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NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

DIVISION II

SEP 29 2021

THE KEY FINANCE, INC.,)

Plaintiff/Appellee,)

vs.)

DJ KOON,)

Defendant/Appellant.)

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JOHN D. HADDEN
CLERK

Case No. 119,063

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE SUSAN STALLINGS, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

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OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

DJ Koon appeals a trial court order denying his "Motion to Lift Stay and Modify and/or Vacate Arbitrator's Award on Attorney Fees." The question here is

whether it was trial court error to refuse to vacate the Arbitrator's denial of Koon's request for attorney fees although he was the prevailing party on The Key Finance, Inc.'s contract claim. After review, we reverse the trial court's order and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

This case has been the subject of two prior appeals. The Key Finance, Inc.,¹ originally filed this action seeking a deficiency judgment of \$7,596.17 against Koon related to the sale, financing, and repossession of a vehicle. Koon filed an answer and motion for class certification. Koon also stated counterclaims for Uniform Commercial Code violations, breach of contract, deceit, Oklahoma Consumer Protection Act violations, intentional infliction of emotional distress, a Federal Odometer Act violation, an Oklahoma Vehicle License and Registration Act violation, and class action claims for invasion of privacy, fraud, and violations of the Truth in Lending Act.

Key filed a motion to dismiss Koon's counterclaims also asking the trial court to compel arbitration. Key alleged that Koon was subject to a valid binding arbitration agreement which provides, in part:

¹ The Arbitrator would later note that, although Koon originally brought counterclaims against the owner of the vehicle's installment contract, The Key Finance, Inc., he later added as a third-party defendant the seller of the vehicle, The Key, LLC. The Arbitrator concluded, "The two entities are related but there was insufficient evidence entered to pierce the corporate structure of either. However, under the facts here, such a finding is not necessary to support the order."

Any claim or dispute, whether in contract, tort or otherwise (including interpretation and scope of this clause and the arbitrability of any issue), between you and us or our employees, agents, successors or assigns, which arises out of or relates in any manner to the purchase, financing, or lease of your vehicle or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Arbitration Agreement) shall, at your or our election (or the election of any such third party), be resolved by neutral, binding arbitration and not by a court action. Any claim or dispute is to be arbitrated on an individual basis and not as a class action, and **you expressly waive any right you may have to arbitrate a class action (this is called the “class action waiver”).**

Koon resisted Key’s attempt to compel arbitration, asserting in part that his signature on the purchase agreement was fraudulently induced. The trial court granted Key’s motion to compel arbitration and Koon appealed. In *Key Finance, Inc., v. Koon*, 2016 OK CIV APP 27, 371 P.3d 1133 (*Key I*), the Court of Civil Appeals reversed the trial court’s decision and remanded the matter for further proceedings after concluding, “Koon has presented evidence that Key’s agent owed him a duty of full disclosure because the agent chose to speak regarding the Arbitration Agreement.” *Id.* ¶ 16. This Court reversed the trial court’s “order compelling arbitration upon the granting of a directed verdict finding no fraud in the inducement of the Arbitration Agreement.” *Id.* ¶ 17.

On remand, Key filed a renewed motion to compel arbitration. The trial court again granted Key’s motion and Koon again appealed. In Case No. 116,388

(*Key II*), the Court of Civil Appeals noted that, on remand the trial court held a hearing “on the limited issue of whether Key’s agent conveyed a false impression to Koon with respect to the Arbitration Agreement.” *Key II*, pg. 2. Koon testified at that hearing “that Key’s agent told him the Arbitration Agreement meant that if Koon took legal action and lost or Key was required to undertake legal action, Koon would be responsible for its attorney’s fee.” *Id.* The Court noted that the lower “court specially found Koon’s testimony to not be credible.” *Id.* pg. 3. The Court affirmed the trial court’s order granting Key’s motion to compel arbitration.

After remand, the Arbitrator dismissed with prejudice the following claims by Koon: (1) intentional infliction of emotional distress, (2) violations of the Oklahoma Uniform Commercial Code stemming from Key’s sale of the vehicle after it repossessed it, and (3) Oklahoma Consumer Protection Act claims. The Arbitrator granted Koon’s motion to add a negligence claim and to conform the pleadings.

The Arbitrator noted that the dispute involved the July 12, 2012, sale of a used vehicle. The seller placed a 30-day temporary tag on the vehicle on July 14, 2012. The paperwork executed contemporaneously with the sale states that within 30 days of the sale the title would be mailed to the address provided. The paperwork further states that Koon must make bi-weekly payments of \$242 on or before the due date. It was Koon’s responsibility to obtain a title for the vehicle,

pay all taxes and fees, and to provide insurance for liability and physical damages, and if he failed to do so, Key had the right to declare the balance due immediately. Koon agreed in the sales contract to notify Key of any change in his address. He listed his address as 6103 S. Douglas Avenue, Oklahoma City, Oklahoma 73139.

The Arbitrator found that the uncontroverted evidence introduced at trial established Koon remained at the address he listed in the paperwork throughout the relevant time period. On August 14, 2012, Key mailed the title by certified mail. On August 15, 2012, Koon called Key, inquired about the title that had been mailed out the day before and verified his phone number. Key called Koon's supervisor on August 16, 2012. Key's note regarding the call states, "He was unable to come to phone calling about Ret Title." The title was returned to Key the next day as "Attempted—Not Known." The Arbitrator found:

The return receipt for the certified mailing indicates it was mailed to "DJ Koon 6103 S. Douglas Ave, OKC, OK 73139." However, the returned envelop itself had the address obscured by the "Returned to Sender" sticker applied by United States Postal Service. It is not available for inspection here as it was discarded by Key.

Although Key's own notes show the title was returned to it on August 17th, Key did not mail the title to Koon again, never told him it had been returned to Key and, in fact, kept the title at its title office. Although Koon called Key several times between the time the title was returned to Key and November 16, 2012, and made several payments in person to Key, Key never told Koon it had the title. On

November 23, 2012, the vehicle was impounded because its temporary tag had expired. Koon's payments on the vehicle were current and Koon had insurance on the vehicle at the time it was impounded. Koon, however, stopped making payments on the vehicle and allowed the insurance to lapse after November 23, 2012.

The Arbitrator found, "The vehicle was repossessed, sent to auction, and repurchased by Key in 2013. The sale of the vehicle was commercially reasonable and within a reasonable range of the amount Mr. Koon introduced as a reasonable retail sales value." There were multiple calls between Key and Koon between the impound date and the repurchase date. Despite having the title, Key told Koon that, in order to keep the vehicle from being repossessed, he needed to get the title, pay the taxes and late charges, bring the payments current, and pay the impound charges. The Arbitrator noted, "During the relevant time period, the person in charge of obtaining titles for Key was 'overworked' and 'reprimanded' for failing to get titles issued or provided to buyers." Koon had inquired about the title during the relevant time period, but Key told him that it had mailed the title to him. Key never told Koon it had the title in its possession.

Koon asserted a claim for fraud and requested exemplary damages because "Key withheld information about his title as part of a business plan that encourages vehicles it sells to be repossessed and resold, thus increasing its profit."

Throughout the arbitration proceedings, Key claimed that Koon's failure to timely obtain a title and tag for the vehicle resulted in the vehicle being impounded and "he is liable for a deficiency judgment because he failed to continue making payments or maintain insurance after the vehicle was impounded."

Without explaining the nature of Koon's fault regarding the title or citing evidence in the record supporting this conclusion, the Arbitrator found Key and Koon "share fault equally insofar as obtaining a title and tag." The Arbitrator then said, "While I do not find that Key's business model or its conduct in this case amount to fraud, I do find that it failed to comply with its own interpretation of its contractual responsibility with regard to Mr. Koon's title in this case." The Arbitrator denied Key's request for a deficiency judgment and found "Key's conduct under the facts unique to the case render the contract rescinded for failure of a material term." The Arbitrator ordered the contract rescinded, as Koon had requested, and determined that Koon's damages resulting from rescission were equivalent to his use of the vehicle up to its impoundment. The Arbitrator denied Koon's request for additional damages, finding the request for those damages to be speculative.

Both Key and Koon presented post-judgment motions for the recovery of fees and costs. Koon sought fees and costs pursuant to 12 O.S. § 936 as the prevailing party on the contract claim. Key asserted it prevailed on the greater

number of claims and was therefore the prevailing party. The Arbitrator concluded:

This matter was aggressively argued on multiple fronts starting with whether it belonged in arbitration at all. The size of the fees sought by both sides is evidence of that fact. While [Key] was ultimately unsuccessful in getting a deficiency judgment, it successfully rebuffed claims for monetary relief against it on multiple claims. It did so under an arbitration clause that required it to bear much of the cost of the arbitration. [Koon], while successful in having the contract rescinded, recovered no monetary award. Neither did he incur legal fees in doing so because of the contingent contract he negotiated with his counsel. While not determinative of the issue, these facts have been noted as reasons supporting the denial of fees/costs to both parties. Tibbetts v. Sight 'n Sound Appliance Centers, Inc., 2003 OK 72, 77 P.3d 1042.

The Arbitrator found that it would be “unfair” to hold either party responsible for the other’s fees and costs and denied both parties’ requests for fees and costs.

Koon asked the Arbitrator to reconsider the order on fees and costs. The Arbitrator again found that the Arbitration Agreement gave the arbitrator discretion in allowing fees and costs and that Key will pay the costs of the arbitration proceeding. The Arbitrator further found that neither party would be required to pay the other for fees and costs outside of Key’s responsibility for the costs of the arbitration.

Koon filed a motion with the District Court of Oklahoma County to lift the stay and modify or vacate the Arbitrator’s decision on attorney fees asserting that

he is entitled to fees as the prevailing party pursuant to 12 O.S. § 936 because he successfully defended himself on Key's breach of contract claim and prevailed on his own breach of contract claim. Koon appeals from the trial court's denial of that motion.

STANDARD OF REVIEW

"Whether the district court had authority to vacate the rulings on attorney fees and expenses in the arbitrator's award and modify the award to grant prevailing party attorney fees and expenses is a question of law. A question of law is reviewed *de novo*." *Sooner Builders & Invs., Inc., v. Nolan Hatcher Constr. Servs., LLC*, 2007 OK 50, ¶ 8, 164 P.3d 1063. "In its re-examination of a trial court's legal rulings an appellate court exercises plenary, independent and nondeferential authority." *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30 (I-30)*, 2003 OK 30, ¶ 5, 66 P.3d 442.

ANALYSIS

Koon asserts (1) the trial court should have vacated the arbitrator's refusal to award him prevailing party attorney fees, (2) he is entitled to attorney fees pursuant to Oklahoma law, specifically 12 O.S. § 936, because he is the prevailing party, (3) "the arbitrator manifestly disregarded the law and/or exceeded his authority," (4) the arbitrator's award is antithetical to Oklahoma statutory law and public policy, (5) the arbitrator specifically concluded that Koon's counsel's hourly rate

was reasonable and the hours expended were reasonable, and (6) the trial court erred when it denied his motion to lift stay. In short, Koon is asserting he is entitled to prevailing party attorney fees because he prevailed on the parties' contract claims. He argues the Arbitrator erred in not awarding fees to him pursuant to 12 O.S. § 936 and the trial court erred in failing to vacate the Arbitrator's decision on attorney fees because of that error. The first question we must address is whether Koon is a prevailing party pursuant to § 936.

I. Koon is a prevailing party on Key's contract claim

Koon asserts he is the prevailing party and thus entitled to attorney fees pursuant to 12 O.S.2011 § 936, which provides:

A. In any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

Section 936 specifically requires that "the prevailing party shall be allowed a reasonable attorney fee." As a general rule, "The word 'shall' expresses a command or a mandatory directive creating an unequivocal right that leaves no discretion with the court to deny it." *Antini v. Antini*, 2019 OK 20, ¶ 14, 440 P.3d 57. A contract relating to the sale of a vehicle is covered by § 936. *See, e.g., Bryan's Car Corner, Inc. v. Mangum*, 2017 OK CIV APP 10, 390 P.3d 982, and

Nayles v. Dodson, 2020 OK CIV APP 53, 476 P.3d 1245. Koon is correct in his assertion that this contract relating to the sale and repossession of a vehicle falls within the purview of § 936, and the award of attorney fees is mandatory if Koon is the prevailing party on Key's contract claim.

In *Sooner Builders & Investments, Inc. v. Nolan Hatcher Construction Services, L.L.C.*, 2007 OK 50, ¶ 17, 164 P.3d 1063, the Supreme Court instructed that when used "as a legal term of art," prevailing party "means the successful party who has been awarded some relief on the merits of his or her claim." In other words, the "traditional understanding [is] that a prevailing party is one who prevails on the merits or for who[m] final judgment is rendered." *Comanche Nation of Oklahoma ex rel. Comanche Nation Tourism Ctr. v. Coffey*, 2020 OK 90, ¶ 19, 480 P.3d 271.

Without question, Koon prevailed on Key's quest for a deficiency judgment that Key asserted from the sale and subsequent repossession of a vehicle sold to Koon and financed by Key. Throughout the arbitration, Key sought a deficiency judgment for the amount it asserted Koon owed for the purchase of the vehicle, subject to a financing agreement, and subsequent repossession of the vehicle. The Arbitrator ruled in Koon's favor on this claim finding that Key's conduct in failing to provide a title and failing to disclose it had possession of the title rendered the contract for which it was claiming a deficiency judgment "rescinded for failure of a

material term.” The only conclusion to be drawn from this is that Koon is the prevailing party because he successfully defeated Key’s contract claim against him and prevailed on his claim for rescission of the contract.

II. The trial court erred in refusing to vacate the Arbitrator’s award as to attorney fees

A similar dispute over competing attorney fee requests during arbitration arose in *Midwest Livestock Systems, Inc. v. Lashley*, 1998 OK 68, 967 P.2d 1197, in which both parties sought fees incurred during arbitration, citing 12 O.S. § 936 (contract for labor and services), 12 O.S. § 939 (breach of express warranty), and 42 O.S. § 176 (mechanics’ liens). *Id.* ¶ 3. The Supreme Court noted, “Each of these statutes provides for prevailing party attorney fees.” *Id.* When the arbitrator awarded attorney fees to one party but not the other, the Supreme Court found both parties prevailed in the case. *Id.* ¶¶ 4, 9. One party prevailed on the lien claim and the other on the breach of contract claim. *Id.* ¶ 9. The Supreme Court directed that each party should recover attorney fees from the other. *Id.* In other words, each statutory basis for attorney fees should have resulted in an award for the party successful on that claim. The Court noted, “Although the parties’ contract did not provide for an arbitration award of attorney fees, both parties agreed to allow the arbitrator to award attorney fees pursuant to these three statutes.” *Id.* n. 4.

The Arbitrator’s order on attorney fees in the present case states, “This matter comes before me on the post-judgment motions of both parties for the

recovery of fees and costs.” Because both parties asked the Arbitrator to award attorney fees, this placed the issue squarely before the Arbitrator despite the fact that the issue of attorney fees arising from the arbitration process is not clearly covered in the Arbitration Agreement.

The Arbitration Agreement signed by Koon mentions attorney fees only in the following context:

You may choose the applicable rules of either the American Arbitration Association (“AAA”) or another arbitration organization, subject to our approval. We waive the right to require you to arbitrate an individual (as opposed to a class) claim if the amount you seek to recover, including attorneys’ fees and expenses, is less than \$2,500. You may obtain a copy of the rules of the AAA by calling 1-800-778-7879 or by visiting its web site.

A separate portion of the Arbitration Agreement addresses the payment of “arbitration fees and costs”:

If you demand arbitration first, you will pay one half of any arbitration filing fee. We will pay the rest of the filing fee, and the whole filing fee if we demand arbitration first or if the arbitrator determines that applicable law requires us to do so or that you are unable to do so or that we must do so in order for this Arbitration Agreement to be enforceable. We will pay the arbitration costs and fees for the first day of arbitration, up to a maximum of eight hours. We will advance costs and fees on your behalf if directed to do so by the arbitrator, subject to later allocation by the arbitrator in accordance with applicable law. ***We will also pay any fees and charges that the arbitrator determines that we must pay in order to assure that this***

Arbitration Agreement is enforceable. The arbitrator shall decide who shall pay any additional costs and fees.

Although the Arbitration Agreement grants the Arbitrator the authority to decide “who shall pay any additional costs and fees,” this provision of the Agreement appears to address “arbitration costs and fees” and does not by its own terms encompass attorney fees.²

Aside from the Arbitration Agreement’s failure to permit the Arbitrator to decide attorney fee issues, the fact that both parties pressed for attorney fees properly put the issue before the Arbitrator. Support for this conclusion is found in the *Lashley* opinion where the parties agreed to allow the arbitrator to award attorney fees. Also, in *Hollern v. Wachovia Securities, Inc.*, 458 F.3d 1169 (10th Cir. 2006), the United States Court of Appeals for the Tenth Circuit concluded that even though the parties’ agreement “did not expressly permit an award of attorneys’ fees, the parties’ subsequent submissions to the arbitrators amended the original arbitration agreement to expressly authorize attorneys’ fees.” *Id.* at 1174. The Court noted, “Arbitrators derive their authority from the parties’ arbitration agreement. The parties may extend that authority, however, in their submissions to

² The Arbitrator’s reading of this provision appears to bear out this conclusion as shown by his May 19, 2020 order denying Koon’s motion to reconsider the denial of his motion for fees and costs. The Arbitrator states: “The arbitration agreement gives the arbitrator discretion in the allowance of fees and costs, particularly those associated with the arbitration proceeding itself, which to date have been and, accordingly, will continue to be borne entirely by Key who drafted the arbitration agreement and sought its enforcement.”

the arbitrators so long as the submissions do not violate an express provision of the original arbitration agreement.” *Id.* Because the Arbitration Agreement here does not expressly address the issue of attorney fees, the pursuit of fees by both parties before the Arbitrator does not violate the Arbitration Agreement.

In *Sooner Builders & Investments, Inc. v. Nolan Hatcher Construction Services, LLC*, 2007 OK 50, 164 P.3d 1063, an arbitrator denied all requests for attorney fees incurred in the course of arbitration. *Id.* ¶ 4. Sooner Builders filed a motion in the district court to modify the arbitrator’s award asserting “that the arbitrator manifestly disregarded the clear mandate in the subcontract and in Oklahoma law requiring prevailing party attorney fees.” *Id.* ¶ 6. The trial court, concluding “that the arbitrator manifestly disregarded the law,” granted Sooner’s request for attorney fees and other costs and expenses. *Id.* Nolan Hatcher Construction Services appealed that decision. *Id.* ¶ 7.

The Supreme Court noted, “The parties’ agreement in this case provided for prevailing party attorney fees and other expenses of litigation or arbitration.” *Id.* ¶ 14. The Court noted that 12 O.S. § 936, “[i]n mandatory language similar to that used” by the parties in their agreement, “gives the prevailing party in a civil action a right to recover attorney fees.” *Id.* ¶ 18. The Court stated, “Section 936 applies to a party who is successful on a contract claim as specified therein even when

another party is successful on another claim and entitled to attorney fees under a different statute.” *Id.*

Title 12 O.S.2011 § 1874 governs the circumstances under which a court may vacate an arbitration award:

A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

1. The award was procured by corruption, fraud, or other undue means;

2. There was:

a. evident partiality by an arbitrator appointed as a neutral arbitrator,

b. corruption by an arbitrator, or

c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act, so as to prejudice substantially the rights of a party to the arbitration proceeding;

4. An arbitrator exceeded the arbitrator’s powers;

5. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act not later than the beginning of the arbitration hearing; or

6. The arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 of

this act so as to prejudice substantially the rights of a party to the arbitration proceeding.

The *Sooner Builders* Court concluded:

The parties' agreement is the source of the arbitrator's power. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53, 94 S.Ct. 1011, 1022, 39 L.Ed.2d 147 (1974). The parties' agreement may give the arbitrator broad power, and it may confine and limit the arbitrator's power. The arbitrator serves as the proctor of the parties' agreement and has the obligation to effectuate the intent of the parties' agreement. *Id.* When the arbitrator's award manifests an infidelity to the parties' agreement, the courts must refuse to enforce the award. *Id.*

Id. ¶ 24. Although the parties did not expressly provide for prevailing party attorney fees in their agreement, they did agree to put the issue of entitlement to attorney fees before the Arbitrator.

We note that the Supreme Court in *Sooner Builders* refused to specifically "adopt or reject the non-statutory 'manifest disregard of the law' basis for vacating the arbitrator's denial of prevailing party attorney fees and expenses because there is a statutory basis" where the arbitrator "exceeded his authority when he ignored the prevailing party attorney fee and expense provision in the parties' agreement."

Id. ¶ 28.

We must, however, also consider the holding of *Midwest Livestock Systems, Inc. v. Lashley*, 1998 OK 68, 967 P.2d 1197, and in doing so, we conclude that this holding dictates that when the Arbitrator failed to award attorney fees to the

prevailing party pursuant to § 936, we must reverse and remand the issue to the district court to determine and award reasonable attorney fees to Koon relating to his defense of Key's breach of contract claim. Further, because the Arbitrator did not specifically find that Key prevailed on a claim for which there is a statutory mandate for attorney fees and Key did not seek review of the Arbitrator's order in this respect, the trial court may not consider the denial of Key's request for attorney fees.³ However, the fee award to Koon must be limited to those attorney fees and costs incurred in defending against Key's claim to a deficiency judgment arising from the contract in question and in Koon's pursuing his claim for rescission of that contract.⁴

We reverse the trial court's decision not to lift the stay and vacate the portion of the Arbitrator's award denying Koon's request for attorney fees as the prevailing party in the contract action. We vacate that portion of the Arbitrator's decision and remand for the trial court to determine the reasonable amount of

³ Even if both parties were entitled to recover fees, they would not "cancel each other out," as the trial court speculated. Each party would be entitled to recover the reasonable and necessary attorney fees incurred in successfully prosecuting and/or defending their fee-bearing claims, independent of the fees claimed by the other party. Each statutory basis for attorney fees would result in an award for the party successful on that claim. *Midwest Livestock Sys., Inc. v. Lashley*, 1998 OK 68, ¶ 0, 967 P.2d 1197.

⁴ It should be noted that whether Koon's attorney fee arrangement with his counsel is hourly, contingent or semi-contingent plays no part in determining entitlement to attorney fees. Otherwise, as Koon points out, a strange dichotomy would exist "if attorneys paid by the hour may recover their fees while those achieving meaningful court access for the indigent may not."

attorney fees and costs pursuant to § 936 to which Koon is entitled consistent with this Opinion.

CONCLUSION

We reverse the decision of the trial court denying Koon's motion to modify or vacate the Arbitrator's award on attorney fees. We remand for further proceedings consistent with this Opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BARNES, J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

Section 936 provides for mandatory attorney fees to the prevailing party "unless otherwise provided by law or the contract which is the subject of the action." 12 O.S. § 936. After specifically allocating certain fees and costs, the contract here provided: "The arbitrator shall decide who shall pay *any additional costs and fees.*" R. 1236 (emphasis added). In my view, this broad language vested the arbitrator with the authority to determine whether to award *any fee* or *any cost* to either party, or not. The majority opinion adds language to the contract in finding that "this provision of the Agreement appears to address '*arbitration costs and fees*' and does not by its own encompass attorney fees." *Majority*

Opinion, pg. 14 (emphasis added). In my view, the reference in the contract to *any* fee necessarily encompasses an attorney's fee.

Because I believe the language of the contract gave the arbitrator discretion to award attorney fees, the case does not fall under the mandatory provision of § 936. I would uphold the district court's affirmation of the arbitrator's order denying fees and costs to both parties, and therefore respectfully dissent.

September 29, 2021