IN THE SUPREME COURT OF MISSISSIPPI
NO: 2007-TS-00648

INDUSTRIAL STEEL CORPORATION — APPELLANT

v.

STEEL SERVICE CORPORATION — APPELLEE

APPEAL FROM THE
CIRCUIT COURT OF
RANKIN COUNTY, MISSISSIPPI

BRIEF OF APPELLEE, STEEL SERVICE CORPORATION
(ORAL ARGUMENT NOT REQUESTED)

Counsel for Appellee:
DAVID W. MOCKBEE, MS Bar [redacted]
MARY ELIZABETH HALL, MS Bar [redacted]
MOCKBEE HALL & DRAKE, P.A.
Capital Towers, Suite 1820
125 S. Congress Street
Jackson, Mississippi 39201
Telephone: 601-353-0035
Facsimile: 601-353-0045

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal:

Industrial Steel Corporation, Plaintiff-Appellant;

Robert Donald, President, Industrial Steel Corporation;

Harvey L. Fiser, Trial Counsel for Plaintiff-Appellant, now working with Wyatt, Tarrant & Combs, LLP;

Lynn Patton Thompson, Trial Co-Counsel for Plaintiff-Appellant, now working with Robinson, Biggs, Ingram, Solop & Farris, PLLC;

Christopher Solop, Attorney of Record for Plaintiff-Appellant, Robinson, Biggs, Ingram, Solop & Farris, PLLC;

Steel Service Corporation, Defendant-Appellee;

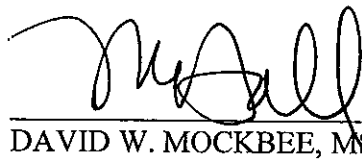
Lawrence A. Cox, President, Steel Service Corporation;

David W. Mockbee, Attorney of Record for Defendant-Appellee, Mockbee, Hall & Drake, P.A.;

Mary Elizabeth Hall, Attorney of Record for Defendant-Appellee, Mockbee, Hall & Drake, P.A.;

The Honorable Kent McDaniel, County Court Judge, County Court of Rankin County, Mississippi;

The Honorable William E. Chapman, III, Rankin County Circuit Court Judge.



DAVID W. MOCKBEE, MS Bar #3396
MARY ELIZABETH HALL, MS Bar #9169

ORAL ARGUMENT NOT REQUESTED

Steel Service Corporation respectfully suggests that oral argument will not significantly assist this Court in resolving the issues presented in this breach of contract claim which have been adequately presented in the parties' briefs and in the record.

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IN THE SUPREME COURT OF MISSISSIPPI
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INDUSTRIAL STEEL CORPORATION — APPELLANT

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STATEMENT OF THE ISSUES

The issues on appeal have been adequately stated by Appellant, Industrial Steel Corporation ("ISC") and need not be reiterated.

STATEMENT OF THE CASE

1. The Nature of the Case[1] and the Course of Proceedings Below.

This garden variety breach of contract action was filed by ISC in the County Court of Rankin County, Mississippi, against Appellee, Steel Service Corporation ("Steel Service"), seeking to recover the full amount of its purchase order of $68,000 for Steel Service's alleged breach of the parties' contract (R.00008)[2] for the fabrication of structural steel for two restaurant and gasoline station island/oases erected by others over Interstate I-90 outside of Chicago, Illinois at the O'Hare and Belvidere Exits (Ex. D-5).[3] Steel Service answered and

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[1] ISC's "Nature of the Case" misstates this Court's function which is not to make de novo factual determinations as ISC suggests but to decide if the trial judge's findings were "supported by substantial, credible and reasonable evidence." Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d 1052 1055 (Miss. 2005).

[2] "R" refers to the Record on appeal. "T" refers to the Trial Transcript, and "Ex." refers to the Exhibits introduced at trial.

[3] ISC attaches to its Brief as Exhibit "A" the same two photographs which ISC attached to its Brief on appeal to the Circuit Court, claiming they are the completed projects. These unauthenticated photographs were not introduced at trial and were stricken by the Circuit Court on appeal. ISC did not appeal this issue to this Court and, for reasons stated in Steel Service's Motion to Strike filed simultaneously herewith, such photographs should not be considered even for "illustrative purposes only"

counterclaimed, seeking to recover the approximate amount of $60,000, being the costs it incurred to complete and correct ISC's work and $28,626.45, being the principal unpaid amount of raw materials purchased by ISC from Steel Service on open account (R00029).

After two days of trial (June 22, 2005 and October 6, 2005), during which a total of 56 exhibits were introduced and five witnesses – one witness for ISC (its President) and four for Steel Service, including its Vice President of Purchasing, its Project Manager, its Vice President of Operations, and its Executive Vice-President – testified, the trial judge found that "there is no doubt that [ISC] was in breach of this contract on the essential element of time," ISC "did not properly man the job, . . . as a result [ISC] was unprepared to ship the first portion of this two-phased Project on the agreed-upon date" (R.00161) (emphasis added).

The trial judge further found that, even though ISC "suggested some reasons why they might have an excuse for that," "I find it to be shown to me by a preponderance of the evidence that they did not timely address this job and get on with it as they should have knowing they had such a tight timetable" (T.435). See also, Bench Opinion at ¶¶ 1, 3 (R.00161-00165).

The trial judge then apportioned the $68,000 contract amount between ISC and Steel Service, finding that ISC performed 59.20% of its total contract, or $40,256.00 ($68,000 x 59.20%) (R.00164) and that, after deduction of $21,942.90, previously paid by Steel Service and $8,657.80 for some of Steel Service's costs incurred to correct ISC's work, ISC was entitled to $9,655.60 (R.00164-00165).

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as suggested by ISC. Brief of Appellant, at 3, n.1.

The trial judge also found that Steel Service was entitled to the remaining contract balance of $36,401.50[4] (including $8,657.80) to compensate it for the costs it incurred to complete and correct ISC's work, calculated as follows:

$68,000.00	
($21,942.90)	Paid to ISC (Ex. D-33)
$46,057.10	
($9,655.60)	Awarded to ISC
$36,401.50	

(R.00164-00165).

The trial judge also found that Steel Service was the "prevailing party," entitled to an award of attorneys' fees and expenses in the amount of $23,731.55 (R.00233-00234) pursuant to the parties' contract (Ex. D-5), for the reason that "but for [ISC's] breach of an essential element of the contract, none of this litigation would have been necessary" (R.00165).

ISC, miffed by the trial judge's ruling, appealed to the Circuit Court of Rankin County where it was soundly trounced a second time and ordered to pay Steel Service's attorneys' fees ($10,359.75) and expenses ($11.07) incurred on appeal[5] (R.00105-00107). Still aggrieved, ISC appealed to this Court.

2. Statement of Facts.

Unfettered by the facts established at trial and the record on appeal, ISC's appellate counsel, who did not try the case, crafts the case he wishes was tried. Thus, the following

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[4] At trial, Steel Service sought to recover the total amount of $53,825 for the costs to complete approximately 44% of ISC's contract and to correct ISC's work (Exs. P-17;D-25). ISC, contrary to its new-found position on appeal, sought to recover the total purchase order amount of $68,000 (R.00008, 00010).

[5] Steel Service has also moved for award of attorneys' fees and expenses incurred on this appeal.

Statement of Facts is offered by Steel Service.

a. The Parties' Purchase Order.

Steel Service is a medium-sized structural steel fabricator which employs 230-240 people and which has plants in Flowood and Brandon, Mississippi (T.204). Steel Service fabricates columns, beams and trusses for hospitals, convention centers, ball parks, and automotive industry plants, ranging from 150 tons to 10,000 tons (T.204). By letter dated October 14, 2003, Steel Service solicited a price from ISC to fabricate the four trusses, sixteen wide flange columns, and four pipe columns for Belvidere and O'Hare oases outside of Chicago, Illinois,[6] based on raw materials and shop drawings provided by Steel Service and delivery dates for the steel for O'Hare on November 20, 2003 and for Belvidere on December 4, 2003[7] (Ex. D-2). ISC responded on October 27, 2003 with a price of $83,369 (Ex. D-3), or almost $20,000 more than Steel Service's estimate for the fabrication labor for the Project (Ex. D-36; T.211-212).

In the meantime, Steel Service received the shop drawings to be used to fabricate the steel and, as a result, on October 28, 2003, ISC re-priced the Project for a total of $68,000 (T.212), still $3,244 more than Steel Service's budget (Ex. D-36) based on the following ISC estimate of manhours[8] (Ex. D-4) produced by ISC to Steel Service in discovery:

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[6] Each oasis was constructed from two trusses, each approximately 240 feet long, two "C-3," or pipe, columns and eight "C-4," or wide flange, columns. Each truss was made from four truss sections, two long sections which were each approximately 72 feet long and two short sections which were each approximately 47 feet long, for a total of eight truss sections per oasis, or 16 truss sections for the total Project. The truss sections are sometimes referred to in the Trial Transcript and/or the Exhibits as "28M-2," "28M-3," "29M-1," and "30M-1" (Ex. D-3). So, each oasis had eight truss sections (or two trusses), two pipe columns and eight wide flange columns (Ex. D-5).

[7] Steel Service had previously entered into a contract with HLM Construction Corporation ("HLM") whereby Steel Service agreed to fabricate and deliver the structural steel for the two Projects, being approximately 150 tons, for $181,635, including the cost of the raw steel (Ex. D-1).

[8] Steel Service estimated a total of 1,826 manhours, consisting of 958 manhours for the

Wide Flange Columns	928 Manhours
Pipe Columns	62.93 Manhours
Short Beams	27.8 Manhours
Short Trusses	384 Manhours
Long Trusses	400 Manhours
1,802.73 Manhours	

On October 28, 2003, Steel Service accepted ISC's offer and, ISC and Steel Service executed a purchase order for $68,000 which Steel Service hand-delivered to ISC (Ex. D-5; T.213) that same day, along with all of the shop drawings needed by ISC to fabricate the steel (Ex. D-6) and the first load of raw steel, consisting of all four pipe columns and four short and four long truss top chords, totaling 22.74 tons of the total 150 tons (Ex. D-7; T.215).

The parties' purchase order included the following Project Schedule (Ex. D-5), consistent with Steel Service's October 14 letter to ISC, requesting a price (Ex. D-2):

Project Schedule for the O'Hare and Belvidere Oasis Project

Location	Description	Ship By Date	Delivery Date
O'Hare	**(2) C3 Columns**	**11/18/2003**	**11/20/2003**
	(8) C4 Columns	**11/18/2003**	**11/20/2003**
	(4) Complete Trusses	**11/18/2003**	**11/20/2003**
Belvidere	**(2) C3 Columns**	**12/2/2003**	**12/4/2003**
	(8) C4 Columns	**12/2/2003**	**12/4/2003**
	(4) Complete Trusses	**12/2/2003**	**12/4/2003**

Note: Please Inform Steel Service two days prior to Steel being ready to ship

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trusses, 68 manhours for the pipe columns, and 800 manhours for the wide flange columns (Ex. D-36).

Based on the Project Schedule, ISC had 21 calendar days (or 16 work days) to fabricate O'Hare. ISC's president, Robert Donald, testified that ISC could fabricate O'Hare in two weeks "with leniency," "with no overtime," and "no strain" (T.39).

b. ISC's "Excuses" for Its Failure to Meet the Project Schedule.

All materials, except the bottom chords for the trusses, being over 80% of the material, were delivered to ISC by Friday, October 31, 2003 – within three days of the parties' contract (Ex. D-7; T.216). As a result, as of Friday, October 31, 2003, ISC had all materials for four pipe columns, sixteen wide flange columns, and for the four trusses except for the bottom chords which had to be "rolled" to create an arc (T.39-40). Thus, as of October 31, 2003, ISC had 106.92 tons of material out of 150 tons (Ex. D-7) and, based on ISC's estimate (Ex. D-4), it had over 1,000 manhours which it could perform.

Steel Service tried to "push" the arc in the bottom chords in its own shop (T.210), but was not satisfied with the results (T.216). As a result, the following Monday, November 3, 2003, Steel Service advised ISC that the bottom chords were being sent to WhiteFab in Birmingham, Alabama to be "rolled" and that it would take approximately three to four days before they would be delivered to ISC (T.217-218).

Four days later, on Friday, November 7, 2003, all eight bottom chords for the short trusses and four of the spliced pieces for the bottom chords for the long trusses, consisting of almost 21 tons, were delivered to ISC's Laurel plant (Ex. D-7; T.218-221).[9] On Tuesday,

[9] Although Steel Service was aware that ISC had a plant in Laurel, there had never been any discussion about which plant (Pearl or Laurel) ISC would use and Steel Service understood that the Pearl plant would fabricate the material because all of ISC's equipment was located in Pearl and there had been no discussion about freight or shipment of materials to Laurel (T.214).

November 11, 2003, ISC received all of the remaining bottom chords which were for the long trusses, consisting of 14 tons (Ex. D-7; T.221). Although ISC vehemently complained at trial that the delivery of the bottom chords delayed its ability to meet the O'Hare ship date of November 18, 2003 (T.43), ISC never notified Steel Service, verbally or in writing, or otherwise complained that it was being delayed by Steel Service (T.222, 230, 259, 262, 355).

In the meantime, on Tuesday, November 4, 2003 – the day after ISC received the bottom trusses for the short trusses – ISC returned the top chords for both long and short trusses to Steel Service to be shotblasted to remove rust from the material (Ex. D-10; T.224). ISC had received these materials as of October 31, 2003 and held them for at least four days before returning them (Ex. D-7).

Steel Service arranged to have the materials taken off of ISC's truck, shotblasted and put right back on the truck (T.223). The actual shotblasting of the material took less than one hour (T.224) and the materials were ready for ISC to pick up. Again, ISC never complained to Steel Service orally or in writing that the need to remove rust from the materials[10] was delaying or preventing ISC from meeting the O'Hare "ship by" date of November 18, 2003 (T.223, 230, 265, 355).

Three days later, on Friday, November 7, 2003 – the same day the remaining bottom chords for the trusses were delivered to ISC (Ex. D-7) – ISC returned more top chords to Steel

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[10] Steel Service witnesses testified that they frequently fabricate using materials that have rust on them without difficulty (T.223, 238, 356). ISC complained at trial in general terms about alleged difficulties fabricating using materials with rust on them but never quantified with any specificity the nature and extent of the alleged delay which Steel Service's witnesses quantified in terms of 3-30 seconds to "knock off the rust to weld" the steel (T.314, 356-357). Thus, it appears that the real delay, if indeed there were any attributable to rust, was caused by ISC's unilateral and undisclosed decision to fabricate the trusses in its Laurel plant and its decision to drive the trusses from Laurel to Flowood to be shotblasted.

Service to be shotblasted (Ex. D-13; T.225-226), again without complaint that the need to return these materials to be shotblasted was causing a delay (T.226, 265). In fact, although Steel Service again arranged for these materials to be shotblasted upon delivery and even though ISC vociferously complained at trial about delay due to rust, ISC did not pick up the materials until Monday, November 10, 2003 (T.226, 359-360).

Next, on Wednesday, November 12, 2003, ISC (Robert Donald, ISC's President) called Steel Service (John Oxley, Steel Service's Vice-President of Purchasing and Donald's golf buddy) to verify a dimension on Drawing G2 for the bottom chord of the long truss – which ISC received five days earlier – and which Steel Service answered in "about five minutes" (Ex. P-6; T.227-228). Although ISC now complains that the confusion caused by a dimension in the wrong place on Drawing G2 was a cause of delay, during their conversations on November 12, ISC never complained that the mistake on the Drawing would affect its ability to meet the O'Hare schedule (T.229). In fact, John Oxley, Steel Service's Vice President of Purchasing, and Robert Donald, ISC's President, continued to play golf during the entire period of ISC's Project performance and Donald never complained to Oxley that Steel Service was delaying ISC (T.230).

Indeed, ISC had no reason to complain because ISC had more than enough work to perform (T.226-269; Exs. D-4, D-26, D-27) and could easily have met the O'Hare November 18, 2003 ship date despite the alleged delays. According to ISC's estimate (Ex. D-4), ISC estimated 1,802.73 manhours for both O'Hare and Belvidere, including approximately 990 manhours for all 20 columns (4 pipe columns and 16 wide flange columns) and approximately 740 manhours for the trusses (Ex. D-4). However, as of November 17, 2003 – the day before the O'Hare

November 18, 2003 ship date – ISC had only completed three wide flange columns out of the eight columns required for the O'Hare Project (Ex. D-15; T.280) even though ISC had the materials for all columns, pipe and wide flange, as of October 31, 2003 (Ex. D-7) and had estimated 990 manhours for the columns (Ex. D-4).

c. ISC's Failure to Prosecute the Work.

ISC offered no excuse at trial for its failure to complete the two pipe columns and the remaining five wide flange columns required for O'Hare which were incomplete as of November 17, 2003 and instead focused at trial on alleged problems with truss deliveries, rusted truss materials, and its alleged confusion about the truss drawing. However, the evidence at trial was overwhelming that ISC's failure to meet the O'Hare ship date was not caused by these alleged truss problems manufactured by ISC after-the-fact but by ISC's failure to timely prosecute the work from the beginning (Exs. D-26, D-27; T.367, 383-388, 390).

Indeed, ISC's own timesheets established that ISC did not meet the O'Hare November 18, 2003 ship date because ISC did not start work on this Project until November 10, 2003 – eight calendar days before the O'Hare ship date (Ex. D-40; T.406-411). In fact, ISC's timesheets established that ISC only worked on this Project a total of 198.5 hours from October 30, 2003 to November 8, 2003 whereas it worked 1,059.75 manhours on other projects during that same period (Ex. D-40) even though it had all but 14 tons of the materials (Ex. D-7) and almost all of the approximately 1,800 manhours of work as of November 7, 2003 (Exs. D-4, D-7).

d. Steel Service's "Shock and Panic".

On Thursday, November 13, 2003, Steven Tillery, Steel Service's Project Manager, called John Stearns, ISC's Project Manager, to inquire about the status of the O'Hare Project and

to tell him that trucks would arrive at ISC's Pearl plant on Monday, November 17, 2003 for loading and shipment on November 18, 2003 (T.271). On November 13th, John Stearns confirmed that "as far as he knew everything was fine and he would call back if there was a problem" (T.271). When John Stearns did not call back, Steven Tillery notified its customer, HLM, that the materials would be timely delivered and to schedule the interstate lane closures and the crane for erection of the steel for November 20, 2003 (T.272). On Monday, November 17, 2003, Steven Tillery called John Stearns on his way to work to advise him that the trailers were being delivered that morning and learned for the first time that ISC was not ready and "it would probably be a couple of weeks" (T.272).

Steven Tillery immediately contacted HLM to cancel the lane closure permits and the crane and attended the regularly-scheduled Steel Service Monday morning production meeting with all department heads, vice presidents (T.273), including Steel Service's President, Larry Cox, and its Executive Vice President, Jim Simonson, who testified that his reaction to the situation was "shock and panic" as this was the first time there was any indication from ISC that there was any problem meeting the O'Hare ship date (T.400). As a result, they "cut [the] meeting short" and Larry Cox directed Steven Tillery and Doug Fiorilli, Vice President of Operations, to immediately drive to Laurel to assess the magnitude of the problem and report back (T.273-274, 400).[11]

[11] For whatever reason, Robert Donald testified at trial that Messrs. Tillery and Fiorilli called him on November 17 for directions from the Gulf Coast and that they were just stopping by for a visit on their way back to Jackson (T.157). Messrs. Tillery and Fiorilli obviously denied that they said they were just there to visit (T.274, 362). And, since it was the day before the O'Hare ship date, Mr. Donald's testimony is quite incredible.

In Laurel, Steven Tillery and Doug Fiorilli found "minimum work done" and only 10-15 men working in the Laurel shop (T.274, 363-365). Based upon discussions between Doug Fiorilli and Robert Donald, decisions were made as to what work would be performed by ISC and what work would be performed by Steel Service (T.276, 364) as it was clear that the work that had to be completed could not be done by one of them without significant delay (T.276, 364). As a result, ISC started shipping materials back to Steel Service that day (Ex. D-16).

During their meeting on November 17, 2003, Robert Donald never blamed Steel Service or mentioned any of the "excuses" he now uses and even commented to Steven Tillery that he had been trying to close the Laurel plant because he did not have anyone other than himself to operate the plant and that Steel Service was actually helping him out by taking the material back (T.276-277).[12]

In the meantime, the general contractor had been contacted by Steel Service and he was so concerned that he flew into Jackson that afternoon to discuss Steel Service's plan for recovery of the Project schedule (Ex. D-17; T.277, 283, 401). The schedule presented to the general contractor that afternoon provided that the last load of material for the O'Hare Project would be shipped on November 20, 2003 (Ex. D-17) for delivery on November 22nd, or a two-day delay. Steel Service cleared both its Brandon and Flowood shops of all other work and pushed this Project through and met the O'Hare extended ship date of November 20, 2003, spending almost

[12] Clearly, the situation was not one whereby Steel Service "decided to perform" ISC's work as ISC's appellate counsel says. Brief of Appellant, at 5. Indeed, as the testimony of the Steel Service witnesses made clear – Steel Service had no choice but to take some of ISC's work back to avoid significant delays (T.276, 364)

1,200 manhours,[13] including 172.5 manhours to correct ISC's defective work (Ex. D-24; Ex. D-32; Ex. P-17; T.374-379).

e. The Parties' Pre-Suit Discussions.

Then, on December 11, 2003, after delivery of all steel, Steven Tillery and Robert Donald met in an unsuccessful effort to close out their contract (T.287). Steven Tillery had prepared Steel Service's original Contract Change Proposal for $60,823 for the costs incurred by Steel Service to complete and correct ISC's work (Ex. D-21) which he showed to Robert Donald (Exs. P-16, D-21; T.287). ISC's response was ISC's appellate attorney's December 18, 2003 letter, demanding that ISC be paid all $68,000 despite the fact that Steel Service had performed substantial work and incurred substantial costs to complete and correct ISC's work (Ex. D-22; T.290). That same day, Steel Service also received ISC's invoice for $61,104, which ISC computed by adding $7,239 for overtime to the original contract amount of $68,000 and by deducting $14,135 as ISC's credit to Steel Service for work performed by Steel Service (Ex. P-15).

Steel Service responded by letter dated December 29, 2003,[14] summarizing the events leading up to Steel Service's completion and correction of ISC's work and describing, in detail,

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[13] ISC says that Steel Service decided to take the work back so that it could perform change order work at an increased hourly rate and at the same time backcharge ISC. Brief of Appellant, at 5. There is absolutely no basis in the record for ISC's appellate counsel's outrageous accusation which it makes for the first time here. In fact, the only proof of change order work was that 210 manhours out of a total of 1,393.30 manhours were inadvertently included in Steel Service's Contract Change Proposal to ISC (Ex. P-17) and in Steel Service's Contract Change Proposal Nos. 3B and 3C submitted by Steel Service to HLM for extra work (Ex. D-32). When ISC notified Steel Service of this error, Steel Service immediately corrected its mistake and paid ISC the additional amount of $7,767.90 (Ex. D-33), being the amount owed ISC for work performed by it after deducting the 210 manhours from Steel Service's claim.

[14] ISC says it heard nothing further from Steel Service after sending its invoice (Ex. P-15). Appellant's Brief, at 5. Obviously, ISC forgets Steel Service's December 29, 2003 (Ex. D-22), explaining

that work performed by Steel Service to complete and correct ISC's contract (Ex. D-22). That same letter also reiterated Steel Service's expectation that there would be backcharges by the general contractor for the delays in shipment of O'Hare and that, as a result of Steel Service's backcharges and other anticipated backcharges, payment of the undisputed contract balance could not be made to ISC (Ex. D-22). No further discussions were had between Steel Service and ISC because ISC sued Steel Service on February 3, 2004 for $68,000, being the entire contract amount (R.00008-00011).

f. ISC's Lawsuit.

After suit was filed, Steel Service discovered that ISC owed Steel Service $28,626.45 for raw materials purchased by ISC on open account from Steel Service during the time period November 12, 2003 to February 20, 2004 (Ex. D-28 (for identification); T.310) in addition to the $60,853.00 for the costs to complete and correct ISC's work (Ex. D-21). As a result, Steel Service filed an answer and counterclaim (R.00029-00036).

On or about February 2, 2005, Steel Service and ISC resolved Steel Service's counterclaim on the open account for $28,626.45 whereby ISC paid Steel Service $14,451.45[15] (Ex. P-18), computed by deducting the then-undisputed amount owed by Steel Service to ISC on the Project of $14,175 ($68,000 - $53,825[16]) from $28,626.45.

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the circumstances in detail.

[15] ISC's appellate counsel mistakenly says that Steel Service paid ISC $14,451.25. Brief of Appellant, at 27.

[16] After the lawsuit was filed, Steel Service realized that it had calculated the amount owed it by ISC of $60,823.00 using the wrong manhour rate (Ex. D-21). As a result, Steel Service re-calculated the amount owed it by ISC of $53,825.00 by using the bid rate per manhour of $37 (Ex. P-17).

Before trial, Steel Service made another payment to ISC of $7,767.90 (Ex. D-33) to correct the inadvertent error included in Steel Service's backcharges, for total payments to ISC of $21,942.90 ($14,175.00 + $7,767.90) (Ex. D-33). As a result, as of trial, Steel Service had in good faith, paid ISC all it claimed ISC was owed under the parties' contract.

Steel Service also analyzed the value of the work performed by ISC both according to Steel Service and according to ISC (Ex. D-25; T.291-298).[17] Based upon that analysis, Steel Service estimated that ISC completed 56.995% of the contract (1,067.291 manhours) and that ISC contended that it completed 63.75% (1,154.78 manhours), thereby earning $38,756.60 of the $68,000 contract price according to Steel Service ($68,000 x 56.995%) and $43,350 per ISC ($68,000 x 63.75%) (Ex. D-25), before deduction of the $21,942.90 paid to ISC by Steel Service and the $53,825 incurred by Steel Service to complete and correct ISC's work (Ex. P-17).

g. The Trial Judge's Findings.

The trial judge, after two days of testimony from five witnesses, found that ISC breached the contract by not properly manning the Project, as established by ISC's own timesheets (Exs. D-14, D-40; R.00161).[18] The trial judge also found that ISC failed to give Steel Service the contractually required notice of any alleged problems with the O'Hare ship date in sufficient time for Steel Service to avoid delays and additional costs and that, as a result of those breaches, Steel

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[17] As Steven Tillery explained, the analysis was based on the description of work in his December 29, 2003 letter to ISC's attorney (Ex. D-22) and on ISC's marked-up shop drawings (Ex. P-6) which was ISC's description of the work it performed, using Steel Service's estimating program and his many years of experience estimating steel fabrication projects (T.247-249, 291, 298).

[18] In addition, ISC's invoices from October 29, 2003 to December 8, 2003 showed that ISC invoiced a total of $105,813 in addition to the $68,000 for this Project (D-41), thereby discrediting ISC's contention that it had no other work (T.35).

Service was entitled to terminate the contract (R.00162). Specifically, the trial judge found that the "many issues" raised by ISC were "insufficient to constitute an excuse for [ISC's] breach of the time element of the contract" (R.00162).

With regard to the measure to damages, the trial judge also found that:

> 4. Based upon the Proposed Judgments submitted by each party, it is plain that the parties and the Court understand the measure of damages in the same way. Namely, where Defendant incurred costs to complete and correct Plaintiff's work and allowed Plaintiff to continue performance after its breach in mitigation of damages caused by the breach, the applicable measure of damages is the reasonable cost incurred to complete and correct Plaintiff's work less the Contract price plus any additional costs to which Plaintiff may be entitled. Plaintiff failed to prove by a preponderance of the evidence that its additional costs, if any, were proximately caused by any breach or other actions of the Defendant.

(R.00162-00163) (emphasis added). The trial judge then apportioned the contract amount between ISC and Steel Service, using Defendant's Ex. 4 (ISC's estimate and a summary thereof) and Defendant's Ex. 25 (summary of work performed by ISC) (R.00164). The trial judge found that ISC estimated a total of 1,802.73 manhours for both O'Hare and Belvidere (Ex. D-4) and that, based on Steel Service's calculations, ISC worked 1,064.291 manhours (Ex. D-25) and completed 59.20% of the total contract (1,064.291 ÷ 1,802.73 manhours), thereby earning a maximum of $40,256 ($68,000 x 59.20%) (R.00164), less $21,942.90 (Ex. D-33) previously paid by Steel Service to ISC, and less $8,657.50 (Ex. D-33), as the costs the trial judge found to be reasonably and necessarily incurred by Steel Service to correct ISC's defective work, leaving a balance owed ISC of $9,655.60 (R.00164-00165). The trial judge also gave Steel Service the balance of the contract price of $27,744, for a total of $36,401.50 ($68,000 - $21,942.90 -

$9,655.60) (R.00164-00165) and then entered judgment on February 22, 2006 for ISC for $9,655.60 plus interest and for Steel Service, as the "prevailing party," for attorneys' fees, expenses, and costs pursuant to the terms of the contract (R.00203).

After hearing oral argument and considering the briefs of the parties, the trial judge entered his Order, finding that Steel Service was entitled to recover its attorneys' fees and expenses incurred from June 6, 2005, being the date of Steel Service's final payment to ISC of $7,767.90 (Ex. D-33; T.460-461), in the total amount of $23,731.55 (R.00233) and allowing Steel Service to reserve its right to recover attorneys' fees and expenses incurred on this appeal (R.00234).

ISC appealed to the Circuit Court of Rankin County, Mississippi which affirmed the trial judge's decision and also awarded Steel Service its attorneys' fees and expenses on appeal (R.00105-00107). ISC now pursues the instant appeal.

ARGUMENT

I. STANDARD OF REVIEW

> Today's case involves a decision made by a [trial] judge sitting without a jury. On appeal of a trial court judgment rendered subsequent to a bench trial where the judge has sat as the fact-finder, we afford deference to the findings of the trial judge. We have held 'a [county] court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible and reasonable evidence.' [Citations omitted]. Therefore, this Court affords the same deference to the rulings of a [county] court judge ruling from the bench as it does a chancellor. It follows that we will not disturb the findings of the judge unless manifestly wrong, clearly erroneous, or an erroneous legal standard was applied.

Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d 1052, 1055 (Miss. 2005) (quoting City of Jackson v. Perry, 764 So. 2d 373, 376 (Miss. 2000)) (emphasis added). See also, Hill v. Southeastern Floor Covering Co., 596 So. 2d 874, 877 (Miss. 1992); Bell v. Parker, 563 So. 2d 594, 597 (Miss. 1990); Dew v. Langford, 666 So. 2d 739, 742 (Miss. 1995).

Additionally, this Court, in determining whether the trial judge's findings of fact are "safe on appeal," is "bound to make its decision based on what is actually contained in the record" and it cannot consider ISC's new-found arguments and/or its evidence which were not presented to the trial judge. George County Board of Supervisors v. Davis, 721 So. 2d 1101, 1105 (Miss. 1998). In fact,

> [p]recedent mandates that this Court not entertain arguments made for the first time on appeal as the case must be decided on the facts contained in the record and not on assertions in the briefs. [Citations omitted]. Stated clearly, '[i]t is an elementary and familiar rule that we sit to review actions of the lower courts, and we will not undertake to consider matters which do not appear of record in the lower court, absent unusual circumstances.' [Citations omitted].

Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d at 1060.

In short, "[a] trial judge cannot be put in error on a matter not presented to him." Southern v. Mississippi State Hospital, 853 So. 2d 1212, 1214-15 (Miss. 2003). This "important procedural tenet," Southern v. Mississippi State Hospital, 853 So. 2d at 1214, applies to exclude from review on appeal new evidence, Skrmetta v. Bayview Yacht Club, Inc., 806 So. 2d 1120, 1126-27 (Miss. 2002), and new argument. Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d at 1056.

Thus, this Court must defer to the trial judge's findings of fact unless they are manifestly wrong, clearly erroneous, or the result of a clearly erroneous legal standard and this Court cannot consider ISC's new "evidence" contained in its Brief at Exhibits "A" or "B," and its reference at page 13, note 6 of its Brief to material invoices – none of which were introduced into evidence at trial. Likewise, this Court cannot consider ISC's new arguments based upon Steel Service's alleged breach of the custom and practice in the steel industry as contained in "the AISC AWS Codes" (Brief of Appellant, at 13) and/or Steel Service's alleged breach of an implied duty of good faith and fair dealing (Brief of Appellant, at 7-12) – neither of which were presented to the trial judge and all of which (both "evidence" and arguments) were stricken by the Circuit Court on appeal and not appealed by ISC to this Court.[19] Similarly, this Court should not consider ISC's arguments that it is entitled to more money and to attorneys' fees and expenses based on arguments not presented to the trial judge.

Finally, as this Court knows, ISC, as the appellant, bears the burden on appeal and "[i]ssues cannot be decided based on assertions from the briefs alone. The issues must be supported and proved by the record." Kelly v. International Games Technology, 874 So. 2d 977, 981 (Miss. 2004) (quoting Pulphus v. State, 782 So. 2d 1220, 1224 (Miss. 2001)). In other words, this Court has "on many occasions held that we must decide each case by the facts shown in the record, not assertions in the brief, however sincere counsel may be in those assertions." Pulphus v. State, 782 So. 2d at 1124 (quoting Robinson v. State, 662 So. 2d 1100, 1104 (Miss. 1995)).

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[19] For that reason, Steel Service has filed, simultaneously with its Brief, a Motion to Strike ISC's "evidence" and its new arguments.

In this case, ISC was represented at trial by other counsel. Now, appellate counsel for ISC, unburdened by the facts and the evidence and the arguments presented to the trial judge and with only a few, random cites to the record, seeks to convince this Court that The Honorable Kent McDaniel made clear error. However, as one appellate court has already found (R.00105), Judge McDaniel's findings were undeniably supported by "substantial, credible, and reasonable evidence" and, therefore, this Court should likewise hold that Judge McDaniel's findings are "safe on appeal." City of Jackson v. Perry, 764 So. 2d 373, 376 (Miss. 2000).

II. THE TRIAL JUDGE APPLIED THE CORRECT LEGAL STANDARD.

As ISC's trial counsel said in his opening statement at trial, this case is "really just a breach of contract" (T.8). ISC's trial counsel's opening statement was consistent with the allegations of ISC's complaint, drafted by ISC's appellate counsel, which only alleges a breach of contract (R.00008-00010, ¶ 9) and not a breach of an implied duty of good faith and fair dealing which ISC's appellate counsel now claims is the applicable legal standard.[20]

Based on the allegations of the complaint and the evidence and the legal theory presented at trial, the trial judge correctly applied the legal standard applicable to breach of contract cases, namely:

> in any suit for breach of contract, the plaintiff has the burden of proving by a preponderance of the evidence the existence of a valid and binding contract, that the defendant has broken or breached it, and that the plaintiff has suffered monetary damages as a result.

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[20] ISC has different counsel on this appeal and, hence, that may be the reason ISC recasts its legal theory. However, as indicated hereinbelow, ISC loses under either its breach of contract theory or its new-found legal theory which, according to Steel Service's Motion to Strike, this Court should not consider because the Circuit Court on appeal struck ISC's new-found legal theory and ISC did not appeal that issue. Nonetheless, Steel Service substantively responds to ISC's new-found argument below without waiver and with reservation of its Motion to Strike.

Garner v. Hickman, 733 So. 2d 191, 195 (Miss. 1999) (citing Warwick v. Matheney, 603 So. 2d 330, 336 (Miss. 1992)). Obviously, the plaintiff also bears the burden of proving that the breach is "material." McCoy v. Gibson, 863 So. 2d 979, 980 (Miss. App. 2004). A "material" breach is:

> a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose.

Id. (quoting Gulf South Capital Corp. v. Brown, 183 So. 2d 802, 805 (Miss. 1966)).

Based on the overwhelming evidence at trial, the trial judge found that ISC "was in breach of contract on the essential element of time" (T.435; R.00161, ¶ 1). Specifically, the trial judge found that, as established by ISC's timesheets (Exs. D-14, D-40) among other proof,[21] ISC "did not properly man the job" and, as a result, "was unprepared to ship the first portion of this two-phased Project on the agreed-upon date" "in direct violation of Section 6, Delivery, and Section 7, Project Schedule, of the Contract. . . ." (R.00161).

The trial judge also found that ISC "likewise failed to give [Steel Service] the required notice of the [alleged] problem with the ship date sufficiently in advance to avoid additional costs and delays on the Project" (R.00161). Most significantly, the trial judge determined that:

> [t]he many issues raised by [ISC] with regard to delays in receiving materials, having materials sent to Birmingham to be rolled, having materials sent to [Steel Service] to be blasted, and the like are found not to have delayed the Project in any significant way. Even if they were delaying the Project it is uncontested in the evidence that [ISC] never provided any notice to [Steel Service] of such delay(s). Accordingly, these matters are insufficient to

[21] Doug Fiorilli, Steel Service's Vice President of Operations, demonstrated how both O'Hare and Belvidere could be fabricated in five weeks (Ex. D-26; T.382-387). Even Robert Donald testified that ISC could fabricate O'Hare in two weeks "with leniency," "with no overtime," "no strain" (T.39).

> constitute an excuse for [ISC's] breach of the time element of the Contract.

(R.00162) (emphasis added).

In short, the trial judge found that Steel Service's delivery of the truss bottom chords, the rust on the truss materials, and the alleged confusion over the dimension on the truss shop drawing were not "material" breaches of the parties' contract. Yet, ISC now thinks it fares better under another legal standard and urges reversal based upon its new legal theory that Steel Service breached its implied duty of good faith and fair dealing by allegedly failing to timely deliver all materials in a condition suitable for ISC's fabrication (Brief of Appellant, at 8-9). However, ISC's new theory is not only procedurally barred but also substantively inapplicable. Or, alternatively, if such theory is applicable, which is denied, then ISC also failed to prove that Steel Service breached that implied duty.

First, as explained in more detail in Steel Service's Motion to Strike filed simultaneously herewith, this Court cannot consider this issue which the Circuit Court struck and which ISC did not appeal. Indeed, the Circuit Court struck this issue because the trial judge "will not be put in error on a matter which was not presented to him for his decision." Southern v. Mississippi State Hospital, 853 So. 2d 1212, 1214 (Miss. 2003); Parker v. Mississippi Game and Fish Comm'n., 555 So. 2d 725, 730 (Miss. 1989). Those "matters" include legal theories. Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d 1052, 1060 (Miss. 2005). And, as required by M.R.A.P. 28(a)(3), ISC did not appeal this issue. Thus, this Court cannot consider this legal theory which is not properly before it and, even if it could, this Court cannot "entertain

arguments made for the first time on appeal. . . ." Chantey Music Publishing, Inc., 915 So. 2d at 1060. As a result, ISC's new-found legal theory must be ignored.

However, even if such legal theory can be entertained, which is denied, it is inapplicable because a claim for breach of implied covenant of good faith and fair dealing arises from the breach of a specific contractual obligation. Baldwin v. Laurel Ford Lincoln-Mercury, Inc., 32 F. Supp. 2d 894, 899 (S.D. Miss. 1998); 4-County Electric Power Ass'n. v. Tennessee Valley Authority, 930 F. Supp. 1132, 1141-1142 (S.D. Miss. 1996); Wilson v. Ameriquest Mortgage Co., 2006 WL 2594522, *5 (S.D. Miss. 2006). Here, ISC neither alleged nor proved that Steel Service breached a specific contractual obligation as there is no contract provision which specifies the dates by which materials were to be delivered to ISC[22] or defines what are suitable materials or provides that only perfect shop drawings will be provided to ISC.

ISC also argues that Steel Service breached this implied duty by not paying ISC. Again, ISC does not point to any specific contract obligation and, indeed, it cannot because the parties' Purchase Order (Ex. D-5, ¶ 8) provides that ISC will be paid when Steel Service is paid for ISC's work. In this case, the undisputed evidence was that Steel Service did not get paid for

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[22] ISC also argues, this time without reference to the Nucor-Yamato Certified Mill Test Report (attached as Exhibit "C" to Appellant's Brief to the Circuit Court and stricken by that court), that Steel Service could have avoided the alleged delay caused by the "rolling" of the truss bottom chords if it had acted responsibly as it allegedly had those materials as of October 1, 2003. First, this argument, which has no basis in the record, was stricken by the Circuit Court on appeal and it was not appealed by ISC. Therefore, for the reasons stated in Steel Service's Motion to Strike, this allegation cannot be considered for in this appeal. Parker v. Mississippi Game and Fish Comm'n., 555 So. 2d at 725, 730 (Miss. 1989).

Second, there is absolutely no proof that the materials invoices which ISC discusses in its Brief, at 13, note 6 are, in fact, the bottom truss chords. Thus, ISC indulges in pure speculation.

Finally, the only date in any of the trial exhibits for receipt of materials is the October 22, 2003 date for receipt by Steel Service of "mill material," identified in Steel Service's October 14, 2003 letter to ISC (Ex. P-1), which is the raw materials and which letter was responded to by ISC on October 27, 2003 (Ex. P-3), without any qualification or question concerning dates for delivery of materials to ISC by Steel Service.

ISC's work until over one year later because of ISC's delays (Ex. D-38; T.306) and that, even then, ISC, because of its delays and its failure to pay Steel Service for raw materials, owed Steel Service $82,626.24 (Ex. D-28 (for identification)[23]; Ex. P-17).

In short, ISC has not and cannot establish that Steel Service breached any specific contract obligation upon which to base its new-found legal theory. For this additional reason, this Court should reject this argument. However, even if ISC could identify some specific contract obligation which Steel Service breached, which it cannot, ISC still cannot meet its burden of proving a breach of the implied covenant.

That is because "[t]he breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness." Cenac v. Murry, 609 So. 2d 1257, 1272 (Miss. 1992) (emphasis added). To establish "bad faith," ISC had to prove "more than mere negligence or bad judgment; rather 'bad faith' requires a showing of conscious wrongdoing . . . caused by 'dishonest purpose or moral obliquity.'" University of Southern Mississippi v. Williams, 892 So. 2d 160, 170-71 (Miss. 2004).

Clearly, the record reveals no basis for ISC's contention – much less a finding of fact – that Steel Service acted in bad faith. Therefore, even assuming that this Court can consider this new theory not presented to the trial judge, stricken by the Circuit Court, and not appealed by

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[23] Steel Service proffered its statement of account (Ex. D-28) in defense of ISC's contention that Steel Service did not timely pay ISC. At the time suit was filed and for months thereafter, Steel Service, in good faith, believed that ISC owed it not only for the costs incurred to complete and correct ISC's work which was $53,825.00 (Ex. P-17) but also $28,626.45 for raw materials purchased by ISC on open account (Ex. D-28), or a total of $82,626.24 – substantially more than the $68,000 that ISC claimed was owed it. Once ISC agreed to pay Steel Service for the raw materials, Steel Service agreed to pay ISC the undisputed contract balance of $14,175 (Ex. P-18) ($68,000 - $53,825). Then, when ISC pointed out that Steel Service was inadvertently charging ISC for 210 manhours, Steel Service immediately paid ISC that amount ($7,767.90) (Ex. P-19).

ISC to this Court and even assuming that a breach of this implied covenant does not stem from a specific contract obligation, ISC cannot support such a claim based on the evidence presented at trial. Thus, the trial judge was not "manifestly wrong" and this argument does not warrant reversal.

III. THE TRIAL JUDGE'S FINDINGS WERE NOT "CLEARLY ERRONEOUS".

As this Court knows,

> . . . [its] scope of review of factual determinations made by a trial judge sitting without a jury is limited. We alternatively and without a great deal of thought refer to the rule interchangeably as the substantial evidence rule or the manifest error rule.
>
> Employing substantial evidence parlance, we have said repeatedly that we will not disturb a trial judge's findings of fact where there is in the record substantial evidence supporting same. [Citations omitted]. This is so whether those findings relate to matters of evidentiary fact or of ultimate fact. [Citations omitted].
>
> On the other hand, we have often stated that the findings of the trial court should and must be accepted unless they are manifestly wrong. [Citations omitted]. The congruence of these two approaches is found in our several cases which employ a 'clearly erroneous' standard for review of findings of fact. [Citations omitted].

UHS-Qualicare v. Gulf Coast Community Hospital, 525 So. 2d 746, 753-54 (Miss. 1987). In UHS-Qualicare, this Court said that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." Id. at 754. (Emphasis added.)

"[T]he entire evidence" in this case leads to the inescapable conclusion that the trial judge's findings are supported by overwhelming evidence and that ISC's challenge to those findings is flimsy at best. Indeed, ISC's appeal of the trial judge's finding that ISC breached the parties' Purchase Order is based solely upon its contentions for which it neither cites the record

nor any law that: (1) the trial judge's finding that ISC was required to give Steel Service notice of the alleged delays but that Steel Service was not required to give ISC notice that it was taking back some of the work constitutes "inequitable," "disparate treatment" (Appellant's Brief, at 15); (2) Steel Service allegedly breached industry standards as contained in the AISC/AWS Codes; and (3) Steel Service allegedly was not harmed by ISC's failure to timely delivery O'Hare. As demonstrated hereinbelow, ISC's attacks on the trial judge's findings fall far short of meeting its burden. This Court can readily affirm.

1. The Trial Judge's Alleged "Inequitable," "Disparate Treatment."

As an initial proposition, ISC mischaracterizes the trial judge's findings in an effort to prove its point, contending that the trial judge found that ISC's failure to give Steel Service notice in and of itself was the breach. However, the trial judge found, first and foremost, that ISC "did not properly man the job . . . as a result of which [ISC] was unprepared to ship [O'Hare] on the agreed-upon date" "in direct violation of . . . the contract" and then the trial judge found that ISC "likewise failed to give [Steel Service] the required notice of the problem with the ship date sufficiently in advance to avoid additional costs and delays on the project." (R.00161) (emphasis added).

In other words, the trial judge found, consistent with Jim Simonson's testimony (T.401), that if timely notice had been given, the problem could have been avoided or the damage minimized. The trial judge further found that, even though Steel Service did not give ISC the contractually-required notice, ISC "was on actual notice of what work was taken over by [Steel Service] as a result of [ISC's] failure timely to perform" (R.00162).

The trial judge's findings are not only supported by the overwhelming evidence which established that ISC never once complained that it was being delayed by Steel Service and/or that it would not meet the O'Hare delivery date (T.222, 226, 230, 262, 265, 355) and that ISC knew that Steel Service was taking back some of the work and participated in that decision (T.276, 364), but also by the law which holds that ISC's actual knowledge that Steel Service would complete some of ISC's work supplanted the need for written notice. Stevens v. Hill, 236 So. 2d 430, 434 (Miss. 1970); Crawford v. Brown, 215 Miss. 489, 61 So. 2d 344 (1952).

Indeed, ISC forgets that, even though its President testified that he told Steven Tillery and John Oxley "many times" that "we're doing all we can do" (T.57-58, 62), ISC admittedly never wrote a letter (T.165) and Steven Tillery, John Oxley and Doug Fiorilli all testified unequivocally that neither Robert Donald nor anyone else at ISC ever complained or blamed Steel Service (T.222, 226, 230, 262, 265, 355) and that, as of November 17, 2003, they all believed O'Hare was ready to ship on November 18, 2003 (T.272, 401). In fact, Steven Tillery said that November 17, 2003 was the first time he ever talked to Robert Donald (T.259). And, John Oxley, Donald's golf buddy, testified that they continued to play golf together during October-November 2003 and that Donald never mentioned any delays (T.230).

Indeed, as of November 17, 2003, Steel Service had absolutely no reason to believe ISC would not be ready to ship O'Hare the next day, as even Robert Donald admitted that ISC could easily fabricate the steel for O'Hare in two weeks and, in fact, ISC's own timesheets confirmed ISC sometimes worked almost 200 hours per day (Ex. D-14). Thus, if ISC wanted to, it could fabricate all 1,800 manhours – not just O'Hare – in 14 days (T.38-39). ISC had a total of 21 days to fabricate just O'Hare (Ex. D-5) and, according to Doug Fiorilli, there were only 65 manhours

of work remaining to complete the O'Hare trusses once the bottom chords arrived on November 7th and 11th (Ex. D-27; T.388).

Based on these facts, the trial judge correctly found that ISC "likewise" breached the contract by failing to give "notice of the problem with the ship date sufficiently in advance to avoid additional costs and delays on the Project" (R.00161).

Similarly, based upon Steven Tillery and Doug Fiorilli's trip to ISC's Laurel plant and their meeting with Robert Donald on November 17 after which ISC starting shipping raw materials back to Steel Service (Ex. D-16), ISC "was on actual notice of what work was taken over by [Steel Service] as a result of [ISC's] failure to timely perform" (R.00162), thereby eliminating the need for Steel Service to give written notice to ISC (R.00162).

Clearly, under the facts and the law, the trial judge's "treatment" of the notice issue was neither "disparate" nor "inequitable" and certainly was not "manifestly wrong."

2. Steel Service's Alleged Breach of Industry Standards.

Next, ISC argues that this Court has to consider the issues raised by ISC in the context of the AISC and/or the AWS Codes[24] even though: (1) that argument was not made to the trial judge; (2) the Circuit Court struck this argument advanced by ISC for the first time on appeal to that court; and (3) ISC did not appeal that ruling in this Court as required in order for this Court to consider this issue. Steel Service has moved to strike this issue and this Court must ignore ISC's invitation to reverse the trial judge on proof not presented to him. M.R.A.P. Rule 28(a)(3).

[24] Interestingly, Robert Donald admitted that he did not even have the AWS Code when he fabricated this job (T.424).

See also, Davis v. J.C. Penney Co., 881 So. 2d 969, 970 (Miss. App. 2004); Giuffria v. Concannon, 851 So. 2d 436 (Miss. App. 2003).

However, even if this Court considers ISC's argument, it does not help ISC. In fact, ISC relies on the AISC Code for only one small issue; namely, the confusion over the shop drawing which, as John Oxley stated, was resolved in "five minutes" (T.227-228).

Specifically, ISC argues that Paragraph 4.2.2 of the AISC Code of Standard Practice (which is not part of the record) required Steel Service to obtain the owner's approval of the clarification made by Steel Service to Drawing G2. However, Paragraph 4.2.2 does not even say that. To the contrary, Paragraph 4.2.2 merely says that the owner's approval of shop and erection drawings also constitutes approval of additions, deletions, or revisions noted on the approved shop drawing which is returned to the steel fabricator for use in fabricating the steel.

In short, ISC's argument does not even apply – much less require reversal of the trial judge's finding that ISC breached the parties' contract. Therefore, even if this Court considers this argument, which it should not, it does not amount to "manifest error."

3. Steel Service's Alleged Lack of Injury.

Finally, ISC argues that reversal is required because Steel Service was not harmed by ISC's failure to meet the O'Hare ship date because no penalty was ultimately assessed against it by HLM and/or the general contractor. However, even if ISC is right that Steel Service's only harm would be a penalty imposed upon it by HLM and/or the general contractor, the fact that there was no penalty does not require reversal. Indeed, under Mississippi law, ISC, as the breaching party, cannot escape liability even if, unlike this case, there was uncertain proof of damages. See, e.g., Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.,

743 So.2d 954 (Miss. 1999). And, the fact that no penalty was ultimately assessed does not mean Steel Service was not harmed.

In fact, ISC forgets Steel Service cleared its two plants of all other work and completed O'Hare, which was only approximately 61%-63% complete (Ex. D-25),[25] in two days in an effort to avoid penalties being assessed against it (T.373-374). Indeed, its swift and decisive action is most likely the reason it was able to avoid the assessment of penalties.

ISC also ignores the fact that Steel Service was legally obligated to and did mitigate its damages caused by ISC and that any penalties, if assessed, would have clearly been ISC's fault. ISC also forgets the fact that Steel Service incurred $53,825 (Ex. P-17) to complete and correct ISC's work upon its default for which the trial judge allowed Steel Service $36,401.50 (R.00164-00165).

Clearly, ISC's incorrect statement of the law and the facts does not justify reversal.

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[25] ISC spends pages of its Brief (at 18-19) attempting, through Steel Service's witnesses, to justify that work that ISC did perform when Robert Donald utterly failed to do that at trial and Steven Tillery testified to that in detail at trial in explaining his Exhibit D-25 which the trial judge adopted when he quantified the work that ISC completed at $40,256.00 (1067.291 MH per Ex. D-25 ÷ 1802.73 MH estimated by ISC = 59.92% x $68,000). In fact, ISC relies heavily upon a photograph (Ex. D-31) which was not even introduced into evidence in an effort to refute Steel Service's testimony regarding the work completed by ISC.

4. ISC's Timesheets – The Story ISC Does Not Tell This Court.

Try as it might at trial and on appeal, ISC cannot escape the fact that the reason O'Hare was not ready to ship by November 18 was because ISC failed to properly man the Project in sufficient time to meet the deadline as found by the trial judge based on ISC's timesheets and Steel Service's summaries of those timesheets (Exs. D-14 and D-40; R.00161). Indeed, ISC never mentions its timesheets in its Brief which are the only contemporaneous records of what ISC did and did not do on the O'Hare Project. And, ISC's timesheets are damning proof that the reason ISC did not meet the O'Hare ship date was because ISC did not start work on O'Hare in earnest until November 10 – eight days before the ship date. In fact, ISC's timesheets for all jobs for the period October 30 to November 22 (Ex. D-40) show the following:

ISC Time Sheets

Date	[This Job]	Other Jobs	Percentage [this Job to all]
	Manhours/Men	Manhours/Men	
10/30 - 11/01*	27/2	372.75/22	6.75%
11/03 - 11/08	171.50/5	687/19	19.90%
11/10 - 11/15	975/19-20	*	100.00%
11/17 - 11/22	923/5-18	*	100.00%
	2090.50 MH	1059.75 MH	
	TOTAL MANHOURS - 3,150.25		

*Partial week - no prior records produced by ISC

In short, ISC's timesheets show that ISC only had two men out of 24 working on O'Hare the first week for 27 manhours of 372.75 manhours even though ISC had 80% of the material (Ex. D-7), five men out of 19 the second week for 171.50 manhours out of 687 manhours, and that ISC's entire work force worked on the Project during the weeks of November 10 and November 17 for 1,898 manhours (Ex. D-40). Clearly, ISC's "excuses" pale in comparison to the

truth as revealed by its own contemporaneous records which ISC would prefer to forget and which it hoped this Court would never look at.

At trial, Robert Donald tried to avoid the undeniable damage caused by ISC's timesheets and, in fact, produced more timesheets during the break in the trial (Ex. D-40). However, the timesheets produced during the break in the trial confirmed the manhours ISC worked on the Project by week and by total as indicated by the timesheets ISC produced during discovery (compare Exs. D-14 and D-40). In fact, the timesheets produced during the break in the trial only added the manhours ISC worked on other jobs during the period (Ex. D-40) and confirmed that ISC did not work on the Project until November 10. Thus, Robert Donald's efforts to obfuscate the fact that ISC's own timesheets proved that ISC did not properly man this Project were unsuccessful as the timesheets were the "icing" for the trial judge's conclusion (R.00161).

Thus, this appeal would not be complete without this Court's consideration of ISC's timesheets (Exs. D-14 and D-40). And, when this Court considers ISC's timesheets, it will readily conclude that the trial judge's finding that ISC breached the contract is supported by overwhelming evidence and it will handily affirm the trial judge.

IV. THE TRIAL JUDGE'S CALCULATION OF DAMAGES WAS NOT "CLEARLY ERRONEOUS".

Next, ISC takes on the trial judge's determination of the value of the work completed by ISC, relying on arguments and facts never presented to the trial judge[26] and mixing apples and oranges to come up with more money that is allegedly owed to it.

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[26] As this Court cannot reverse the trial judge on "new" arguments, Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d at 1060, Steel Service has also moved to strike them.

In fact, Steel Service is completely confused by ISC's changing position on the amount it claims it is entitled to recover. Its complaint sought $68,000 (R.00008). At trial, it sought the entire purchase order amount of $68,000 plus overtime of $7,239 (T.100-101; Ex. P-11), but then introduced its invoice to Steel Service for $61,104, which acknowledged that ISC did not complete all of the contract, and Robert Donald's unexplained computation of the $61,104 invoice (Ex. P-9) which the trial judge rejected as "insufficiently documented" (R.00164).

Now, ISC, for the first time, says it is entitled to $39,161.91 ($61,104 - invoice amount - $21,942.09 paid) (Brief of Appellant, at 6). Yet, ISC also spends pages arguing, also for the first time, that the trial judge should have found that ISC completed 79.85% of the contract, or $54,298.00, as the value earned by ISC and, therefore, ISC is entitled to an additional $10,948.00 not awarded to it by the trial judge (Brief of Appellant, at 20-23).

To support this new-found calculation for additional money, ISC engages in voodoo mathematics as it re-computes Steel Service's Ex. D-25, which quantified the value of work performed per Steel Service and per ISC. However, in so doing, ISC doubles up on manhours by adding 181.46 manhours (shown in bold by ISC) (Brief of Appellant, at 21) which are already in Ex. D-25 under the listed categories.[27] Thus, ISC inflates the manhours and the percentages to make its point. Then, ISC uses Steel Service's planned production manhours (Ex. D-26) which shows a total of 1,693 manhours over five weeks but ISC says the total manhours is 1,750 (Brief of Appellant, at 21) – another inflation of manhours. In short, ISC's new-found theory is based

[27] As an aside, ISC further inflates the manhours by adding two "Dwg. 28" for 27.80 manhours each when ISC's estimate (Ex. D-4) upon which ISC relies has only one "Dwg. 28" for 27.80 manhours (Brief of Appellant, at 21).

upon cherry-picking numbers to suit its whims – some of which are not even the correct numbers.

But, contrary to ISC's new-found calculations, the trial judge correctly determined that ISC earned $40,256.00 – not $31,598.50 as ISC claims[28] – based upon its finding that ISC earned 59.20% of the $68,000 (R.00164). The trial judge then found that ISC was owed $31,598.50 before deductions for $21,942.90 already paid by Steel Service and after deducting the $8,657.50 for expenses incurred by Steel Service (R.00165). And, the trial judge properly calculated damages using the only credible evidence he had, being Steel Service's determination of the work completed by ISC according to Steel Service and ISC (Ex. D-25) and Steel Service's summary of ISC's estimate of manhours required to perform the entire Project (Ex. D-4) and the testimony of Steven Tillery.

Steven Tillery described in detail the work performed by both Steel Service and ISC, using his December 29, 2003 letter to ISC's attorney (Ex. D-22) and ISC's marked-up shop drawings which were ISC's description of the work it performed (Ex. P-6) which he then quantified by manhours and percentages in Exhibit D-25. The trial judge used the ISC manhours as estimated by Steven Tillery of 1067.291 (Ex. D-25) and then divided those manhours by ISC's estimate of the total manhours of 1,802.73 (Ex. D-4) to arrive at the percentage of work completed by ISC of 59.20% (R.00164). The trial judge then multiplied that percentage by the contract amount to determine the contract value earned by ISC of $40,256.00 (59.20% x $68,000) from which he then deducted the expenses he found were reasonably and

[28] The trial judge succinctly stated that ISC "earned a maximum of $40,256.00 on the contract" (R.00164).

necessarily incurred by Steel Service of $8,657.50 (Ex. D-33; R.00164) and the payments made by Steel Service to ISC of $21,942.90 to arrive at the total amount owed to ISC of $9,655.60 (R.00165).[29]

As demonstrated, the trial judge used the only credible evidence he had which was Steel Service's estimate of manhours worked by ISC (1067.291 MH) from Exhibit D-25. In any event, according to Exhibit D-25, Steel Service's estimate of the manhours ISC claimed it performed was 1154.78, or 87.488 manhours more than Steel Service's estimate of the manhours worked by ISC. The trial judge used Steel Service's manhour estimate of 1067.291 MH – not the percent complete as ISC alleges (Brief of Appellant, at 22). If the trial judge had used ISC's manhour estimate, the value earned by ISC, using the same formula used by the trial judge would be $43,558.95 (1154.78 ÷ 1802.73 = 64.06% x $68,000 = $43,558.95) versus $43,350.00 computed by Steel Service (Ex. D-25), using 63.75% as the contract value earned by ISC ($68,000 x 63.75%), or a difference of $208.95 ($43,558.95 - $43,350.00). Thus, $43,558.95 was the most ISC could earn based on the only evidence before the trial judge before deductions for previous payments and for the expenses Steel Service incurred. And, ISC's attempt to compare Exhibit D-25 and Exhibit D-4 (ISC's estimate) mixes apples and oranges because that comparison assumes that ISC's actual fabrication manhours were the same as its estimated manhours when ISC timesheets show that was not the case.

Indeed, as of November 22, 2003, ISC's timesheets show that ISC had expended 2090.50 MH on this Project (Ex. D-40) to complete 63.75% of the Project (Ex. D-25). As a

[29] The trial judge, after calculating the $40,256.00 earned by ISC, says that "[t]he remainder of the contract goes to Defendant to offset their costs . . ." (R.00164). That finding meant that Steel Service was awarded $36,401.50 ($68,000 - $31,598.50).

result, at that time, ISC was 941.26 manhours over its estimate[30] (1,802.73 estimated manhours x 63.75% complete = 1149.24 manhours estimated at 63.75% complete) (2090.50 MH actual - 1149.24 MH estimated = 941.26 MH overrun, or 52.21% overrun). At that rate of progress, the remaining 36.25% of work to be completed would require 1335.84 manhours (1802.73 MH x 36.25% = 653.48 MH estimated x 52.21% overrun = 341.18 MH + 653.48 MH = 1335.84 MH), for total manhours of 3426.34, or 1623.61 manhours over the 1802.73 manhours estimated. In short, ISC's new-found theory does not work and is only ISC playing with numbers.[31]

Next, ISC argues that Steel Service's reliance upon ISC's timesheets to determine ISC's percent complete was erroneous and that the trial judge's reliance upon ISC's timesheets was also erroneous. First, Steel Service did not use ISC's timesheets to determine ISC's percent complete. ISC's timesheets (Exs. D-14 and D-40) prove that ISC did not meet the O'Hare ship date because it did not start work on the Project until eight days before the November 18 ship date but they have nothing to do with the percent of work ISC completed. Conversely, Steven Tillery testified in detail that his determination of ISC's percent complete as shown in his Exhibit D-25 was based upon Robert Donald's marked-up shop drawings which showed what work ISC said it completed (T.291-298; Ex. P-6).

Second, the trial judge likewise did not rely on the timesheets to determine the value of the contract earned by ISC as his Bench Opinion clearly shows (R.00164-00165). In fact, ISC's

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[31] ISC tries to bolster its theory by reference to its invoice to Steel Service (Ex. P-15) for $61,104.00 which was introduced by ISC at trial without any explanation and which conflicts with its appellate counsel's pre-lawsuit demand for $68,000 (Ex. D-22) and by its demand in its complaint for $68,000 (R.00008) and by Robert Donald's testimony at trial that he wanted $68,000 plus overtime (T.100-101)

timesheets played absolutely no role in the trial judge's calculation of damages as ISC's appellate counsel alleges (Brief of Appellant, at 23).[32]

The trial judge also properly denied ISC overtime as the only evidence that overtime was allegedly incurred was Robert Donald's testimony and his handwritten calendar (Ex. P-5) which he never corroborated as required by M.R.E. 1006, using ISC's timesheets or its payroll and he never explained how or when he compiled the hours or who performed the alleged overtime.

Moreover, all of the alleged overtime was incurred during the weeks ending November 15, 2003 and November 22, 2003 – the weeks that ISC's timesheets show that ISC went into overdrive on the Project despite the undisputed testimony by Steel Service (Ex. D-26, D-27; T.382-387, 388-390) that ISC had plenty of work to do beginning October 28, 2003.[33] In short, ISC simply failed to meet its burden of proving that it incurred overtime because of something Steel Service did or did not do.

Additionally, Steel Service's charges for additional freight were properly considered by and allowed by the trial judge based on the undisputed testimony of Steven Tillery and Steel Service's Contract Change Proposal (Ex. P-17[34]; T.289) which contained an itemized summary

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[32] ISC points to Jim Simonson's testimony concerning his review of ISC's timesheets (Ex. D-40). However, Jim Simonson reviewed all ISC timesheets produced by ISC both during discovery and during the break in the trial to demonstrate that ISC had the manpower but did not properly man this Project as the trial judge found (R.00161) until the week of November 10, 2003 (Ex. D.40). Jim Simonson did not review ISC's timesheets for purposes of determining damages as ISC's appellate counsel alleges.

[33] ISC relies upon the AISC for its claim for overtime. First, ISC's failure to present this argument to the trial judge and its failure to appeal the Circuit Court's ruling, striking any reference to the AISC, precludes such argument here. M.R.A.P. 28(a)(3); Parker v. Mississippi Game and Fish Comm'n., 555 So. 2d 725, 730 (Miss. 1989). Second, the AISC does not help ISC as the delays about which ISC complained were, as the trial judge found, insignificant (R.00162) whereas the AISC refers to "significant" delays.

[34] ISC refers for its proposition to Exhibit D-23. Exhibit D-23 was not introduced at trial. Exhibit P-17, introduced by ISC, is Steel Service's Contract Change Proposal which contains an itemized breakdown and ISC did not cross examine any of Steel Service's witnesses about its freight costs. Therefore, ISC has no basis to complain.

of Steel Service's costs and which was introduced into evidence by ISC (Ex. P-17) and without objection under M.R.E. Rule 1006.

Finally, despite the 2.75 manhour error made by Steel Service in calculating its Contract Change Proposal (Ex. P-17; T.341) which was not discovered before trial,[35] out of total manhours of 1,183.3, the trial judge disallowed $17,423.50 of Steel Service's labor costs to complete and correct ISC's work (Ex. P-17) when the trial judge allowed Steel Service $36,701.50 of its total of $53,825 (Ex. P-17) (R.00163). Therefore, ISC has no basis to complain about Steel Service's labor charges.

As demonstrated, ISC cites no basis upon which the trial judge's calculation of damages was clearly erroneous. Indeed, the trial judge calculated damages based on the only evidence it had – Steel Service's analysis.

V. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN FINDING THAT STEEL SERVICE WAS THE "PREVAILING PARTY".

As an initial proposition, this Court has held that the standard of review regarding attorneys' fees is the "manifest abuse of discretion" standard. Mississippi Power & Light Co. v. Cook, 832 So. 2d 474, 478 (Miss. 2002); Mauck v. Columbus Hotel Co., 741 So. 2d 259, 269 (Miss. 1999). That standard means that the trial judge's ruling stands if he "considered all the legally relevant factors and has not made a clear error in judgment." Munford, Mississippi Appellate Practice, at 15-27 (MLI Press 2006).

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[35] Before trial, ISC pointed out that Steel Service's manhours charged against ISC inadvertently included 210 manhours which Steel Service immediately deducted and paid ISC the difference (Ex. D-33).

Contrary to ISC's contention, the trial judge did not abuse his discretion when he determined that Steel Service was the "prevailing party" for purposes of attorneys' fees because he found that ISC was the breaching party – not because ISC did not recover the entire $68,000 contract amount as ISC's appellate counsel contends (Brief of Appellant, at 25). Indeed, the trial judge, in his Bench Opinion, stated the reasons he found Steel Service to be the "prevailing party" as follows:

> [e]ven though [ISC] received a judgment, it cannot be considered the 'prevailing party' for at least two reasons. First, [ISC] did not recover all that it claimed that it was due, in fact, it did not get close to that amount. Second, and most crucial, but for [ISC's] breach of an essential element of the contract, none of this litigation would have been necessary.

(R.00165) (emphasis added).

Based upon the trial judge's "most crucial" finding that "but for [ISC's] breach . . . none of this litigation would have been necessary" (R.00165), it is clear that ISC did not prevail on any significant issue in the litigation despite the trial judge's finding that ISC was owed $9,655.60 for work performed by it for which it had not already been paid. See, e.g., Cruse v. Nunley, 699 So. 2d 941, 945 (Miss. 1997). Indeed, the trial judge vindicated Steel Service, further finding that Steel Service was the "prevailing party" because:

> [t]his litigation was necessitated by [ISC's] breach . . . of the contract. [Steel Service] was entirely justified in taking the actions it took and in defending the claims of [ISC] in court.

(R.00165) (emphasis added).

In short, the trial judge found that Steel Service was the "prevailing party" because he

found that ISC breached the contract.[36] See, e.g., King v. Brock, 646 S.E. 2d 206, 207 (Ga. 2007) (the majority view is that the "prevailing party" under a contractual fee-shifting clause is the one who establishes that the other party breached the contract even if it did not prove entitlement to actual damages); Spencer v. City of Aurora, Colo., 884 P.2d 326, 331, 332 (Colo. 1994) (the "prevailing party" for purposes of an award of attorneys' fees under a contract clause is "the party in whose favor the decision or verdict on liability is rendered" and not the party which "breached its contractual obligations, notwithstanding the fact that it was not required to pay damages for that breach"); Premier Capital, Inc. v. Grossman, 887 A.2d 887, 893 (Conn. App. 2005); Lewis v. Grange Mutual Casualty Co., 11 S.W. 3d 591, 594 (Ky. App. 2000). And, as demonstrated hereinabove, the trial judge did not abuse his discretion. As a result, there is no basis for reversal of the trial judge's findings.

Nonetheless, ISC argues for the first time on appeal and without citation to any authority, that Steel Service's purported bad faith refusal to make any payment to ISC after completion of the Project, thereby forcing ISC to sue Steel Service to obtain payment to ISC, warrants an award of attorneys' fees against Steel Service. However, this Court well knows that it cannot consider ISC's bad faith argument for the first time on appeal. Chantey Music Publishing, Inc. v. Malaco, Inc., 915 So. 2d at 1060. That is because "[a] trial judge cannot be put in error on a matter not presented to him." Southern v. Mississippi State Hospital, 853 So. 2d at 1214-15.

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[36] ISC argues that the trial judge ignored the fact that Steel Service was paid in December 2004 and that it did not make any payment to ISC until after ISC sued in February 2004 (Appellant's Brief, at 26). ISC makes no mention of the fact that it owed Steel Service $28,626.45 for raw materials it purchased on open account from November 12, 2003 to February 20, 2004 (Ex. D-28 (ID)) and that Steel Service contended, at that time, that ISC owed it $60,823 (Ex. P-16) or a total of $89,624.24. And, that is why ISC made the February 2005 payment to Steel Service (Ex. P-18) and not the other way around contrary to ISC's contentions (Appellant's Brief, at 27).

In any event, ISC forgets that it admittedly owed Steel Service $28,626.45 on open account for materials purchased by it from Steel Service from November 12, 2003 to February 20, 2004[37] (Ex. D-28 (ID)) in addition to the costs Steel Service incurred to complete and correct ISC's work on O'Hare of $53,825 (Ex. P-17) and that ISC – not Steel Service[38] – wrote Steel Service a check for $14,451.45 on February 2, 2005 (Ex. P-18) (($68,000 - $53,825 = $14,175 owed to ISC) ($28,626.45 - $14,175 = $14,451.45 paid to Steel Service)).

Next, ISC contends that it should be awarded attorneys' fees because, but for its lawsuit, it would have never been paid the $31,598.50 awarded it by the trial judge. However, ISC forgets that, prior to trial, Steel Service paid ISC a total of $21,942.90 (Ex. D-33), leaving only $9,655.60 as the balance due ISC based on the trial judge's calculation of $31,598.50 owed to ISC (R.00165).

Next, ISC seizes upon the trial judge's finding that ISC was owed $31,598.50 and that a judgment was entered in its favor to support its position that it is the "prevailing party" for purposes of award of attorneys' fees. However, the very authorities ISC cites for support betray it. For instance, as ISC notes, Black's Law Dictionary (6th Ed. 1994) defines prevailing party as "the party who successfully prosecuted the action . . . , prevailing on the main issue . . . ." (Emphasis added.) Similarly, Cruse v. Nunley, 699 So. 2d 941, 945 (Miss. 1997), also cited by ISC, holds that the "prevailing party" is one who succeeds "on any significant issue." And, both

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[37] ISC sued Steel Service on February 3, 2004 (R.00008). ISC started work on this Project on November 11, 2003 (Exs. D-14 and D-40) and started buying materials from Steel Service the next day and continued even after it sued Steel Service. Obviously, ISC was concerned that it would not get paid and decided to engage in vigilante justice.

[38] ISC's appellate counsel incorrectly states the facts when he says that Steel Service was wrongfully withholding $14,451.45 and paid that amount to ISC (Appellant's Brief, at 26-27). It was actually the other way around as established by ISC's check for that amount to Steel Service (Ex. P-18).

Black's and Cruse are consistent with the majority rule which defines "prevailing party" as used in contractual fee-shifting clauses as the party that establishes that the other party breached the contract, regardless of whether or not damages are recovered for the breach. See, e.g., King v. Brock, 646 S.E. 2d at 207; Spencer v. City of Aurora, Colo., 884 P.2d at 331.

Here, even though the trial judge, when "calculating the reasonable costs to which each party is entitled after [ISC's] breach" (R.00164), compensated ISC for the earned but unpaid value of the contract performed by it and entered judgment in its favor for $9,655.60, the trial judge found that ISC was the breaching party and that Steel Service was entitled to $36,401.50 ($68,000 - $31,598.50) (R.00164) for the costs incurred by Steel Service to complete and correct ISC's work. Therefore, even though ISC got a judgment for $9,655.60, Steel Service is clearly the "prevailing party" as the trial judge made clear by the following findings:

-- ISC "breached the contract" (R.00161);

-- ISC's breach "entitled [Steel Service] to terminate the contract" (R.00161);

-- "[t]he many issues raised by [ISC]" "are insufficient to constitute an excuse for [ISC's] breach" (R.00162);

-- "[t]his litigation was necessitated by [ISC's] breach . . . [Steel Service] was entirely justified in taking the actions it took and in defending the claims of [ISC] in court" (R.00165).

Most importantly, the trial judge specifically found that "[e]ven though [ISC] received a judgment, it cannot be considered to be the 'prevailing party' for at least two reasons. First, [ISC] did not recover all that it claimed it was due, in fact, it did not get close to that amount. Second, and most crucial, but for [ISC's] breach . . . , none of this litigation would have been necessary" (R.00165) (emphasis added).

Finally, ISC complains about the fact that the trial judge only awarded Steel Service some of its attorneys' fees and expenses – being those fees and expenses incurred from and after June 6, 2005, which was the date of Steel Service's last payment to ISC (R.00233). ISC argues, without citation to the record because there is none, that the trial judge used that date because it was the date a settlement offer was made by Steel Service and that the trial judge improperly treated that settlement offer as an offer of judgment.

However, whether or not a settlement offer was made is beside the point, as the Order, which was "Approved as to Form" by ISC's appellate (as opposed to its trial) counsel, specifically states, at paragraph 2, that:

> 2. As the prevailing party, the defendant is contractually entitled to attorneys' fees and expenses incurred from and after June 6, 2005, the date of the last payment from defendant to plaintiff.

(R.00233) (emphasis added).

ISC's counsel cannot now impeach the wording of an order which he signed "Approved as to Form." Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993).

In addition, as Steel Service's statements for attorneys' fees and expenses reflect (R.00178-00202), June 6, 2005 is the date that Steel Service began focusing upon preparation for trial. Thus, the trial judge obviously used June 6, 2005 because he wanted to compensate Steel Service for the majority of the expenses that it incurred which were incurred to prepare for and attend trial ($22,204.75 awarded ÷ $36,928 total requested = 60% incurred from and after June 6). Under these circumstances, it is clear that the trial judge did not abuse his discretion.

VI. THE CIRCUIT JUDGE DID NOT ABUSE HIS DISCRETION IN AWARDING STEEL SERVICE ATTORNEYS' FEES AND EXPENSES ON APPEAL.

Finally, ISC complains that the Circuit Court erred in awarding Steel Service attorneys' fees and expenses on appeal. However, as ISC acknowledges, an award of attorneys' fees and expenses is reversed only where there is an abuse of discretion. Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp., 743 So. 2d 954, 970-71 (Miss. 1999). As there was no abuse of discretion by the Circuit Court, the award must stand.

As its only basis for abuse of discretion, ISC cites the fact that the Circuit Court awarded Steel Service attorneys' fees and expenses on appeal even though Steel Service initially sought to recover its attorneys' fees and expenses incurred on appeal via a motion to remand to the trial judge, seeking to enforce his April 7, 2006 Order, reserving Steel Service's claim for attorneys' fees and expenses on appeal (R.00233-00234), and then, in its reply, acknowledged that the Circuit Court had jurisdiction and sought to recover same in the Circuit Court (R.00078).[39] According to ISC, the Circuit Court was "procedurally barred" from considering Steel Service's request because its request was first made in Steel Service's Reply (R.00078) and not in its initial Motion (R.00058), citing Lauro v. Lauro, 847 So. 2d 843, 851 (Miss. 2003); Blevins v. Bardwell, 784 So. 2d 166, 180 (Miss. 1002); and Mack v. State, 784 So. 2d 976 (Miss. App. 2001).

Lauro, Blevins, and Mack are inapplicable. These cases do not pertain to an award of attorneys' fees. They pertain to appellate briefs and a violation of this Court's Rule 28(a)(3) that

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[39] ISC responded to Steel Service's Motion to Remand, citing the same domestic relations cases which it cites here. Even though ISC's authorities were not the most relevant, Steel Service agreed that the Circuit Court, as well as this Court, can award attorneys' fees and expenses incurred on appeal where, as here, the parties' contract so provides. See, e.g., Knight v. McCain, 531 So. 2d 590, 597 (Miss. 1988); Clow Corp. v. J.D. Mullican, Inc., 356 So. 2d 579, 583 (Miss. 1978); Morgan v. United States Fidelity & Guaranty Co., 191 So. 2d 917, 924 (Miss. 1966).

"the failure to cite any authority [in support of an issue on appeal] can be treated as a procedural bar, and this Court is under no obligation to consider the assignments." Blevins, 784 So. 2d at 180.[40] As this Court stated, the reason for this Rule is that"[i]t would be unfair for us to review this issue as written in the reply brief because [the appellee] was not afforded the opportunity to respond." Id.

Here, it was not unfair for the Circuit Court to award fees and expenses on appeal because ISC knew that Steel Service sought to recover its attorneys' fees and expenses incurred on appeal based upon Steel Service's initial Motion to Remand (R.00058) and ISC was able to and did respond substantively to Steel Service's Reply in Support of Motion for Award of Attorneys' Fees and Expenses on Appeal (R.00081). Therefore, the Blevins[41] notion of fairness was fulfilled here.

CONCLUSION

ISC's second appeal – like its lawsuit – is without merit. Thus, the trial judge and the Circuit Judge should be affirmed and Steel Service should be awarded its attorneys' fees and expenses incurred in connection with this appeal.[42] And, this Court should also award Steel Service its costs pursuant to M.R.A.P. Rule 36 and damages for this frivolous appeal pursuant to M.R.A.P. Rule 38.

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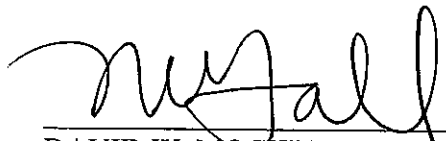
[40] Mack is even more remote from the issues sub judice not only because it is a criminal case but also because, in that case, this Court's holding was that it need not consider issues raised for the first time on appeal. 784 So. 2d at 9797. That is not the situation here where the issue was raised in Steel Service's initial Motion (R.00058).

[41] In Blevins, the appellant, in his initial brief, "fail[ed] to cite any authority to support this issue, but he also decline[d] to devote any discussion or attention whatsoever to it." 784 So. 2d 15 180.

[42] Steel Service has filed simultaneously herewith a Motion for Award of Attorneys' Fees and Expenses on appeal upon this Court's affirmance.

Respectfully submitted,

STEEL SERVICE CORPORATION, APPELLEE



DAVID W. MOCKBEE, MS Bar #[redacted]
MARY ELIZABETH HALL, MS Bar #[redacted]
Its Attorneys

OF COUNSEL:

MOCKBEE HALL & DRAKE, P.A.
Capital Towers, Suite 1820
125 S. Congress Street
Jackson, Mississippi 39201
Telephone: 601-353-0035
Facsimile: 601-353-0045

CERTIFICATE OF SERVICE

I, Mary Elizabeth Hall, do hereby certified that I have this day mailed via United States Mail a true and correct copy of the above and foregoing Brief of Appellee Steel Service Corporation to the following:

The Hon. William E. Chapman, III
Rankin County Circuit Court
Justice Center
215 E. Government Street
Post Office Box 1885
Brandon, MS 39043-1885

The Hon. Kent McDaniel
County Court of Rankin, MS
Justice Center
215 E. Government Street
Post Office Box 1599
Brandon, MS 39043-1599

Christopher Solop, Esq.
Lynn Patton Thompson, Esq.
Robinson Biggs Ingram Solop & Farris
Post Office Box 14028
Jackson, Mississippi 39236-4028

Harvey L. Fiser, Esq.
Wyatt, Tarrant & Combs, LLP
4450 Old Canton Road, Suite 210
Jackson, MS 39211

This the 9th day of October, 2007.

Mary Elizabeth Hall