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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

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

Appellate Case No. 2026-001127

Lower Court Case No. 2020-CP-40-03915

ATC Site Construction, LLC, ... Respondent,

v.

NKD, Inc., ... Appellant,

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err by affirming the award of attorney fees to Respondent?

2. Did the Circuit Court err by affirming the amount of attorney fees awarded to Respondent?

INTRODUCTION

This appeal arises from a voluntary arbitration between Appellant, NKD, Inc. ("Appellant") and Respondent, ATC Site Construction, LLC ("Respondent"). After Respondent prevailed at the arbitration, Appellant has engaged in a quixotic attempt to invalidate the determination of the arbitration panel through any means necessary. Despite the length of Appellant's brief, the only issues in this appeal are whether the Circuit Court erred in affirming the determination of the arbitration panel to award attorney fees to Respondent and the amount of those fees. No error occurred.

STATEMENT OF THE FACTS

As early as 2005, Appellant obtained a residential subdivision near White Rock, South Carolina called River Shoals. (R pp ___ Interim Award at p 3). Appellant contracted with Respondent to perform site work at the development pursuant to an AIA Contract dated May 16, 2027. (R pp ___ Interim Award at p 3). After problems arose between the parties concerning the failure of Appellant to pay Respondent for its work and allegations by Appellant about the quality of Respondent's work, litigation was initiated.

STATEMENT OF THE CASE

Respondent initiated litigation by filing a mechanics lien against Appellant in an ultimately revised amount of $847,236.20. (R pp ___ Interim Award at p 4 and R pp ___ Complaint). There is no dispute the lien was timely filed and perfected. (R pp ___ Interim Award at p 4).

In response to the filing of the complaint, Appellant filed a series of counterclaims against Respondent, in which Appellant claims it was entitled to $3,373,570.29, exclusive of

interest, fees and costs. (R pp ____ Final Award at pp 1-2; R pp ____ Fourth Amended Answer, Counterclaims and Cross Claims)

On July 10, 2024, the parties entered a consent order to stay the litigation pending a voluntary arbitration. (R pp ___ Consent Order to Stay Pending Arbitration). The parties and the Court agreed that the "arbitration panel shall be empowered to hear and rule on all motions as though this matter were being heard in the South Carolina Court of Common Pleas." (R pp ___ Consent Order to Stay Pending Arbitration at ¶ 8).

The arbitration was conducted over four days from November 19, 2024 through November 22, 2024. (R pp ___ Interim Award at p 2). The arbitration panel consisted of C. Allen Gibson, Jr., J. Blanton O'Neal, IV and Henry P. Wall, three well regarded attorneys with extensive construction litigation experience. (R pp ___ Interim Award at p 11).

On January 21, 2025, the arbitration panel issued an interim award. (R pp ___ Interim Award). The arbitration panel found Appellant had suffered net repair damages of $1,111,787.83 plus liquidated damages of $365,000, and pre-judgment interest of $147,616.05. (R pp ___ Interim Award at pp 10). The panel also found Respondent was entitled to an award of $838,685.95 on its mechanics lien claim. (R pp ___ Interim Award at p 5). The panel then offset Appellant's award by the amount due on Respondent's award, and determined the total amount due to Appellant was $785,717.93, including pre-judgment interest. (R pp ___ Interim Award at p 10).

The only issue not resolved by the interim award was the issue of the award of attorney fees and costs. (R pp ___ Interim Award at p 10). The arbitration panel asked that the parties brief that issue. (R pp ___ Interim Award at p 10).

On February 11, 2025, Appellant filed a motion to correct the interim award, which raised issues concerning: 1) alleged mistakes in, or inconsistent calculation of, liquidated damages; 2) a miscalculation of interest on a settlement; and 3) a clerical error concerning the damages claimed by Appellant. (R pp ___ Motion to Correct Interim Award). Therein, Appellant noted that the amount of damages it had asserted against Respondent was $3,373,570.29, exclusive of interest and attorney fees. (R pp ___ Motion to Correct Interim Award at p 10).

On February 28, 2025, Respondent submitted its petition for award of attorney fees. (R pp ___ Petition for Award of Attorneys Fees). Respondent noted that it was the "prevailing party" under the applicable version of S.C. Code Ann. § 29-5-10. (R pp ___ Petition for Award of Attorneys Fees). The amount sought in the petition for award of attorney fees was supported by the affidavits of Russell Jeter and Robert L. Buchanan, Jr. (R pp ___ Affidavit of Russell Jeter & Affidavit of Robert L. Buchanan, Jr.). Ultimately, Respondent sought attorney fees and costs in the amount of $267,930.00 for the prosecution of the mechanics lien. (R pp ___Final Award at p ____; Affidavit of Russell Jeter & Affidavit of Robert L. Buchanan, Jr.).

On February 29, 2025, Appellant submitted its petition for attorney fees and expenses. (R pp ___ Petition for Attorney's Fees and Expense). Appellant specified that it was seeking $317,541.81, including $224,456.50 in legal fees and $93,085.31 in expenses, for the defense of the mechanic's lien claim. (R pp ___ Petition for Attorney's Fees and Expense at p 4).

On April 9, 2025, the arbitration panel issued its final award. (R pp ____ Final award). With respect to the award of attorney fees and costs, the arbitration panel determined that Respondent was the "prevailing party" under S.C. Code Ann. § 29-5-10. (R pp ____ Final award at p 3). The arbitration panel noted that neither party had made an offer of settlement pursuant to

S.C. Code Ann. § 29-5-10(b). (R pp ____ Final award at p 2). Thus, as Respondent's demand in its complaint was "clearly 'closer to the verdict reached' in this matter," Respondent was the "prevailing party." (R pp ____ Final award at p 3).

The arbitration panel then examined the six factors set forth in *Jackson v. Speed*. (R pp ____ Final award at p 3-5). Based on its evaluation of the *Jackson* factors, the arbitration panel awarded Respondent $228,600.00 in fees, a reduction from its requested fees of $267,930.00. (R pp ____ Final award at p 5). After post-judgment interest was included and the attorney fees and costs were accounted for, a total final award of $568,437.71 was awarded to Appellant. (R pp ____ Final award at p 6).

On May 13, 2025, Appellant filed a motion to vacate, in part, modify, in part, and confirm, in part, the arbitration award. (R pp ___ Motion to Vacate, in part, Modify, in part, and Confirm, in part the Arbitration Award).

On June 16, 2025, Respondent moved to confirm the final award of the arbitration panel. (R pp ____ Motion to Confirm the Final Award of the Arbitration Panel Dated April 9, 2025).

On March 19, 2026, after briefing by both parties, the Circuit Court held a hearing on the pending motions. (R pp ___ Form 4 Order dated April 8, 2026). After consideration of additional arguments and briefs, the Court granted Respondent's motion to confirm the final award of the arbitration panel and denied Appellant's motion to vacate, in part, and modify, in part, the arbitration award. (R pp ___ Form 4 Order dated April 8, 2026).

On April 22, 2026, the Circuit Court entered its order. (R pp ___ Order Granting Motion to Confirm Award, and Denying Motion to Vacate, Modify in Part and Confirm in Part). The Circuit Court found the arbitration panel was correct in its determination that Respondent was the "prevailing party" under S.C. Code Ann. § 29-5-10 and that the arbitration panel properly

considered the *Jackson* factors in their award of fees to Respondent. (R pp ___ Order Granting Motion to Confirm Ward, and Denying Motion to Vacate, Modify in Part and Confirm in Part at pp 8-14).

STANDARD OF REVIEW

This appeal is an attempt to reverse the decision of the Circuit Court affirming the decision of the arbitration panel with respect to its award of attorney fees and costs to Respondent. Thus, the proper standard of review is that which is used to evaluate whether the decision of an arbitration panel should be affirmed, vacated or modified. Put simply, the proper standard of review is an abuse of discretion standard.

S.C. Code Ann. § 15-48-130(a) provides the grounds for vacating an arbitration award. However, Appellant does not explicitly argue the applicability of any of those grounds. Rather, citing *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009), Appellant argues the arbitration panel in this case "exceed[ed its] powers and/or manifestly disregard[ed] or perversely misconstrue[d] the law" in awarding attorney fees to Respondent. "However, for a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." *Id.*; *see also Jones v. Dancel*, 792 F.3d 395, 402 (4th Cir. 2015) ("[a] court may vacate an arbitration award under the manifest disregard standard only when a plaintiff has shown that: (1) the disputed legal principle is clearly defined and is not subject to reasonable debate; and (2) the arbitrator refused to apply that legal principle."); *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997) ("[w]hen a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. Generally, an arbitration award is conclusive,

and courts will refuse to review the merits of an award. An award will only be vacated under narrow, limited circumstances.").

Just as the decisions of an arbitration panel are afforded great deference, the decision to award attorney fees are only to be reversed upon demonstration of an abuse of discretion. "The decision to award or deny attorney fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "Similarly, the specific amount of attorney fees awarded pursuant to a statute authorizing reasonable attorney fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id. quoting Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008). "This standard is met only when the award is the product of an intentional or reckless flouting of the law, not a mere error in interpreting it." *Waldo v. Cousins*, 442 S.C. 662, 665, 901 S.E.2d 276, 278 (2024); *see also Kiriakides*, 382 S.C. at 20, 675 S.E.2d at 445 *quoting Layman*, 376 S.C. at 444, 658 S.E.2d at 325 ("[a]n abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.").

ARGUMENT

A. Respondent is Entitled to an Award of Attorney Fees.

Attorney fees are only recoverable when authorized by contract or statute. *See Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Here, S.C. Code Ann. § 29-5-10 provides that the "prevailing party" is entitled to costs, including attorney fees. The mechanic's lien statute provides in relevant part:

> (a) A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate…by virtue of an agreement with, or by consent of,

> the owner of the building or structure…shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the deed due to him. The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party. 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…
>
> (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 party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees.
>
> If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.
>
> If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code Ann. § 29-5-10.

Appellant highlights a portion of the above statute, which provides "…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." Appellant appears to argue that because the amount Respondent was awarded for its mechanic's lien was less than the amount awarded for Appellant's counterclaim, Respondent was not "entitled to a mechanic's lien," and thus, not the "prevailing party." Appellant is wrong for at least two reasons.

First, Respondent is entitled to a mechanic's lien. The arbitration panel found Respondent was entitled to $838,685.95, or 98.99 % of the mechanics lien amount it claimed in its complaint. The fact that such amount was offset against a larger amount does not eliminate Respondent's entitlement to it. The offset simply solves a logistical problem of having each party collect different amounts from the other and allows for the more simplistic practice of requiring only the party who was awarded the larger amount to collect.

Second, Appellant ignores the language in the entirety of the statute. The quoted language is clearly explaining how to determine the "one verdict" and not imposing a condition on the party pursuing the mechanic's lien. To determine the "one verdict," the Court (or arbitration panel) is to determine the amount the party pursuing the lien is entitled and then subtract from that the amount the opposing party was entitled from a compulsory counterclaim. The result is to reduce the litigation awards to "one" number.

Even more convincingly, the line of the statute that follows the line quoted by Appellant provides "[t]he party whose offer is closer to the verdict reached is considered the prevailing party in the action." It does not indicate the party pursuing the lien is the prevailing party only if its offer is closer and the amount it was awarded was greater than the amount awarded to the opposing party due to its counterclaim.

Put simply, nothing in the statute indicates that to be the "prevailing party" the amount of the mechanic's lien has to be greater than any counterclaim. And, Appellant does not cite to any such holding in any South Carolina case.

When the language in the entire statute is applied, the "one verdict" (even including interest awarded to Appellant) is $785,717.93 owed to Appellant. That amount was reached by

taking the full amount to which Appellant was entitled, including pre-judgment interest, of $1,624,403.88 and subtracting the full amount to which Respondent was entitled of $838,685.95.

As there is no dispute that neither party made any written offers of settlement, the "one verdict" was then compared to the amount sought in the complaint by Respondent, which was $847,236.20. This means Respondent was $1,632,954.13 short of the amount claimed.

Similarly, the "one verdict" was also compared to the amount sought in the counterclaims by Appellant, which Appellant conceded was $3,373,570.29 (exclusive of interest). This means Appellant was at least $2,587,852.36 short of the amount it claimed.[1] This is the math that the arbitration panel performed, which led them to correctly conclude Respondent was "clearly 'closer to the verdict reached' in this matter."

Put simply, under S.C. Code Ann. § 29-5-10 Respondent was the "prevailing party" and was entitled to attorney fees and costs.

Perhaps recognizing that the language of S.C. Code Ann. § 29-5-10 clearly indicates Respondent was the "prevailing party," Appellant argues the formula explicitly stated in the statute should be ignored in favor of Appellant's reading of the common law. Appellant's argument appears to be that since at the end of the day money was owed to Appellant, Appellant must have been the "prevailing party." Appellant relies upon *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006); *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) and *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990). However, none of the three cases support Appellant's position.

[1] While ultimately inconsequential to the determination, Appellant was given the benefit of pre-judgment interest to increase the amount of the "one verdict" in its favor, but pre-judgment interest was not added to the amount claimed in the counterclaim keeping that number lower. Thus, if the existence of pre-judgment interest were consistently applied, Appellant would have had an even larger shortfall.

In *EFCO*, a supplier of windows and framing systems was contracted to provide supplies to a real estate project. *EFCO*, 370 S.C. at 615, 635 S.E.2d at 923. The supplier filed a mechanic's lien but failed to bring an action to foreclose on that lien within six months as required by S.C. Code Ann. § 29-5-120. *See id*. at 616, 635 S.E.2d at 924. Accordingly, the Court of Appeals affirmed the determination that the owner of the property was the "prevailing party" because it prevailed on the merits of the mechanic's lien by demonstrating that the lien was not timely filed. *See id*. at 618, 635 S.E.2d at 925. It must be noted that as the supplier was awarded nothing on its mechanic's lien and, as the owner did not have a counterclaim, the "one verdict" was closer to the owner's "offer of settlement [which] is considered to be zero" under S.C. Code Ann. § 29-5-10.

EFCO does not support Appellant's argument. There was no offset of amounts in *EFCO*, rather the Court found the mechanic's lien was procedurally defective. Here, Appellant was not successful in defending against Respondent's mechanic's lien on a procedural or substantive basis. Respondent was awarded almost the entirety of the lien it sought. Moreover, the result in *EFCO* of an award of fees to the owner was consistent with the formula contained in S.C. Code Ann. § 29-5-10.

In *Seckinger*, a contractor made a claim of lien against the owner of a sailing vessel. *See Seckinger*, 326 S.C. at 385, 483 S.E.2d at 776. The Court of Appeals found that by S.C. Code Ann. § 29-5-10(b)'s use of the phrase "[t]he offer shall state that it is made…" required an offer to be made. *See id*. at 389-390, 483 S.E.2d at 779. As the Court found no written offers of settlement were made, "the definition of prevailing party found in § 29-5-10(b) is not applicable." *See id*. at 391, 483 S.E.2d at 779. Therefore, the Court found the "prevailing party" to be the party who received an award. *See id*. at 391, 483 S.E.2d at 780.

The South Carolina Supreme Court has effectively overruled the holding in *Seckinger* on two different occasions by holding that the S.C. Code Ann. § 29-5-10(b) test for the prevailing party is applicable, regardless of whether either party made a pre-trial settlement offer. *See Brasington Tile Co., Inc. v. Worley*, 327 S.C. 280, 289, 491 S.E.2d 244, 248 (1997) (describing the method to determine the "prevailing party" under S.C. Code Ann. § 29-5-10(b) when neither party makes a written offer of settlement); *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 614 S.E.2d 629 (2005).

In *JRS Builders*, the Supreme Court summarized the legislative history of S.C. Code Ann. § 29-5-10(b). *See JRS Builders*, 364 S.C. at 599-600, 614 S.E.2d at 631. The Court noted that the General Assembly amended the statute in 1999, which is the same version applicable to this case, to provide that if the defendant made no written offer of settlement, the value of his counterclaim is the negative offer of settlement. *See id.* Put simply, the Supreme Court explained how to determine the "prevailing party" under S.C. Code Ann. § 29-5-10, which was followed by the arbitration panel. Thus, *Seckinger* has been effectively overruled and certainly is not binding authority on which party is the "prevailing party" under the current version of S.C. Code Ann. § 29-5-10(b).

The dispute in *Heath* centered on the location and control of the communications division for Aiken County. *See Heath*, 302 S.C. at 179, 394 S.E.2d at 710. After the trial, Sheriff Heath sought attorney's fees under S.C. Code Ann. §15-77-300. *See id.* at 181, 394 S.E.2d at 711. While the Court in *Heath* engaged in a discussion of what it means to be the "prevailing party" under S.C. Code Ann. § 15-77-300, there is no discussion of S.C. Code Ann. § 29-5-10. *See id.* Accordingly, the discussion in *Heath* of who might be a "prevailing party" is irrelevant to a determination of who is the "prevailing party" under S.C. Code Ann. § 29-5-10. Clearly, the

language of the statute authorizing attorney fees is controlling as to who is awarded those fees. *See Jackson*, 326 S.C. at 307, 486 S.E.2d at 759 (1997) (Court held attorney fees are only recoverable when authorized by contract or statute).

The language in S.C. Code Ann. § 29-5-10 clearly sets forth a formula, which, when followed, indicates Respondent was the "prevailing party." Thus, Appellant cannot demonstrate the Circuit Court or the arbitration panel abused their discretion or erred in awarded attorney fees to Respondent.

B. The Amount of Fees Awarded to Respondent is Appropriate.

Despite seeking $317,541.81 in attorney fees and costs itself, Appellant argues Respondent was not entitled to the $228,600.00 awarded to it for attorney fees. As noted above, "the specific amount of attorney fees awarded pursuant to a statute authorizing reasonable attorney fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Kiriakides*, 382 S.C. at 20, 675 S.E.2d at 445 *quoting Layman*, 376 S.C. at 444, 658 S.E.2d at 325. Here, Appellant appears to argue the arbitration panel abused its discretion because the arbitration panel failed to properly apply the six factors in *Jackson v. Speed*. However, the arbitration panel went through each factor and explained how each factor justified its award of fees. (R pp ____ Final Award at pp 3-5).

As to the nature, extent and difficulty of the case, the panel noted it was "well aware of the complexities of this matter" given that it sat through a four-day arbitration.

As to the time necessarily devoted to the case, the panel noted Respondent's counsel spent "an appropriate amount of time on the case" as evidenced by a combined 762 attorney hours for the mechanics lien portion of the case compared to over 956 attorney and paralegal hours by Appellant.

As to professional standing of counsel, the panel noted the over 90 years of combined legal experience for Mr. Buchanan and Mr. Jeter.

As to contingency of compensation, the panel noted that for the mechanic's lien portion for the case both Mr. Buchanan and Mr. Jeter charged an hourly rate of $300, which was less than was typically charged.

As to the beneficial results obtained, the panel noted that Respondent recovered almost the entirety of its asserted mechanic's lien.

Finally, as to customary legal fees for similar services, the panel found the fees charged to Respondent for the mechanic's lien portion of the case was very similar to the amount charged to Appellant, and was thus customary and reasonable.

Accordingly, the arbitration panel, which was intimately familiar with the work at, and surrounding, the arbitration, did not abuse its discretion in awarding Respondent's $228,600.00 in attorney fees.

CONCLUSION

For the reasons stated herein, this Court should affirm the decisions of the Circuit Court and the arbitration panel to award Respondent its attorney fees.

Respectfully submitted,

August 14, 2026

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