

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

**REPLY BRIEF OF THE APPELLANT,
INDUSTRIAL STEEL CORPORATION**

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Appellant Industrial Steel Corporation ("Industrial Steel") finds it interesting and also incredible for Appellee Steel Service Corporation ("SSC") to argue that this is a "garden variety breach of contract action" and devote forty-five (45) pages to defending its wrongful conduct. In its brief, SSC spins the facts in an effort to depict itself as the party that has been wronged in this litigation, hoping to weave together a story that will support the trial judge's decision. However, when read in its entirety, this Court will find the trial testimony of SSC's witnesses riddled with inconsistencies leading the Court to the inescapable conclusion that the trial court's decision *is not* supported by the law or substantial, credible and reasonable evidence and must be reversed.

SSC begins building its case by counting witnesses. Apparently, SSC believes since it had four witnesses compared to Industrial Steel's single witness, SSC's case is more credible. However, SSC's parade of witnesses offered nothing but confusion and doubletalk. When the testimony of each SSC witness is carefully examined it does not lead to the legal and factual conclusions reached by the trial court and affirmed by the circuit court. On the other hand, Industrial Steel's President, Robert Donald, offered substantial, credible and reasonable testimony to support a decision in favor of Industrial Steel and against SSC. This Court must now correct the legal and factual errors of the trial court and render a decision in favor of Industrial Steel or, in the alternative remand the case for a new trial.

II. CLARIFICATION OF THE STANDARD OF REVIEW

SSC argues for the application of a single standard of review to the issues in this appeal. SSC is incorrect. This appeal involves both legal and factual issues. A single standard of review does not control. See **Brief of Appellant at page 6-7**. In an effort

to muddy the waters on this issue, SSC cobbles together frequently misleading, out-of-context quotations, and suggests the lower courts' rulings are unassailable, even by this Court. Contrary to SSC's assertions, Industrial Steel's brief contains a plethora of citations to the trial record. Industrial Steel also provides this Court with accurate citations to applicable legal authority that establish the trial court's decision was not supported by substantial, credible and reasonable evidence or the law.

III. GETTING THE FACTS RIGHT

SSC methodically outlines the parties' Purchase Order for the Court. **Appellee's Response at page 4.** What SSC fails to mention, however, is the fact that it squandered away valuable performance time (from October 14, 2003 through October 28, 2003) while it tried to beat down Industrial Steel's initial price of \$83,369.00 to \$68,000.00. Even this price was apparently not low enough for SSC since it calls to the Court's attention that Industrial Steel's \$68,000.00 price was \$3,244.00 more than SSC's budget. *Id.* Why even mention this fact? Because SSC wants this Court to believe, as the trial court did, that SSC could have accomplished the work faster and cheaper. Instead, this Court should consider this seemingly insignificant fact to be what motivated SSC to try rolling the bottom chords in its own shop rather than incur the expense of shipping the materials to WhiteFab in Birmingham, Alabama to have this work accomplished in a timely manner.¹ It was SSC's decision to "save a buck" that ultimately caused the delay in the delivery of ***all*** of the material to Industrial Steel at the time the Purchase Order was entered into by the parties.

¹ Based upon SSC's "Structural Recap" and "Freight Recap" set forth in Exhibit D-36, performing this work in its shop would have saved SSC approximately \$11,452.00. Instead, SSC's decision to cut corners by "pushing" the arc for bottom cord ultimately cost it additional money and wasted valuable time that Industrial Steel could have used to complete its work.

Next, SSC sets forth its interpretation of Industrial Steel's "estimate" for the work to use as its baseline to justify its actions. This document was admittedly obtained long after Industrial Steel's work was completed and SSC's decision not to pay Industrial Steel a "plugged nickel" of the \$68,000.00 Purchase Order price. **Appellee's Response at page 4.** Nonetheless, SSC used Industrial Steel's "estimate", and with the assistance of its able counsel, to develop a trial strategy based upon a "Monday morning quarterback" theme that failed to take into consideration the cumulative impact of the SSC's breach of its duty to timely deliver *all* of the material to Industrial Steel in a suitable condition.²

SSC then describes the vast quantities of materials it delivered to Industrial Steel. **Appellee's Response at page 5.** SSC conveniently omits any statement that its first delivery did not contain *all* of the material necessary for Industrial Steel to complete the trusses for O'Hare.³ In addition, SSC inaccurately highlights a *portion* of Mr. Donald's testimony where he states Industrial Steel could have completed the work in two weeks. The question posed to Mr. Donald and his response was as follows:

Mr. Fiser: . . . *If you had had all of the steel on that date* [October 29 or 30, 2003], what was your estimation as to how long it would take you to complete the entire O'Hare project?

Mr. Donald: We could, with leniency, do it in two weeks.

² Industrial Steel's price was based upon its understanding that *all* the material would be available at the time the Purchase Order was entered into by the parties. **Transcript at page 24 and 31; Plaintiff's Exhibit P-1.**

³ SSC later describes the reasons for its late delivery of material to Industrial Steel. **Appellee's Response at pages 6-8.** However, the trial court dismissed SSC's untimely delivery of *all* the materials as "insufficient to constitute an excuse for Plaintiff's breach of the time element of the contract" whereas the trial court considered Industrial Steel's failure to execute a recovery plan to compensate for SSC's late delivery of materials as a "material breach". **Record at page 00162.**

Transcript at pages 38-9. (emphasis added) The trial court apparently dismissed or forgot this critical testimony in finding that SSC's untimely delivery of **all** the material was insufficient to constitute a breach of its contractual obligations to Industrial Steel.

It is essential for this Court to understand what the trial court apparently failed to recognize about impact of the untimely delivery of **all** the material to Industrial Steel. Contrary to SSC's position, the mere fact that SSC delivered eighty percent (80%) of the steel does not necessarily mean that Industrial Steel would have to expend eighty percent (80%) of its estimated labor hours before it needed the remaining twenty percent (20%) of the materials. **Transcript at pages 42-3; 49-50.** SSC's analysis labor hour analysis is an extreme over simplification aimed at excusing its untimely delivery of **all** the materials to Industrial Steel. See **Appellee's Response at pages 6-9 and 30-1.** There is not a direct relationship between the number of labor hours required to perform a task and a particular quantity of steel. There is also a preferred and, in this instance, necessary sequence within which the work must be performed.⁴ Industrial Steel's "estimate" does not identify the sequence to complete the work within the compressed time schedule. Industrial Steel expected to receive **all** of the material and perform the work in its planned sequence—not in the sequence made necessary by SSC's effort to "save a dollar" by attempting to "push" the arc in the bottom chords in its own shop. **Appellee's Response at page 6.**

SSC, Industrial Steel and the trial court all agree that the Purchase Order provided, *inter alia*, that time was of the essence in the performance of the work. Industrial Steel's performance was therefore contingent upon SSC's timely performance

⁴ The fabrication and assembly of the trusses is much like assembling a car. You can have eighty percent (80%) of the parts shipped to you, laid out and ready to put together but, if you do not have the bolts to assemble the parts, there is not much that you can do except wait for those essential components to arrive.

of its promise to provide **all** of the materials (in a suitable condition) at the time the Purchase Order was entered into by the parties. **Brief of Appellant at page 8-9.** However, the trial court's decision steers clear of the unambiguous language of the Purchase Order that required SSC to "provide all shop drawings, material, paint and freight." (**Plaintiff's Exhibit P-5**) Instead, notwithstanding SSC's admission that it failed to timely deliver **all** of the required material, the trial court excuses this delay as "insufficient to constitute an excuse for Plaintiff's breach of the time element of the contract." **Appellee's Response at pages 6-8; Record at 00162.** The overwhelming weight of the evidence and SSC's admitted breach of its duty under the Purchase Order to "provide **all** shop drawings, material, paint and freight" establishes the materiality of SSC's breach. . (**Plaintiff's Exhibit P-5**) (emphasis added).

Undaunted by the disparity in evidence, SSC employs the strategy of "the best defense is a good offense". SSC cleverly seeks to beguile this Court with the same argument it used before the trial court—Industrial Steel should have placed SSC on notice that its late delivery of materials would impact the completion of the work. **Appellee's Response at pages 6-8.** In an effort to drive home its point, SSC notes in its response brief that "John Oxly, 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 [Robert] Donald never complained to [John] Oxley that Steel Service was delaying ISC." **Appellee's Response at page 8.** So what?!⁵ Mr. Oxly knew SSC had breached its obligation to furnish **all** of the material required for Industrial Steel to complete the work. It is disingenuous to even suggest Mr. Oxley was

⁵ Robert Donald was in daily communication with Steve Tillery, the Project Manager.

not aware of the potential impact of this late deliver on a contract where time was of the essence. *Id.*

Industrial Steel's plan to prosecute the work required **all** of the material to be delivered prior to commencement of the work.⁶ SSC adroitly attempts to dodge the issue by alleging that Industrial Steel failed to prosecute the work. This theory is built upon incomplete documentation and invalid assumptions. It is therefore not supported by substantial, credible and reasonable evidence.

In an after the fact analysis created and developed by its legal counsel, SSC offered into evidence various reports manipulated to suit SSC's interpretation of Industrial Steel's pre-bid estimate and irrelevant time records to mesmerize the trial court into believing Industrial Steel was not prosecuting the work. The trial court was apparently transfixed on this illusion and lost sight of the fact that SSC breached its obligation to timely furnish **all** of the material to Industrial Steel to enable it to prosecute the work in an efficient and timely manner. This material breach essentially eviscerated Industrial Steel's ability to control its sequencing and performance schedule. The breach literally put Industrial Steel at the mercy of SSC.

The domino effect of the late delivery of material by SSC, the delays caused by the rusted material, and SSC's direction to fabricate the trusses based upon incorrect information⁷ had a substantial impact on Industrial Steel's plan for performance. Nonetheless, SSC successfully convinced the trial court to simply look at the total tons

⁶ Industrial Steel also expected the materials could be used upon delivery. **Brief of Appellant at pages 9-12.** At trial, SSC attempted to minimize the impact of the rust by representing to the trial court this task took only a few hours. However, it appears the trial court did not consider the valuable production time lost by Industrial Steel in the loading, shipping to SSC's facility, off-loading, re-loading, shipping back to Industrial Steel's facility, and off-loading of this material.

⁷ This incorrect information was SSC's attempt to correct an error in its initial shop drawings furnished to Industrial Steel.

delivered and compare that figure to the total labor hours in Industrial Steel's estimate. Applying this elementary logic without understanding the nuances of what was involved in the proper sequencing of the work, the trial court was lulled into believing SSC's conduct had no material impact on Industrial Steel's ability to timely complete the work. The substantial, credible and reasonable evidence does not support the trial court's findings and conclusions.

IV. INDUSTRIAL STEEL WORKED WITH WHAT IT HAD

SSC used Industrial Steel's time reports to convince the trial court that Industrial Steel failed to adequately staff the work. The facts do not support this conclusion. Rather than offering a complete picture of the manpower used by Industrial Steel, SSC "cherry picked" the time cards. If the trial court had examined the Defendant's Exhibit D-40 and compared them with Plaintiff's Exhibit P-23, the disparity would have been evident.⁸ Exhibit P-23 includes hundreds of labor hours between October 31, 2003, when SSC delivered its first shipment of steel, through November 11, 2003, when SSC finally delivered all the bottom chords. **Transcript at page 221.** The lack of accuracy associated with SSC's labor hour analysis was ignored by the trial court despite the following testimony from Mr. Donald:

Mr. Fiser: . . . What was your understanding of the time cards that were sent during the production of documents? What were those?

Mr. Donald: I was getting everything that I could that I could identify with this job for Steel Service.

Mr. Fiser: Now, those are the things that you can identify with Steel Service?

Mr. Donald: Yes.

⁸ It appears from the trial court's Bench Opinion that it focused on the summaries of Industrial Steel's time records prepared by SSC and set forth in Exhibit D-40 rather than examining the actual time records introduced by Industrial Steel as Exhibit P-23. **Record at 00161.**

Mr. Fiser: Now, does that mean that that is every time card that has to do with work that was done on the Steel Service job?

Mr. Donald: By no stretch of the imagination, no, it does not.

Transcript at pages 432-3.

The unreliability of the data used by SSC in its Exhibit D-40 begins with the inconsistency in the total labor hours used by Industrial Steel during the period beginning October 30, 2003 and ending November 22, 2003, which was 3,150.25 hours. This is incorrect based upon Industrial Steel's Exhibit P-23. The number of labor hours for that period, based upon the complete time records, is 3,195.75. SSC also states that Industrial Steel only worked 198.5 labor hours for Steel Services from October 30, 2003 through November 8, 2003. Exhibit P-23 reflects 1,315.75 labor hours.⁹ Even when the labor hours associated with SSC's category of "other jobs" is deducted from this number, Industrial Steel's time records conservatively reflect that a minimum of 256 labor hours not accounted for by SSC in its analysis.¹⁰ As the trial court correctly observed, "the devil is in the details". However, that detail was not provided as part of Exhibit D-40. Contrary to the self-serving and incomplete rear view mirror labor hour analysis of SSC set forth in Exhibit D-40, the evidence supports the conclusion that work was behind schedule because SSC failed to timely deliver *all* of

⁹ Mr. Donald testified Industrial Steel performed a substantial amount of work during this period **Transcript at pages 43-4.**

¹⁰ As previously discussed in Industrial Steel's initial brief, the Simplex Time Card data does not reflect the job on which each employee worked. **Brief of Appellant at page 23.** SSC's Exhibit D-40 is therefore inaccurate and unreliable evidence of the actual time expended by Industrial Steel on the work from October 30, 2003 through November 8, 2003. There is absolutely no testimony or documentation to support SSC's assumption that all of the labor hours being performed on "other jobs" during this same period were unrelated to this project. It is worth noting that SSC never attempted either at trial or in its response, to specifically identify any "other jobs" on which it contends Industrial Steel was working during this same period. Simply put, no job including SSC's can be identified by Simplex time cards.

the material as promised and not because Industrial Steel did not prosecuted the work. The trial court therefore erred in finding that Industrial Steel breached the time element of the contract.

V. "SHOCK AND PANIC" - SSC'S OPPORTUNITY TO PROFIT AT THE EXPENSE OF INDUSTRIAL STEEL

The "shock and panic" alleged to have been experienced by SSC was manufactured. SSC knew the status of Industrial Steel's work and that delivery of the November 20, 2003 shipment was delayed not by Industrial Steel but by SSC's contractor. SSC not only managed to convince the trial court that Industrial Steel was the cause of the delay in meeting the November 20, 2003, delivery date but also convinced the trial court to pay for additional freight charges without any backup documentation. **Appellee's Response at page 36.** The truth is that SSC told the trial court what it needed to hear to support SSC's case against Industrial Steel. However, SSC's letter dated December 17, 2004, addressed to HLM Construction tells a different story that is inconsistent with SSC's testimony and the trial court's findings. **(Exhibit D-38)** In that correspondence, SSC demanded an additional \$18,044.00 from its contractor for "[a]dditional freight costs to have (4) loads per location instead of (2) as quoted." *Id.* SSC also requested an additional \$1,100.00 for permits, explaining this amount represented "[a]dditional cost for permits and trailer rental due to cancellation after permits were purchased. *This was done because HLM could not have the joist delivered until a week later and the trusses were not needed until the joist was [sic] delivered.*" *Id.* (emphasis added) If there was "shock and panic" on the part of SSC, it was temporary. SSC took what appeared to be a problem and turned it into an

opportunity to justify its back charges against Industrial Steel and its change order proposal against its contractor.¹¹

Finally, SSC's reliance on *Sentinel Indus. Co. v. Kimmins Indus.*, 743 So. 2d 954 (Miss. 1999) is misplaced. It is true that, pursuant to *Sentinel*, a plaintiff may not be deprived of its right to recover due to its inability to prove the extent of its damages with reasonable certainty. *Id.* at 967. But that proposition has nothing to do with Industrial Steel's arguments on this issue. Industrial Steel argued in its initial brief that SSC could not prove the existence – that is, the nature – of any damage caused by Industrial Steel's alleged failure to meet the scheduled completion date. *Sentinel* is inapposite in this case.

VI. SSC'S PRE-SUIT DISCUSSIONS - "VOID"

Industrial Steel is shocked by the trial court's comments that "but for Plaintiff's breach of an essential element of the contract, none of this litigation would have been necessary." (**Record at 00165**). None of this litigation would have been necessary if SSC had not returned Industrial Steel's invoice stamped "void" and with a post-it note stating "Not Steel Service's". (**Plaintiff's Exhibit P-15**) SSC laid down the gauntlet. Industrial Steel merely picked it up. Incredibly, the trial court was not offended by SSC's absolute refusal to pay Industrial Steel a dime of the Purchase Order amount without any documentation from SSC of its back charges.¹² This conduct can only be characterized as a breach of SSC's duty of good faith owed to Industrial Steel.

¹¹ In fact, it appears SSC actually profited as a result of the delay which it alleges was caused by Industrial Steel. **Transcript at pages 315-6**. See also, **Plaintiff's Exhibit P-22** and **Defendant's Exhibit D-32**.

¹² SSC Response references its self-serving letter dated December 29, 2003, recounting SSC's recollection of the events ending with the following: "All of the back up for the back charges on the items SSC had to fabricate, the rework on the mis-fabricated pieces and the additional freight required by SSC will be pulled together and

VII. SSC'S PRETRIAL PAYMENTS: WHAT TO DO WHEN CAUGHT WITH A HAND IN THE COOKIE JAR

SSC's "good faith" efforts to resolve this matter are tantamount to a criminal offering to return money he or she has stolen after being caught the police. Every penny Industrial Steel secured from SSC prior to trial was a result of "errors" being discovered by Industrial Steel and "corrected" by SSC. Industrial Steel was forced to trial because SSC continued to withhold payment for work that Industrial Steel had performed. The simple fact is that "this litigation would not have been necessary" if SSC had not breached its promise to timely deliver *all* of the material to Industrial Steel and honored its payment obligations to Industrial Steel.

VIII. INDUSTRIAL STEEL HAS ADEQUATELY RESERVED ALL OF ITS ISSUES AND ARGUMENTS FOR THIS COURT TO RESOLVE

In its Notice of Appeal, Industrial Steel properly appealed the entirety of the circuit court's Opinion and Order. Industrial Steel is perplexed at SSC's arguments that "[Industrial Steel] did not appeal the circuit court's ruling, striking the 'Exhibits'" and "[Industrial Steel] did not appeal the Circuit Court's ruling, striking [Industrial Steel's] new found legal arguments." **SSC's Motion to Strike**, ¶¶ 4, 7.

Under the Mississippi Rules of Appellate Procedure, the only action that is absolutely required to perfect an appeal is the timely filing of a Notice of Appeal. M.R.A.P. 3(a). Failure of an appellant to take any other step does not affect the perfection of the appeal. *Id.* Industrial Steel filed its Notice of Appeal in the Circuit Court of Rankin County on April 12, 2007. This pleading perfected Industrial Steel's appeal of the entire decision rendered by the circuit court on March 13, 2007.

forwarded to ISC shortly." The total back charges (**Plaintiff's Exhibit P-16**) of \$60,823.00 turned out to be grossly overstated. Nonetheless, the trial court did not appear to be trouble by this fact.

Succinctly stated, Industrial Steel took all steps necessary to perfect its appeal of the trial court and circuit court's decisions. Therefore, Industrial Steel preserved its right to have this Court review the trial and circuit court's errors, both with regard to the facts and the law.

SSC conveniently ignores the substance of Industrial Steel's Notice of Appeal and Appellate Brief to this Court. SSC attempts to elevate the form of Industrial Steel's assignments of error over the actual substance of Industrial Steel's arguments. SSC's form over substance assertions amount to nothing more than a futile effort by SSC to forestall this Court's ruling on the merits of Industrial Steel's appeal. Although not specifically couched as "whether the Circuit Court erred in striking legal standards the trial court was duty bound to consider", Industrial Steel's appeal set forth the issue of "Whether the trial court applied the correct legal standards in determining Industrial Steel Corporation had breached its contract with Steel Services Corporation." **Brief of Appellant at page 1.** Notably, SSC agrees that the issues set forth on appeal by Industrial Steel "have been adequately stated . . . and need not be reiterated." *Id.* However, despite conceding to the issues on appeal, SSC now asserts that the issue of "whether the trial court applied the correct legal standard" is not an issue since the circuit court struck the arguments of Industrial Steel.

Industrial Steel has fully complied with the technical requirements of the Mississippi Rules of Appellate Procedure. See M.R.A.P. 28 (requiring the filing of a brief containing a certificate of interested persons, tables, a statement of the issues, a statement of the case, a summary of the argument, argument, and a conclusion, all of which are contained in Industrial Steel's Brief). *Cf. Davis v. J.C. Penny Co.*, 881 So.2d 969 (Miss.App. 2004) (holding that appellant's brief failed to comply with M.R.A.P. 28

where appellant declined to identify any issues, stating instead that he would make the Court aware of his issues upon oral argument), *Giuffria v. Concannon*, 851 So.2d 436 (Miss.App. 2003) (refusing to consider a brief where it failed to cite any legal issues). Industrial Steel has satisfied the requirement in M.R.A.P. 28 (a)(3) that all issues argued by counsel must be distinctly identified. Industrial Steel has clearly identified multiple issues for this Court to address on appeal. This Court should dismiss SSC's form over substance assertions and proceed with ruling on the merits of the appeal.

IX. THE TRIAL COURT FAILED TO APPLY THE CORRECT LEGAL STANDARD

There is an implied duty of good faith and fair dealing inherent in every contract. This legal principle is deeply imbedded in Mississippi contract law. In *Cenac v. Murry*, 609 So.2d 1257 (Miss. 1992). Nonetheless, SSC manages to craft a number of legal arguments which it believes makes its contract with Industrial Steel not subject to this duty. SSC argues that the duty is not applicable here "because a claim for breach of implied covenant of good faith and fair dealing arises from a breach of a specific contractual obligation." **Appellee's Response at page 22.** For example, however, SSC breached its specific contractual obligation to "provide *all* shop drawings, material, paint and freight." **(Plaintiff's Exhibit P-5)** (emphasis added) SSC admittedly breached that critical obligation which was an essential term of the Purchase Order. **Appellee's Response at pages 6-8.** This Court has defined material breach as follows:

[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.

Gulf South Capital Corp. v. Brown, 183 So.2d 802, 805 (Miss. 1966). SSC's breach of this requirement was material, and the trial court's finding otherwise is not supported by the record.

SSC also seeks to rid itself of its obligation to make timely payment to Industrial Steel by arguing that SSC could not pay Industrial Steel until it received payment for Industrial Steel's work. **Appellee's Response at page 22.** The overwhelming weight of evidence presented to the trial court establishes beyond question that SSC breached its payment obligations to Industrial Steel. (**Defendant's Exhibit D-7 and Trial Transcript at pages 196-7**). This is why the trial court awarded Industrial Steel damages against SSC.

SSC contends that it did not get paid until more than one year after the work under the Purchase Order was complete.¹³ SSC relies upon its Exhibit D-38 to support its refusal to make any payment to Industrial Steel after its completion of the work. This document shows SSC's original contract amount was \$181,635.00.¹⁴ It also establishes that SSC received payments from its contractor in the amount of \$62,002.40 on May 5, 2004 and \$19,733.80 on June 25, 2004. Thus, SSC had received forty-five percent (45%) of its original contract amount by June 25, 2004. Nonetheless, SSC did even begin to balance its ledger with Industrial Steel until on or about February 2, 2005, more than one year after SSC sent its December 17, 2004, demand letter to its contractor. **Appellee's Response at page 2; (Defendant's Exhibit P-18).** SSC's next payment to Industrial Steel came on June 19, 2005, just three days before trial. The "final payment" due from SSC was determined by the trial court when it awarded Industrial Steel

¹³ Interestingly, there is nothing in the record that would establish the date on which SSC received its contract balance from its contractor.

¹⁴ SSC also claims "invoiced change proposals" for \$34,879.00. Industrial Steel was not the beneficiary of any of the proposed change order amounts.

\$9,655.60.¹⁵ Therefore, the substantial, credible and reasonable evidence supports a finding that SSC breached its payment obligations to Industrial Steel.

X. MISCALCULATION OF DAMAGES BY TRIAL COURT

Industrial Steel's computation of the damages to which it is entitled is anything but "voodoo." **Brief of Appellant at pages 20-3.** Rather, the calculation is a logical and straight forward analysis of the figures marshaled by SSC in support of the back charges to which it claims entitlement. Based upon the evidence, Industrial Steel's calculation of damages explains what the trial court did wrong in determining its award to Industrial Steel. SSC's response is merely an effort to build an impenetrable factual wall to protect its back charges. SSC knows that confusion and obfuscation of the facts are the enemy of an appellant and the best friend of an appellee. Industrial Steel's analysis makes sense and demonstrates the trial court's damage calculations are not supported by the substantial, credible and reasonable evidence in the record.

XI. SSC WAS NOT THE PREVAILING PARTY AND IS NOT ENTITLED TO ATTORNEY FEES AND EXPENSES

SSC was not the prevailing party in this litigation and should not have been awarded attorney fees and expenses. The slender reed upon which SSC relies to support the trial court's finding as to this issue is the belief that the litigation was necessitated by Industrial Steel. SSC's failure to pay Industrial Steel for its work necessitated the litigation, not Industrial Steel's alleged breach of contract. SSC argues that it was entitled to withhold payment based on a claimed right to back charges and unrelated payment disputes. **Appellee's Response at page 39.** Once again, SSC

¹⁵ Industrial Steel continues to question the trial court's calculation of the award amount as discussed in its initial brief to this Court.

seeks to shift the focus from the issue of "prevailing party" to facts that it believes depict SSC as the "white knight".

Whether SSC is the prevailing party in this litigation must be measured in part by the amount demanded by Industrial Steel and the amount ultimately paid by SSC *after* the litigation was initiated, regardless of whether the payment was voluntary or by decision of the trial court. It is error for the trial court to sweep SSC's pre-trial payments under the carpet and find that because Industrial Steel only received an actual judgment of \$9,665.60 against SSC that it was therefore the prevailing party.¹⁶

The trial court awarded Industrial Steel \$31,598.50 for work for work it performed before filing suit. **(Record at 00225-6)** Even though the trial court found SSC to be the "prevailing party", Industrial Steel recovered \$31,598.50 of the original \$68,000.00 claimed, which equates to forty-six percent (46%) of its original demand. Industrial Steel respectfully submits that this award is no trifling amount, as suggested by the trial court. **(Record at 00226)**. The trial court's finding SSC to be the prevailing party in this litigation punishes Industrial Steel for rightfully seeking compensation for work which SSC acknowledged and was legally obligated to pay. SSC may have been successful in convincing the trial court that Industrial Steel failed to timely deliver the finished product to SSC, but Industrial Steel is the party that secured a monetary award against SSC because it failed to timely pay Industrial Steel for work performed.

Industrial Steel obtained a judgment against SSC because SSC breached its obligation to pay Industrial Steel. Thus, as the "Plaintiff" in this litigation, Industrial Steel prevailed on the issues of liability and was successful in securing a judgment in its favor

¹⁶ SSC had initially asserted a counterclaim against Industrial Steel. However, SSC dismissed its counterclaim with prejudice leaving only Industrial Steel's claim for contract payment to be decided by the trial court. **(Record at 00125)**

and against SSC. SSC obtained no relief from the trial court and did not prevail in this litigation. The trial court therefore abused its discretion by declaring SSC the prevailing party and must be reversed.

SSC reaches across this Court's jurisdictional boundaries to shore up the trial court's determination that SSC was the prevailing party. SSC cites opinions from Georgia, Colorado, Connecticut, and Kentucky to support the argument that it was the prevailing party below. The authority upon which SSC relies should be disregarded, as those cases are in direct conflict with Mississippi public policy. This Court has repeatedly admonished parties that it is not bound by the jurisprudence of other courts, stating that "[w]hile the Court may utilize [decisions from other jurisdictions] as persuasive authority if it finds them well-reasoned, the decisions are not binding, and this Court is at perfect liberty to disregard them." *Paz v. Brush Engineered Mat'ls*, 949 So. 2d 1, 7 (Miss. 2007). The Court may also refuse to follow a foreign decision that is contrary to the public policy of this state. *Cucos, Inc. v. McDaniel*, 938 So. 2d 238, 241 (Miss. 2006).

Although not directly implicated in this appeal, *Miss. Code Ann.* § 11-53-81 (Rev. 2002) allows the prevailing party to collect attorneys' fees in an action founded on an open account. The Mississippi Supreme Court has held that a defendant is a prevailing party under Section 11-53-81 *only* if it obtains a judgment in its favor and against the plaintiff. *Hughes Equip. Co. v. Fife*, 482 So. 2d 1144, 1147 (Miss. 1986); *Rainbow Rental & Fishing Tools, Inc. v. Delta Underground Storage, Inc.*, 542 So. 2d 258, 263 (Miss. 1989) (defendant did not "prevail in the suit" even though it admitted that it owed plaintiff a sum certain). This Court's interpretation of what qualifies a party as the "prevailing party" for purposes of fee-shifting is a statement of Mississippi public policy.

See *Trustmark Nat'l Bank v. Pike County Nat'l Bank*, 716 So. 2d 618, 622 (Miss. 1998) (Mississippi Supreme Court is ultimate expositor of Mississippi law). The non-binding authority relied on by SSC must be rejected because the definitions of "prevailing party" in those cases are at odds with this statement of Mississippi public policy.

Like Section 11-53-81, the contract at issue in this case specifically entitles the prevailing party in litigation to an award of its attorneys' fees. Thus, under the prevailing notion of what qualifies a party as the "prevailing party" in Mississippi, SSC was not entitled to its attorneys fees in this case because it did not obtain a judgment against Industrial Steel.

Further, the question of what qualifies a party as a "prevailing party" is no longer open for review. Where a question of law has been decided by the Mississippi Supreme Court, that question is to be regarded as settled. *Moss Point Lumber Co. v. Board of Sup'rs of Harrison County*, 42 So. 290, 302 (Miss. 1906). As demonstrated, this Court has determined that a defendant is a "prevailing party" for purposes of attorney fee-shifting *only* if it obtains a judgment against the plaintiff. Consequently, the cases upon which SSC relies are of no consequence.

Even if the Court chooses to consider foreign decisions in determining whether SSC was the "prevailing party" below, which it need not, SSC's arguments as to the award of attorneys' fees fail nevertheless. Significantly, the Fifth Circuit has concluded "that for a party to qualify as a prevailing party, it must (1) obtain *actual relief*, such as an *enforceable judgment* or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement." *Energy Mgmt. Corp. v. City of Shreveport*, 467 F.3d 471, 482 (5th Cir.2006) (emphasis added). Thus,

under the Fifth Circuit's definition, SSC is not the prevailing party since it obtained no actual relief from and against Industrial Steel. Rather, the trial court rendered a judgment against SSC and in favor of Industrial Steel.

SSC cites to *King v. Brock*, 282 Ga. 56, 646 S.E.2d 206 (2007) where the Court concluded that a party could be considered to have prevailed in litigation even if it only recovered nominal damages. Here, SSC recovered no damages from Industrial Steel. *Lewis v. Grange Mut. Cas. Co.*, 11 S.W.3d 591 (Ky. App. 2000) addressed the issue of whether a plaintiff that succeeds on the issue of liability but recovers no damages could be a prevailing party. This case is also inapposite because Industrial Steel received a monetary award against SSC. *Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326 (Colo. 1994) actually supports Industrial Steel's position to the extent the Colorado court concluded that "where a claim exists for a violation of contractual obligation, the party in whose favor the decision or verdict on liability is rendered is the prevailing party for purposes of awarding attorney fees." *Id.* at 829. In this instance, Industrial Steel obtained a verdict on liability against SSC and an award of damages.

The decisions from these foreign jurisdictions recognize that the linchpin in the determination of whether a party has prevailed in litigation is whether it has obtained a verdict or monetary award against the opposing party. In the case *sub judice*, SSC was not the prevailing party. Rather, Industrial Steel is the party that obtained an award of damages against SSC and therefore prevailed on the issue of liability. Accordingly, the trial court erred in finding SSC was the prevailing party and was entitled to an award of attorney fees and expenses against Industrial Steel.

SSC's argument that "the party that establishes that the other party breached the contract, regardless of whether or not damages are recovered for the breach" is the

prevailing party means that a party found to have breached a contract could never be the prevailing party in the litigation regardless of the amount recovered. **Appellee's Response at page 41.** Hypothetically, this would mean that even if Industrial Steel had recovered, for example, \$62,000.00 of the \$68,000.00 demanded in its Complaint, or ninety-one percent (91%) of its claim, Industrial Steel would not be considered the prevailing party because it was found by the trial court to have breached its contract. Such a result defies logic and is unreasonable.

Finally, SSC erroneously relies on *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993) for the proposition that Industrial Steel may not impeach the wording of an order if Industrial Steel's attorney signed the order acknowledging that the order was "Approved as to Form". *Sperry* does not support that proposition. *Id.* In addition, Mississippi law is clear that an agreement to the form of an order is not an agreement to the contents of the order. *Klein v. McIntyre*, --So. 2d --, 2007 WL 2994216, *5-6 (Miss.Ct.App., No. 2006-CP-01775-COA, October 167, 2007) (the limiting language, "Approved as to Form Only", accompanying a party's signature on an order indicated that the party did not voluntarily consent and agree to the terms of the order).

XII. THE CIRCUIT COURT ERRED IN GIVING SSC "TWO BITES AT THE APPLE"

SSC's desperate desire to make this issue disappear is evident from the noticeable absence of relevant legal authority supporting its prayer for relief. SSC has no compunction about wielding the "procedural bar" argument when it comes to Industrial Steel. However, SSC applies a different standard to its procedural errors that can only be characterized as the "do over rule". Under the new procedural rule adopted by SSC and erroneously followed by the circuit court, SSC gets to file a new motion and correct its errors at the expense of Industrial Steel. This has not been the rule of law in

this jurisdiction and should not be now. See *Blevins v. Bardwell*, 784 So.2d 166, 180 (Miss. 2001). Contrary to SSC's contention, however, it is firmly established in Mississippi that when one party exposes the legal frailties in another's pleading, the issue is procedurally barred from consideration. Therefore, the circuit court should not have entertained SSC's new Motion for Attorneys' Fees and Expenses on Appeal but dismissed it as procedurally barred.

XIII. CONCLUSION

The trial court's finding that Industrial Steel breached its contract is inconsistent with the overwhelming weight of the evidence. The trial record is replete with inconsistent statements from SSC's witnesses and confusing charts and summaries that were either ignored or misunderstood by the trial court. The substantial, credible and reasonable evidence does not support the trial court's findings or its decision. The trial court's decision must be reversed and a decision rendered in favor of Industrial Steel and against SSC for not less than \$39,161.91, that Industrial Steel be determined to be the prevailing party and that this matter be remanded to the trial court for a determination of the attorney fees and expenses to which Industrial Steel is entitled to recover from SSC. In the alternative, Industrial Steel requests that this matter be reversed and remanded for a new trial.

THIS the 13th day of November, 2007.

Respectfully submitted,

INDUSTRIAL STEEL CORPORATION

By: 

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One of its Attorneys

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CERTIFICATE OF SERVICE

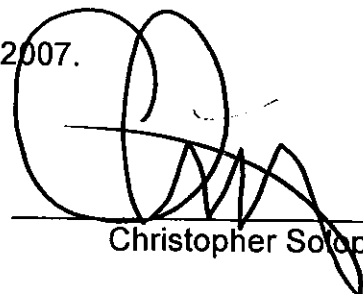
I, Christopher Solop, attorney for Industrial Steel Corporation, do hereby certify that I have this day served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to the following:

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Honorable William E. Chapman, III
Rankin County Circuit Judge
P.O. Box 1626
Canton, MS 39046-1626

Honorable Kent McDaniel
Rankin County Court Judge
P. O. Box 1599
Brandon, MS 39043-1599

THIS, the 13th day of November, 2007.



Christopher Solop