appeal on May 11, 2026.

STANDARD OF REVIEW

The South Carolina Uniform Arbitration Act sets forth the statutory grounds for vacating, modifying, or correcting an arbitration award. *See* S.C. Code §§ 15-48-130 and -140. However, even absent one of the statutory grounds for vacating, modifying, or correcting an arbitrator's award, it is well established that "an arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." *See Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009); *see also Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (providing that "an arbitration award will be vacated only on the non-statutory ground of 'manifest disregard or perverse misconstruction of the law'"). "[M]anifest disregard of the law occurs when the arbitrator knew of a *governing* legal principle yet refused to apply it, *and* the law disregarded was well defined, explicit, and clearly applicable to the case." *Weimer*, 364 S.C. at 80, 610 S.E.2d at 852."

The appellate court reviews the denial of a motion to vacate, modify, or correct an arbitration award de novo. *See Crouch Const. Co. v. Causey*, 405 S.C. 155, 162-63, 747 S.E.2d 482, 486 (2013) ("The circuit court's adoption of a legal standard for evaluating claims of evident partiality under section 15-48-130 is a question of law which we review de novo.") Determining the proper interpretation of a statute is a question of law, which is decided "with no particular deference to the circuit court." *See Catawba Indian Tribe of S.C. v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("We are free to decide a question of law with no particular deference to the circuit court.") Where the issue of the amount of the fees awarded depends on the appellate court's interpretation of the reasonableness of the fees awarded pursuant to a statute authorizing reasonable attorney's fees, the interpretation of the statute is a question of law that the appellate court reviews de novo. *See TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, 446 S.C.

202, 221, 918 S.E.2d 699, 709 (Ct. App. 2025), *reh'g denied* (July 30, 2025), *cert. denied* (Jan. 16, 2026) (*quoting S.C. Dep't of Transp. v. Revels*, 411 S.C. 1, 8, 766 S.E.2d 700, 704 (2014)).

ARGUMENT

South Carolina law does not allow an award of attorney's fees to a contractor who, at the conclusion of the action, is not entitled to enforce its mechanic's lien upon the entry of the one verdict in the action and against whom judgment is entered in the mechanic's lien action. Section 29-5-10(b) of South Carolina's Mechanic's Lien Statute provides as follows:

> [f]or purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. ***One verdict assumes some entitlement to the mechanic's lien*** and the consideration of compulsory counterclaims.

See S.C. Code § 29-5-10(b) (emphasis added). An award of attorney's fees under S.C. Code § 29-5-10(b) is authorized to the "prevailing party" in the mechanic's lien action, which "assumes some entitlement to the mechanic's lien." *Id*. Repeated reported decisions by this Court confirm that:

> In a mechanic's lien action the defendant is entitled to an award of attorney fees as the prevailing party **if it is determined that a mechanic's lien cannot be enforced against it.**

See e.g., Seckinger v. Vessel Excalibur, 326 S.C. 382, 388, 483 S.E.2d 775, 778 (Ct. App. 1997) (emphasis added); *see also EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006).[3] In this case, ATC could not enforce a mechanic's lien because its work was so defective and dilatory that ATC owed NKD a gross amount of

[3] The principles established in these cases are not limited to instances when the contractor fails to follow statutory prerequisites, as the circuit court erroneously held. The decisions in *EFCO* and *Seckinger* do not contain any such limiting language. It is more important, not less, to award attorney's fees to a defendant who prevails against the contractor on the merits, as this would inherently involve a greater burden upon the property owner than would obtaining early dismissal of an untimely lien. Furthermore, the circuit court's attempt to distinguish these cases fails to address the broader "prevailing party" principles that these cases apply in the specific context of cases arising under S.C. Code § 29-5-10.

$1,476,787.83 in damages, which resulted in a net amount owed to NKD of $785,717.93 after an offset. A contractor who owes their client hundreds of thousands of dollars is not entitled to enforce a mechanic's lien against the client. The award of attorney's fees to ATC was beyond unjust, it was a manifest disregard and perverse misconstruction of the law.

The Arbitration Panel's award of attorney's fees to ATC, a contractor who is not entitled to enforce or foreclose its mechanic's lien, and refusal to award NKD its reasonable attorney's fees and costs incurred in defending against the lien, is the product of the Panel's subjective interpretation of S.C. Code § 29-5-10 and applicable South Carolina law, which violates the rules of statutory construction. As discussed more fully below, the $228,600.00 fee award to ATC cannot be reconciled with South Carolina law or the Arbitration Panel's own findings and warrants reversal of the Final Award, or in the alternative, remand for further proceedings on the issue of attorney's fees.

I. THE CIRCUIT COURT ERRED IN FAILING TO VACATE THE AWARD OF ATTORNEY'S FEES TO ATC

A. The Arbitration Panel's Interpretation of S.C. Code § 29-5-10 Violates South Carolina's Rules of Statutory Construction and is a Perverse Misconstruction of the Law

Under the Arbitration Panel's and the circuit court's reading of S.C. Code § 29-5-10(b), the language of the statute providing that an award of attorney's fees "assumes some entitlement to the mechanic's lien" is rendered unnecessary and irrelevant to the determination of the prevailing party for purposes of the award of attorney's fees. Additionally, even though the "amount of the lien" awarded to ATC in this case was $0 (because ATC was liable to NKD for the net amount of $785,717.93), the Arbitration Panel and the lower court violated and manifestly disregarded the terms of S.C. Code § 29-5-10(a) by awarding attorney's fees to ATC that "exceed the amount of the lien."

The Arbitration Panel's selective reading of S.C. Code § 29-5-10 violates South Carolina's cardinal rule of statutory construction, which is to ascertain and effectuate the intent of the legislature. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."). To accept the Panel's statutory interpretation would render meaningless the "assumes some entitlement to the mechanic's lien" language chosen by the General Assembly for the specific purpose of determining the award of attorney's fees under S.C. Code § 29-5-10(b). Similarly, the Arbitration Panel and the lower court failed to follow the requirement that a fee award to a contractor cannot exceed the "amount of the lien" at the conclusion of the case.

South Carolina law requires that a statute "be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *See Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). The Panel focused exclusively on the offer-comparison formula portion of S.C. Code § 29-5-10(b) by considering the amounts of ATC's claim and NKD's counterclaims, which were riddled with errors and glaring miscalculations, and declared ATC the prevailing party. *See Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (recognizing that courts deciding questions of statutory interpretation "should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose").

The Arbitration Panel could not have reasonably considered the South Carolina Mechanic's Lien Statute as a whole, and in a manner intended by the General Assembly, and concluded that ATC is the "prevailing party" because the Arbitration Panel's own findings and conclusions establish that the "one verdict" in the mechanic's lien action resulted in a net judgment of $<u>785,717.93</u>. There was no amount remaining upon which ATC could enforce or foreclose its mechanic's lien. In other words, ATC had no "entitlement to the mechanic's lien" based on the one verdict issued in the mechanic's lien action. *See* S.C. Code § 29-5-10(b). The Arbitration Panel nevertheless chose to ignore the threshold requirement of "some entitlement to the mechanic's lien" and decided that "ATC is clearly 'closer' to the verdict reached." (Final Award p. 3.) Similarly, ATC cannot legally be awarded a fee that exceeds the amount of the lien, but this provision of the statute was also disregarded. The circuit court found no error and confirmed the fee award to ATC, the contractor with no entitlement to enforce and foreclose the mechanic's lien and against whom the net award and judgment were entered.

The Arbitration Panel's $228,600.00 fee award to ATC, and refusal to award attorney's fees to NKD under S.C. Code § 29-5-10(a), "is the product of an intentional or reckless flouting of the law, not a mere error in interpreting it" such that vacatur of the Final Award is warranted. *See Waldo v. Cousins*, 442 S.C. 662, 665, 901 S.E.2d 276, 278 (2024). The Arbitration Panel therefore exceeded its power by manifestly disregarding or perversely misconstruing the law governing the dispute when it awarded ATC attorney's fees as the "prevailing party" under S.C. Code § 29-5-10(b). *See Waldo v. Cousins*, 442 S.C. 662, 665, 901 S.E.2d 276, 278 (2024) (recognizing that, notwithstanding the limited scope of judicial review, South Carolina courts may vacate an arbitration award rendered in manifest disregard of the law). The Arbitration Panel found ATC liable to NKD and entered judgment in favor of NKD. As a result of the $785,717.93 net award against ATC, no amount remained upon which ATC could enforce or foreclose its mechanic's lien. The Arbitration Panel's decision to award attorney's fees to ATC cannot be "reconciled with factual inferences and legal conclusions that are at least 'barely colorable.'" *Waldo,* 442 S.C. at 665, 901 S.E.2d at 278.

The decision by the Arbitration Panel separately qualifies as a "perverse misconstruction of the law," which is a term by our appellate courts separate and apart from "manifest disregard" of the law. Based on the plain meaning of the words used, the law would be "perversely misconstrued" when it is "misinterpreted" in a "wrongheaded" manner. *"Misconstrue" and "Perverse,"* Merriam Webster.com Dictionary, Merriam Webster, accessed July 16, 2026. By comparison, a "perverse verdict" is defined as "a verdict whereby the jury refuse to follow the direction of the judge on a point of law." *"Perverse Verdict,"* Black's Law Dictionary (5th ed. 1979).

B. When Ruling Upon the Issues that NKD Raised, the Circuit Court Formulated and Applied an Erroneous Standard of Review

During the proceedings below, NKD presented the issue whether the Arbitration Panel manifestly disregarded and perversely misconstrued applicable law regarding attorney's fees, an issue upon which the lower court unquestionably ruled. Although the lower court ruled, it utilized a "legal standard" that demonstrates it was laboring under a fundamentally incorrect view of applicable law governing the review of arbitration awards. After citing a portion of *Pittman Mortg. Co. v. Edwards,* 327 S.C. 72, 488 S.E.2d 335 (1997) and a portion of S.C. Code § 15-48-130(a), the circuit court articulated the following as part of the "standard of review" in this case:

> [T]he primary role of the courts is not one of reviewing the record for factual or legal errors. Rather, the primary role is to provide relief where the arbitrators have acted in an **unexpected and harmful manner** such as to exhibit corruption, evident partiality, or acting beyond their powers. In these cases, it is appropriate for a court to remedy the situation **to protect the parties, who cannot protect themselves**.

Order p. 3.) This formulation of the standard of review indicates that, although the lower court ruled on the issue of the award of attorney's fees to ATC, the lower court's ruling was controlled by legal error. The lower court did not provide any citations for this portion of the standard of review, support for which cannot be found within *Pittman* or S.C. Code § 15-48-130(a).

There are no reported decisions applying South Carolina law in which it is stated that the primary role of courts in reviewing arbitration awards is to "provide relief where the arbitrators have acted in an unexpected and harmful manner" toward "the parties, who cannot protect themselves." On the contrary, in *Waldo v. Cousins*, the South Carolina Supreme Court vacated the award of an arbitration panel even though no unexpected or harmful conduct, such as corruption, partiality, or misconduct of any kind was alleged. *See Waldo,* 442 S.C. 662, 901 S.E.2d 276 (2024). The Court disclaimed any inquiry into the arbitrators' motives: "**Whatever the panel's motives,** the only legal justification for their award rests on a theory" superseded by controlling law. *Id.* at 670, 901 S.E.2d at 280 (emphasis added) (vacating award). Manifest disregard is not limited to instances of maliciousness or intentional malfeasance. It occurs whenever an award is "untethered from controlling legal principles known to, but shrugged off by, the arbitrator," *id.* at 669, 901 S.E.2d at 279. It applies in cases when, as here, an arbitration panel fails to apply the plain terms of a statute in the correct manner. *See also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 742 S.E.2d 359 (2013) (vacating award, absent any allegation of arbitrator misconduct, where the arbitrator declined to apply a controlling statute). In this case, the Arbitration Panel and the trial court refused to apply multiple controlling legal principles applicable to awards of attorney's fees that appear on the face of the statute itself and in controlling precedent applying the statute.

The phrase "unexpected and harmful manner" does not appear in any decision by a South Carolina court in the context of an arbitrator's conduct, manifest disregard of the law, or perverse misconstruction of the law. On the contrary, courts may vacate awards where arbitrators, among other things, exceed their powers, manifestly disregard the law, or perversely misconstrue the law. *See, e.g., Gissel v. Hart*, 382 S.C. 235, 242, 676 S.E.2d 320, 324 (2009). Rather than framing the question as whether the arbitrators acted in an "unexpected and harmful manner," the relevant inquiry established by the South Carolina Supreme Court is whether the award can be reconciled with at least a “barely colorable” legal or factual basis and specifically recognizes that an award may be vacated if it reflects a manifest disregard of the law. *See Waldo v. Cousins*, 442 S.C. 662, 665, 901 S.E.2d 276, 278 (2024).

The circuit court's misstatement of the standard of review is not harmless error. Although the lower court ruled upon the issues of manifest disregard and perverse misconstruction of the law, it labored under a misapprehension of the law. By creating a new legal standard that is not supported by applicable law, the lower court committed error. It is well-established that an arbitrator “exceeds his or her powers” under South Carolina law by “manifestly disregard[ing] or perversely misconstru[ing] the law.” *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). The lower court’s declaration that its role did not include "reviewing the record for . . . legal errors” indicates that the lower court committed error when ruling upon the issues that NKD presented. This is because a manifest-disregard challenge requires that the reviewing court examine controlling law, confirm what the arbitrators knew of it, and determine whether the award can be reconciled with it. *See Waldo*, 442 S.C. at 665, 901 S.E.2d at 278. The issue of manifest disregard was unquestionably ruled upon, but in a manner that was legally erroneous and necessitates reversal. Because the circuit court's confirmation of the Final Award was controlled by errors of law as to the governing standard, and because this Court's review is de novo, the Order is entitled to no deference.

The lower court’s order suggests that NKD claimed that the lower court applied the “wrong test.” This finding is inaccurate. There is no dispute that the test arises under S.C. Code § 29-5-10 and relevant case law. The error was that the lower court misapprehended and misapplied the test, resulting in an clearly erroneous outcome. By failing to follow the statutory requirements that the contractor must have “some entitlement to the lien” and that the "the fee and the court costs may not exceed the amount of the lien," the decision of the Arbitration Panel and the lower court constitute a manifest disregard of the law. *See* S.C. Code § 29-5-10(a) (“The fee must be determined by the court in which the action is brought but **the fee and the court costs may not exceed the amount of the lien**”) (emphasis added); *see also* S.C. Code § 29-5-10(b) (“For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict **assumes some entitlement to the mechanic's lien** and the consideration of compulsory counterclaims.”) The lower court (and the Arbitration Panel) also failed to interpret S.C. Code § 29-5-10 in light of prior appellate decisions that constitute binding precedent.

C. The Arbitration Panel Manifestly Disregarded or Perversely Misconstrued the Law Governing the Determination of the “Prevailing Party” Under Fee-Shifting Statutes

The Arbitration Panel’s conclusion that ATC was the “prevailing party” was not a mere error in interpreting South Carolina law. *Waldo*, 442 S.C. at 665, 901 S.E.2d at 278. It was the product of the Arbitration Panel’s intentional decision to substitute the Panel’s subjective reasoning in place of decades of binding legal precedent and the statute’s threshold requirement of “some entitlement to the mechanic’s lien,” which was “shrugged off by” the Arbitration Panel. *Waldo*, 442 S.C. at 669, 901 S.E.2d at 279 (authorizing vacatur of an arbitration award “when it is untethered from controlling legal principles known to, but shrugged off by, the arbitrator”).

The Arbitration Panel found ATC liable to NKD for damages suffered as “a proximate result of ATC’s breach of contract and breach of warranty,” including repair damages, liquidated damages, and prejudgment interest, which “shall be paid by ATC within 30 days.” (Interim Award pp. 6 – 9; Final Award p. 6.) Despite finding in favor of NKD, the Arbitration Panel concluded that

"ATC is the 'prevailing party' pursuant to the South Carolina Mechanic's Lien statute" and that ATC is entitled to attorney fees under S.C. Code § 29-5-10(b) in the amount of $228,600.00, "as the prevailing party." (Final Award pp. 3, 5.) The award of attorney's fees to ATC reflects an intentional or reckless disregard by the Arbitration Panel of controlling law governing the award of attorney's fees under South Carolina's Mechanic's Lien Statute and the longstanding principles governing the determination of the "prevailing party" under fee-shifting statutes.

South Carolina precedent makes clear that the "prevailing party" for purposes of awarding attorney fees "in a mechanic's lien foreclosure action [is] the party in whose favor the decision or ***verdict on liability is rendered***" and "***judgment entered***." *See Seckinger*, 326 S.C. at 388, 483 S.E.2d at 777–78 (emphasis added); *see also Heath v. Cnty. of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1990). In the context of fee-shifting statutes, the South Carolina Supreme Court has defined a "prevailing party" as "[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and ***judgment entered***." *See Heath v. Cnty. of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1990) (emphasis added). A key factor in determining whether a party is the "prevailing party" is the degree of success obtained. *Id*. at 183, 394 S.E.2d at 711; *see also Douan v. Charleston Cnty. Council*, 373 S.C. 384, 386, 645 S.E.2d 241, 243 (2007) (confirming that the degree of success obtained is the "key factor in determining whether a party is a prevailing party" for purposes of the fee-shifting statute under S.C. Code § 15-77-300).

Because the net award in favor of NKD precluded ATC from enforcing and foreclosing on its mechanic's lien, ATC could not be the "prevailing party" in the mechanic's lien action under South Carolina law. *See Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409

S.C. 331, 340, 762 S.E.2d 561, 565 (2014). "[M]echanics' liens are purely statutory and may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them." *Id.* The South Carolina Supreme Court has recognized that "[t]he statutory process encompasses several steps, including the (1) creation, (2) perfection, and (3) enforcement of the lien." *Id*. While the Arbitration Panel acknowledged that ATC filed and perfected a mechanic's lien in the reduced amount of $<u>847,236.20</u>, there is no finding by the Arbitration Panel in the Interim Award or Final Award that ATC is entitled to enforce and foreclose the mechanic's lien. This is because ATC caused damages that exceeded the amount of money that it claimed for its defective work. Other jurisdiction openly recognize that it would be illogical to award attorney's fees to a contractor in such an instance. *See, e.g., Farah, LLC v. Architura Corp.,* 952 N.E.2d 328, 335 (Ind. Ct. App. 2011) ("It is logical that a contractor whose breaches of contract have resulted in damages that exceed the remaining balance due under the contract should not be allowed to recover attorney fees under the mechanic's lien statute.")

Although the Arbitration Panel found that ATC was entitled to recover unpaid pay applications, retainage, and change-order work in the amount of $<u>838,685.95</u>, which the arbitrators noted was "nearly all of its mechanic's lien amount," the Arbitration Panel never ordered foreclosure of the mechanic's lien and never found that ATC was entitled to enforce the lien. This is because ATC caused damages that far exceeded the amount it claimed. The Arbitration Panel offset the contract balance amount against NKD's damages to find "the total Interim Award against ATC and in favor of NKD is $<u>785,717.93</u>." (Interim Award p. 10.)

The fact that ATC was not entitled to enforce or foreclose its mechanic's lien against NKD was further confirmed by the circuit court's Consent Order for Interim Relief Pending Final Judgment, the filing of the Notice of Release of Cash Bond, and the filing of the Notice of

Cancellation of Lis Pendens. (NKD's Reply Regarding Pending Mots. pp. 6 – 8.) If the property has been released from the lien by "bonding out," the lien is no longer enforced against the property. *See Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 555, 548 S.E.2d 900, 902 (Ct. App. 2001) (reversing trial court's refusal to award fees to owners who were determined to have been the "prevailing party" in the mechanic's lien action because the lien could not be enforced against the property due to the filing of a bond). The Arbitration Panel was aware that ATC was not entitled to bring a lien enforcement action against the cash bond filed by NKD because no judgment had been entered in favor of ATC. *See* S.C. Code § 29-5-110 (authorizing an owner or other interested party to discharge a mechanic's lien by filing a bond, after which the lien attaches to the bond rather than the real property); *see also Moorhead Const., Inc. v. Enter. Bank of S.C.*, 410 S.C. 386, 391, 765 S.E.2d 1, 3 (Ct. App. 2014) ("If there is no right to foreclosure because the right to a lien is not established, there is no right to recover against the surety on the bond."). The circuit court's reliances on *Cohen's Drywall Co. v. Sea Spray Homes, LLC*¸ 374 S.C. 195, 648 S.E.2d 598 (2007) and *United Tank Servs., Inc. v. United Indus. Grp., Inc.,* 453 F. Supp. 3d 826 (D.S.C. 2020) constitute additional legal error. The cases are inapposite. Neither case involves an award of attorney's fees under S.C. Code § 29-5-10.

The Arbitration Panel's $228,600.00 fee award to ATC, a contractor who has no "entitlement to the mechanic's lien," obtained no foreclosure of the mechanic's lien, and suffered a net judgment against it in the amount of $785,717.93, was the result of the Panel's manifest disregard or perverse misconstruction of law for which vacatur of the Final Award was warranted. *See Gissel v. Hart,* 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) ("An arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law"). The Arbitration Panel's manifest disregard of the law in awarding ATC attorney fees under S.C. Code § 29-5-10 falls within the narrow, limited circumstances for which vacatur is appropriate. *See Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) (recognizing the "narrow, limited circumstances" under which an award may be vacated). In its Order confirming the Final Award, the circuit court repeatedly cited the exacting standard for vacatur and the exceeding rarity of obtaining such relief. Although the standard of manifest disregard is high, "it is not insurmountable." *See C-Sculptures, LLC v. Brown*, 403 S.C. 53, 58, 742 S.E.2d 359, 361–62 (2013) (holding that the "manifest disregard is an exacting standard, but it is not insurmountable").

The Supreme Court's decision in *C-Sculptures* is particularly instructive because, as here, the reason why the arbitration award needed to be vacated is that the arbitrator failed to apply a statute in the correct manner, even though the error did not involve any corruption, fraud, or "unexpected and harmful conduct." The evidence necessary for the Supreme Court to reverse the decisions of the Court of Appeals and trial court upholding the arbitration award was simply that "the arbitrator was apprised of the applicable law, but nevertheless denied Petitioners' motion to dismiss 'after due consideration of all the evidence and authorities presented by the parties in this Arbitration.'" *See C-Sculptures, LLC v. Brown*, 403 S.C. 53, 55, 742 S.E.2d 359, 360 (2013). In this case, NKD made a comprehensive presentation of applicable law to the Arbitration Panel before the erroneous decision to award attorney's fees was made. *See* NKD, Inc.'s Opposition to ATC Site Construction, LLC's Petition For Attorney's Fees, dated March 7, 2025. The Arbitration Panel manifestly disregarded and perversely misconstrued applicable law. NKD raised the issue with the circuit court. who refused to correct it despite the obvious perverseness of awarding attorney's fees to a contractor who owed the property owner $785,717.93 in actual damages, liquidated damages, and prejudgment interest due to defective and untimely work that breached the underlying contract.

The Final Award confirms that the "net award, or one verdict, resulted in an Interim Award in favor of NKD[.]" (Final Award p. 3.) The Arbitration Panel, having relied on there being "one verdict" and finding a "net award" in the amount of $785,717.93 in favor of NKD, nevertheless departed from controlling law and awarded attorney fees to ATC, not NKD. In the Order confirming the Final Award, the circuit court stated that NKD "failed to cite to a case saying the party with the smaller award cannot be the prevailing party under the statute for purposes of awarding attorneys' fees, despite the statute having been in effect for 35 years." (Order p. 9.)[4] The record confirms that, after determining NKD's counterclaims exceeded the amount due to ATC, the Arbitration Panel entered the only affirmative award in the mechanic's lien action, which was a net judgment in favor of NKD in the amount of $785,717.93. The single net award against ATC

[4] The underlying facts of this case are indeed unprecedented, which only serves to underscore the errors inherent in the outcome of the proceedings below:

(i) the contractor breached the contract and breached the warranty;

(ii) the contractor owed the property owner hundreds of thousands of dollars in damages due to defective and dilatory work;

(iii) the contractor did not obtain a judgment and therefore had no entitlement to a lien;

(iv) the contractor could not enforce a lien against the property owner;

(v) the mechanic's lien was dissolved because the contractor was not entitled to enforce it based on the award by the arbitrators;

(vi) the property owner, having prevailed on its claims for breach of contract and breach of warranty, requested an award of attorney's fees, which the arbitrators refused;

(vii) instead, the arbitrators re-directed 28% of the damages that the property owner recovered through the arbitration to the contractor to pay attorney's fees for two attorneys whose primary involvement was observing the other attorneys; and

(viii) the circuit court misapprehended the legal standard and declined to disturb the decision.

is not "the smaller award" because there is no comparison where there is "one verdict" and a single "net award."

As both the Arbitration Panel and circuit court were aware, the decisions by South Carolina courts over the past forty years demonstrate that a contractor has not been entitled to attorney fees under S.C. Code § 29-5-10 without some net judgment in its favor. Based on the research conducted by the undersigned counsel for NKD of available published and unpublished decisions by South Carolina courts, a contractor has never received an award of attorney fees under S.C. Code § 29-5-10 where the contractor did not have some amount remaining upon which a lien could be enforced. (Ex. H to NKD's Reply Regarding Pending Mots., pp. 5 – 7.) Decades of South Carolina precedent establish that ATC is not the "prevailing party" for purposes of the award of attorney's fees under S.C. Code § 29-5-10 where ATC cannot meet the threshold "entitlement to the mechanic's lien" based on the one verdict issued in the mechanic's lien action. *See EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006); *see also Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 555, 548 S.E.2d 900, 902 (Ct. App. 2001).

Rather than rectifying the erroneous decision to hand a fee award to a non-prevailing party, the circuit court confirmed the Final Award and the Arbitration Panel's award of attorney's fees under S.C. Code § 29-5-10(b) to ATC in the amount of $228,600.00. In doing so, the circuit court concluded that "any confusion on how to handle this situation" would be controlled by the holding in *Brasington Tile Co. v. Worley*, 327 S.C. 280, 491 S.E.2d 244 (1997). (Order p. 10.) *Brasington* involved a contractor that actually recovered a mechanic's lien judgment. *Id*. at 283, 491 S.E.2d at 245. The court in *Brasington* did not address whether a contractor that recovered no enforceable lien whatsoever may nevertheless recover attorney's fees under S.C. Code § 29-5-10(b).

Brasington does not hold that every contractor who establishes some contract balance is automatically the prevailing party or that a contractor may recover attorney's fees after failing to enforce its mechanic's lien.

Similarly, the case of *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 601, 614 S.E.2d 629, 632 (2005) also involved an outcome where the "final judgment was entered for Builder" in the amount of $20,617.14, after an offset of the amount of a judgment entered in favor of the property owner. As a result, based on the plain terms of S.C. Code § 29-5-10(b), the builder had "some entitlement to the lien" due to the net judgment in the builder's favor and could enforce the lien against the property in the amount of the net judgment amount. In this case, the Arbitration Panel manifestly disregarded the fact that both the applicable statute and the case law interpreting it prohibit a contractor who is a ***net judgment debtor*** from recovering attorney's fees against the property owner. There is only "some entitlement to the lien" when a net judgment of some amount is entered in favor of the contractor. Otherwise, the lien cannot be enforced because there is no debt to the contractor, in which case, "the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it." *See, e.g., EFCO Corp.,* 370 S.C. at 618, 635 S.E.2d at 925.

The principles of law that were manifestly disregarded and perversely misconstrued are not limited to the terms of S.C. Code § 29-5-10(b), but also include the case law interpreting and applying the statute. In *EFCO,* when reviewing a claim under S.C. Code § 29-5-10, this Court stated that:

> Our supreme court has defined a "prevailing party" as "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention **[and] is the one in whose favor the decision or verdict is rendered and judgment entered."**

See EFCO Corp., 370 S.C. at 618, 635 S.E.2d at 925 (emphasis added). There is no legal basis for awarding attorney's fees to a contractor against whom a net judgment is entered due to defective and dilatory work. This is the fundamental issue presented by this appeal.

The Arbitration Panel's decision to award attorney's fees to the contractor who, at the end of the case, is the net judgment debtor to the owner it sued, contradicts the remedial purpose of S.C. Code § 29-5-10.[5] The Final Award has allowed ATC to recover beyond what the General Assembly has authorized. Accordingly, because the Arbitration Panel exceeded its power by manifestly disregarding or perversely misconstruing the law governing the dispute, the Final Award should be vacated.

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[5] Although the erroneous award of fees to ATC and the erroneous denial of fees to NKD arise under S.C. Code § 29-5-10(a), the parallel provisions of S.C. Code § 29-5-20 demonstrate that the mechanic's lien statute, when read as a whole, prohibits awards of attorney's fees to a contractor who is not entitled to enforce a lien at the conclusion of the dispute:

> Every laborer, mechanic, subcontractor, or person furnishing material for the improvement of real estate when the improvement has been authorized by the owner has a lien thereon, subject to existing liens of which he has actual or constructive notice, to the value of the labor or material so furnished, including the costs of the action and a reasonable attorney's fee which must be determined by the court in which the action is brought **but only if the party seeking to enforce the lien prevails**. **If the party defending against the lien prevails, the defending party must be awarded costs of the action and a reasonable attorney's fee as determined by the court.** The fee and the court costs may not exceed the amount of the lien. The lien may be enforced as herein provided.

A "statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013). Accordingly, this Court should "read the statute as a whole" and "should not concentrate on isolated phrases within the statute." *Id.*

II. THE CIRCUIT COURT ERRED BY REFUSING TO VACATE THE PORTION OF THE AWARD THAT DENIED NKD A RECOVERY OF ITS ATTORNEY'S FEES AND COSTS INCURRED

The Arbitration Panel manifestly disregarded controlling law by refusing to award NKD the fees and costs incurred in its successful defense of the mechanic's lien action, as provided under the South Carolina Mechanic's Lien Statute. The circuit court failed to correct this manifest disregard of the law. South Carolina law recognizes that "in a mechanic's lien action, the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it." *See, e.g., EFCO Corp.,* 370 S.C. at 618, 635 S.E.2d at 925 (Ct. App. 2006). Decades of South Carolina precedent, both before and after the amendment of S.C. Code § 29-5-10, establish that where there is no "entitlement to the mechanic's lien," the owner is the prevailing party because no lien is enforced in the contractor's favor.

Section 29-5-10(a) authorizes NKD to recover its reasonable attorney's fees and costs incurred in defending against the mechanic's lien, which ATC was not entitled to enforce or foreclose in the mechanic's lien action. South Carolina courts have consistently defined a "prevailing party" as the party who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, and in whose favor judgment is entered. *Heath*, 302 S.C. at 182–83, 394 S.E.2d at 711. Under the well-established definition, NKD was the "prevailing party," having defeated foreclosure of the mechanic's lien, succeeded in proving that ATC breached the Contract and breached its warranties to NKD resulting in damages, including, but not limited to, repair damages, liquidated damages, and prejudgment interest, and obtaining the only affirmative award entered in the mechanic's lien action. The Arbitration Panel's refusal to award NKD attorney's fees and costs incurred in defending against the mechanic's lien (that could not be enforced or foreclosed against the property), and awarding $228,600.00 to ATC, is beyond a mere factual or legal error.

All rules of statutory construction must yield to the principle that courts should endeavor to ascertain the real intention of the Legislature. *See Horn v. Davis Elec. Constructors, Inc.,* 307 S.C. 559, 416 S.E.2d 634 (1992). "[T]he intent of the legislature in allowing the prevailing party in an action brought under the mechanic's lien statute to recover attorney fees and costs stems from a desire to deter both wrongful filing of liens and unjustified refusal to pay debts subject to mechanic's liens." *See Cedar Creek Props. v. Cantelou Assocs., Inc*., 320 S.C. 483, 486, 465 S.E.2d 774, 775 (Ct. App. 1995) (holding that the owner was the "prevailing party" in defending against the contractor's mechanic's lien, as the owner was required to defend against the lien until the issue was resolved and had incurred attorney fees and costs during that time). NKD successfully demonstrated that ATC was not entitled to further payments due to ATC's defective work and the accrual of liquidated damages. At the time the Final Award was issued, the Arbitration Panel had already determined that: (i) "NKD discovered certain defects in the work performed by ATC and proceeded to correct those defects and complete the project without ATC;" (ii) "ATC was behind schedule from the beginning of the project and did not progress the work in a diligent manner;" (iii) "installation performed by ATC did not meet the [C]ontract requirements;" (iv) NKD suffered damages "proximately caused by ATC's breach of contract and/or warranty for failing to meet the project requirements and failing to correct the issue when it was discovered;" and (v) "ATC [was] responsible for 365 days of delay." (Interim Award pp. 6 – 9.) The Arbitration Panel knew of the governing law authorizing NKD to recover its reasonable attorney's fees and costs incurred in defending against the lien yet refused to apply it. *Gissel*, 382 S.C. at 241–42, 676 S.E.2d at 323–

24 (holding that an arbitrator's manifest disregard of the law occurs when the arbitrator knew of a governing principle yet refused to apply it).

Nothing in S.C. Code § 29-5-10, both before and after the amendment, suggests that the General Assembly intended to abandon the prevailing party principle by authorizing attorney fees to a contractor who is not entitled to enforce and foreclose its mechanic's lien, is liable to the owner, and suffered a net judgment of $785,717.93. The purpose and intent of the fee-shifting provision of Section 29-5-10 was not to reward a contractor who breached the construction contract, abandoned the project, caused over a million dollars in damages, and, after filing a lien for nonpayment, was then ordered to pay the owner nearly $800,000 in damages. To hold otherwise would expand the statute beyond its plain language and create a fee-shifting remedy the General Assembly did not authorize. The circuit court erred in refusing to vacate the Final Award.

III. THE CIRCUIT COURT ERRED IN CONFIRMING THE FINAL AWARD WHERE THE ARBITRATION PANEL MISAPPLIED THE "BENEFICIAL RESULTS OBTAINED" FACTOR

Notwithstanding the fact that ATC recovered no amount upon which it could enforce or foreclose its lien and suffered the only net judgment in the case, the Arbitration Panel concluded that "ATC achieved a beneficial result on the mechanic's lien action." (Final Award p. 5.) The $228,600.00 fee award was confirmed by the circuit court despite the absence of an enforceable mechanic's lien judgment in favor of ATC and sufficient evidentiary support to sustain the fee award. This was a reversible error. *See Griffith v. Griffith*, 332 S.C. 630, 646, 506 S.E.2d 526, 534–35 (Ct. App. 1998); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993).

South Carolina law provides that, once a basis for an award is established, to evaluate a request for attorney's fees and expenses, courts must consider the following factors when determining an award of attorney's fees: (1) the nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *See Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). The South Carolina Supreme Court has held that "[w]hen an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor." *Blumberg*, 310 S.C. at 494, 427 S.E.2d at 661; *see also Griffith v. Griffith*, 332 S.C. 630, 646, 506 S.E.2d 526, 534–35 (Ct. App. 1998) ("Our case law and court rules make clear that when a contract or statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record for each of the required factors to be considered.").

Both the Arbitration Panel and the circuit court recognized that ATC was the judgment debtor in the mechanic's lien action. In confirming the Final Award, the circuit court found that the Arbitration "Panel's reduction of $39,330 indicates the Panel considered the points NKD argued[.]" (Order p. 14.) Where the Arbitration Panel's own findings establish that no amount remained upon which the mechanic's lien could be foreclosed, and that ATC was liable to NKD for a net award of $<u>785,717.93</u>, the conclusion that ATC achieved the "beneficial result" for purposes of awarding attorney fees under S.C. Code § 29-5-10(b) cannot be reconciled with applicable law. The Panel's formulaic recitation of the six factors for assessing ATC's attorney fees erroneously assumes that fees were authorized under S.C. Code § 29-5-10 in the first place. A contractor whose mechanic's lien action results in a net judgment *against* it is not the "prevailing party" in the mechanic's lien action "[f]or purposes of the award of attorney's fees" because "the determination of the prevailing party is based on one verdict in the action," which "assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims." *See* S.C. Code § 29-5-10(b).

Furthermore, in assessing the "beneficial results obtained," the Arbitration Panel relied on its finding that ATC was entitled to the "benefit" of an offset against NKD's damages in the amount of $838,685.95. By evaluating ATC's ability to offset "nearly all of its mechanic's lien amount" in isolation from the ultimate disposition of the mechanic's lien action, the Arbitration Panel concluded that ATC "achieved a beneficial result on the mechanic's lien action." (Final Award p. 5.) The circuit court, adopting the same reasoning applied by the Arbitration Panel, concluded that, because "[t]he set-off resulted in a benefit to ATC of $838,685.95[,]" the Panel "correctly determined that ATC was the prevailing party" under S.C. Code § 29-5-10(b). (Order p. 12.) These expansive notions of "beneficial results" and the "prevailing party" in the mechanic's lien action are contrary to South Carolina law.

South Carolina law recognizes that the verdict in a mechanic's lien action under S.C. Code § 29-5-10 includes "compulsory counterclaims, offsets, and other closely related joined claims in determining the amount of the verdict." *See Brasington Tile Co. v. Worley*, 327 S.C. 280, 288, 491 S.E.2d 244, 248 n. 4 (1997) (*citing Utilities Const. Co. v. Wilson*, 321 S.C. 244, 247, 468 S.E.2d 1, 2 (Ct. App. 1996)). The determination of the "prevailing party" under South Carolina's Mechanic's Lien Statute "should be based on one verdict in the action assuming some entitlement to a mechanic's lien." *Id*. After applying NKD's compulsory counterclaims, the Arbitration Panel entered a single net award of $785,717.93 in NKD's favor and against the "prevailing party."

The Arbitration Panel manifestly disregarded the law by treating ATC's offset as the "beneficial result" notwithstanding the Panel's own determination that there was "one verdict" and a net award in favor of NKD, not ATC. (Final Award pp. 2 – 3.) The circuit court erred by confirming the Arbitration Panel's award and by further finding "[t]he fact that the offsetting common law claims exceeded the lien recovery, meant that ATC's 98.99% mechanics lien recovery took the form of an offset rather than cash under the 'one verdict' procedure." (Order p. 12.) A contractor cannot "recover" 98.99% of a debt that, netted against its own breach, never existed.

Accordingly, the Order confirming the unauthorized fee award to ATC should be reversed.

IV. AT A MINIMUM, THE FEE AWARD SHOULD BE REVERSED AND REMANDED FOR FURTHER PROCEEDINGS ON THE ISSUE OF THE AMOUNT OF THE FEES AWARDED

To the extent that this Court were to affirm the Order confirming the Final Award and the findings that ATC is the "prevailing party" in the mechanic's lien action for purposes of awarding attorney fees under S.C. Code § 29-5-10(b), the fee award to ATC in the amount of $228,600.00 should be reversed and remanded for further proceedings to develop a record sufficient to support the amount awarded. This Court has recognized that "if on appeal there is inadequate evidentiary support for each of the factors, the appellate court should reverse and remand so the trial court may make specific findings of fact." *Griffith*, 332 S.C. at 646, 506 S.E.2d at 535.

Although the Arbitration Panel cited the six factors set forth in *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), it lacked an adequate evidentiary basis for the award of $228,600.00 to ATC. (Final Award pp. 3 – 4.) The record contains no contemporaneous billing records or task-by-task time entries that would allow the Arbitration Panel or the reviewing court to verify what work was actually performed, whether multiple attorneys duplicated efforts, whether the hours claimed were reasonable and necessary, or whether the work related solely to the mechanic's lien claim. ATC submitted a one-page list of invoice amounts from ATC's internal QuickBooks Ledger. (Ex. C to NKD's Omnibus Mem. on Pending Mots.) The one-page list contains no description of the tasks performed, hours billed, or the hourly rate(s) and provides no identification of the timekeeper or timekeepers performing the work. The one-page document attached to ATC's fee petition contains no itemization of the legal fees and expenses from which the Arbitration Panel could determine the reasonableness of both the hours and rates and to make specific findings of fact as to the accuracy and reasonableness of the hours and absence of duplication, redundancy, or excessiveness. The lack of supporting documentation accompanying ATC's fee petition was particularly concerning when considering ATC's history of having four or more attorneys present during the same depositions. (NKD's Omnibus Mem. on Pending Mots. pp. 20 – 21.) The Arbitration Panel conducted zero analysis of the duplicative efforts of ATC's counsel or whether it is appropriate to reduce the actual damages incurred by NKD to pay $228,600.00 in attorney fees under S.C. Code § 29-5-10(b) to have two lawyers generally watch two other lawyers in a mechanic's lien action where the contractor was ultimately not entitled to foreclose on the lien.

This Court recently confirmed that itemized records of the hours each attorney and legal staff member spent on the case are necessary to support a fee award in a mechanic's lien action. *See TCC of Charleston, Inc. v. Concord & Cumberland, LLC*, 446 S.C. 202, 229, 918 S.E.2d 699, 713–14 (Ct. App. 2025) (reversing and remanding master's award of attorney's fees where the record on appeal did not include evidence to support the fee award). In *TCC*, the court found that although the master made findings regarding the factors required to be considered when awarding attorney fees, and owner's counsel presented itemized records of the hours each attorney and legal staff member spent on the case to the trial court in camera, the itemized records were not included in the record on appeal. *Id*.

The Arbitration Panel's fee award is based on the unsupported conclusions contained in the Affidavit of Russell Jeter, which purports to reduce ATC's total fees from $267,930.00 to

$228,600.00. (Final Award p. 5.) The Panel awarded fees to ATC based on a deficient fee petition that was based on the figures derived exclusively from Mr. Jeter's affidavit, as it is the only document identified by the Panel in the Final Award, rather than itemized, contemporaneous billing records that were necessary to assess the reasonableness of ATC's request against the *Jackson* factors. The record on appeal does not include evidence to support the Panel's fee award to ATC "based on factors such as the nature, extent, and difficulty of the case and the time necessarily devoted to the case." *See TCC*, 446 S.C. at 230–31, 918 S.E.2d at 714 (*citing Sunrise Sav. & Loan Ass'n v. Mariner's Cay Dev. Corp*., 295 S.C. 208, 211-12, 367 S.E.2d 696, 698 (1988) (reversing and remanding for redetermination of attorney's fees because an award of $125,000 was "outrageous and shocking to the conscience of the court" and it was "necessary to take evidence on the reasonableness of the fees")). The circuit court erred in confirming the Final Award that lacks sufficient evidentiary support on the record for each factor. Accordingly, NKD requests that this Court vacate the fee award, or in the alternative, remand for further proceedings to develop a record sufficient to support (or correct) the amount awarded.

CONCLUSION

For the foregoing reasons, Appellant NKD, Inc., respectfully requests that this Court: (i) reverse the circuit court's Order confirming the Final Award as to attorney's fees; (ii) vacate the Arbitration Panel's award of attorney's fees to Respondent ATC Site Construction, LLC; (iii) vacate the Arbitration Panel's refusal to award attorney's fees to NKD and remand this case to the circuit court with instructions to determine and enter an award of reasonable attorney's fees and costs to NKD under SC. Code § 29-5-10(a). In the alternative, NKD respectfully requests that this Court reverse and remand the issue of the attorney's fees awarded to ATC for further proceedings.

Respectfully submitted,

By: *s/Ellis R. Lesemann*

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