

WEDNESDAY, FEBRUARY 18, 2009
11:00 A.M.

NO. 3

#24931, #24941

W.J. BACHMAN MECHANICAL
SHEETMETAL COMPANY, INC.,
Plaintiff

PAR GOLF CONSTRUCTION,
Plaintiff and Appellee,

vs.

WAL-MART REAL ESTATE BUSINESS
TRUST; BODELL CONSTRUCTION
COMPANY, INC. (Intervenor),
Plaintiffs and Appellants,

and FRONTIER MECHANICAL, INC.;
DAL SIN, INC. d/b/a M.J. DAL SIN;
and SPEARFISH EXCAVATING, INC.
Defendants and Third Party
Plaintiffs

vs.

WAL-MART STORES, INC.
Third-Party Defendant

TRAVELERS CASUALTY AND SURETY
COMPANY OF AMERICA and BODELL
CONSTRUCTION COMPANY, INC.,
Defendants and Appellants.

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Mr. Barton R. Banks
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(FOR APPELLANTS)

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(FOR APPELLEE)

The Honorable Warren G. Johnson
Fourth Judicial Circuit
Lawrence County

(CIV 05-523)

NOTICE OF REVIEW FILED JULY 22, 2008

STATEMENT OF LEGAL ISSUES

The issues presented on this appeal are as follows:

A.

WHETHER A MANDATORY ARBITRATION PROVISION IN A SUBCONTRACT BETWEEN A SUBCONTRACTOR AND CONTRACTOR MAY BE ENFORCED IN CONNECTION WITH LIEN CLAIMS FILED BY THE SUBCONTRACTOR.

The trial court held in the negative.

Burgi v. Rudgers, 108 N.W. 253 (SD 1906)

Oakdale Park, LTD v. Byrd, 346 So.2d 648 (NY 1970)

B.

WHETHER THE DATE OF THE LAST OF THE WORK PERFORMED ON A PROJECT FOR PURPOSES OF MAINTAINING A MECHANICS LIEN IN SOUTH DAKOTA CAN INCLUDE WARRANTY WORK

The trial court held in the affirmative.

F.H. Peavey & Co. v. Whitman, 82 S.D. 367, 369, 146 N.W.2d 365, 366 (S.D. 1966)

Thorson v. Pfeifer, 82 SD 313, 145 N.W.2d 438 (SD 1966)

C.

WHETHER A MECHANIC'S LIEN WHICH IS LARGELY UNITEMIZED IS UNENFORCEABLE AND INVALID IN ITS ENTIRETY.

The trial court held in the negative.

R & L Supply, Ltd. v. Evangelical Lutheran Good Samaritan Society, 462 N.W.2d 515 (S.D. 1990)

Crescent Electric Supply Co. v. Nerison, 89 S.D. 203, 232 N.W.2d 76 (1975)

D.

WHETHER A SUBCONTRACTOR CAN PROPERLY RECOVER AGAINST AN OWNER FOR UNJUST ENRICHMENT WHEN THE OWNER WAS CONTRACTUALLY ENTITLED TO THE SERVICES PROVIDED AND HAS PAID THE GENERAL CONTRACTOR FOR THE WORK.

The trial court held in the affirmative.

Hofeldt v. Mehling, 2003 SD 25, 658 N.W.2d 783

Velton v. McDonald, 234 N.W.2d 23 (SD 1930)

E.

WHETHER THE COST OF COMPLETING THE WORK PAR GOLF WAS REQUIRED TO PERFORM UNDER ITS CONTRACT SHOULD HAVE OPERATED AS A SETOFF AGAINST PAR GOLF'S CLAIMS.

The trial court held in the negative.

Hoaas v. Griffiths, 2006 SD 27, 714 N.W.2d 61

F.

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING LEGAL FEES TO PAR GOLF UNDER SDCL 44-9-42 WHERE THE LIEN WAS INSUFFICIENTLY ITEMIZED AND INVALID.

The trial court held in the negative.

Hoffman v. Olsen, 2003 SD 26, 658 N.W.2d 790

Arneson v. Arneson, 2003 SD 125, 670 N.W.2d 904

STATEMENT OF LEGAL ISSUES

APPELLANTS

I.

WHETHER THE DEFENDANTS WAIVED ANY ARGUMENT THAT THE LIEN FORECLOSURE SHOULD BE SUBMITTED TO ARBITRATION.

The trial court correctly held that they did. Action Mechanical, Inc. v. Deadwood Historic Preser. Com'n, 2002 SD 121, 652 NW2d 742; and Rossi Fine Jewelers, Inc. v. Gunderson, 2002 SD 82, 648 NW2d 812.

II.

WHETHER THE LIEN WAS FILED WITHIN 120 DAYS OF THE LAST DATE OF THE WORK PERFORMED.

The trial court correctly held it was. SDCL 44-9-15.

III.

WHETHER PAR GOLF SUBSTANTIALLY COMPLIED WITH THE ITEMIZATION REQUIREMENTS OF SDCL 44-9-16.

The trial court correctly held it did. SDCL 44-9-16; H & R Plumbing & Heating v. FDIC, 406 NW2d 151 (SD 1987); Riggenberg v. Wilmsmeyer, 253 NW2d 197 (SD 1977); and R & L Supply, LTD. Evangelical Lutheran, 462 NW2d 515 (SD 1990).

IV.

WHETHER PAR GOLF COULD RECOVER FOR UNJUST ENRICHMENT AGAINST THE PROPERTY OWNER WHO WAS NOT A PARTY TO ANY CONTRACT FOR IMPROVEMENTS.

The trial court correctly held it could. Action Mechanical, Inc. v. Deadwood Historic Preser. Com'n, 2002 SD 121, 652 NW2d 742.

V.

WHETHER BODELL WAS ENTITLED TO ANY OFFSET TO PAR GOLF'S CLAIM BASED ON THE AMOUNT THAT WAS WITHHELD FROM PAYMENT TO PAR GOLF UNDER THE RETAINAGE PROVISION OF THE SUBCONTRACT.

The trial court correctly held it was not. Black's Law Dictionary, Seventh Edition, page 430; South Dakota Civil Pattern Jury Instruction Number 21-01; and Stinson Chevrolet v. Connelly, 356 NW2d 480 (SD 1984).

VI.

WHETHER THE TRIAL COURT APPROPRIATELY AWARDED LEGAL FEES TO PAR GOLF UNDER SDCL 44-9-42.

The trial court correctly held such fees were appropriate under the circumstances of the case. SDCL 44-9-2; and Wald, Inc. v. Stanley, 2005 SD 112, 706 NW2d 626.

APPELLEE'S

I.

FOR PURPOSES OF APPLICATION OF SDCL 15-30-2, SHOULD THE SUPREME COURT CONSIDER PAR GOLF'S ALTERNATIVE PRAYER FOR RELIEF FOR THE FULL AMOUNT OF ITS DAMAGES ON THE UNJUST ENRICHMENT COUNT.

SDCL 15-6-8(e)(2); and SDCL 15-30-2.