

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 THE APPELLANT,
INDUSTRIAL STEEL CORPORATION**

ORAL ARGUMENT REQUESTED

COUNSEL FOR APPELLANT:

**Christopher Solop (MSB No. [REDACTED])
ROBINSON, BIGGS, INGRAM,
SOLOP & FARRIS, PLLC
111 Capitol Building
111 East Capitol Street, Suite 101
Jackson, Mississippi 39201
Telephone: (601) 987-4822
Facsimile: (601) 713-9920**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Industrial Steel Corporation, Plaintiff-Appellant
2. Robert Donald, President, Industrial Steel Corporation
3. Harvey L. Fiser, Trial Counsel for Plaintiff-Appellant, now working with Wyatt, Tarrant & Combs, LLP
4. Lynn Patton Thompson, Trial Co-Counsel for Plaintiff-Appellant, now working with Robinson, Biggs, Ingram, Solop & Farris, PLLC
5. Steel Services Corporation, Defendant-Appellee
6. Mary Elizabeth Hall, Trial Counsel for Defendant-Appellee

This the 4th day of September, 2007.



Christopher Solop, MSB No. 7687
Attorney for Plaintiff-Appellant

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I. STATEMENT OF THE ISSUES

The issues in this appeal are set forth by Appellant, Industrial Steel Corporation as follows:

- A. Whether the trial court applied the correct legal standards in determining Industrial Steel Corporation had breached its contract with Steel Services Corporation.
- B. Whether the trial court erred in determining Industrial Steel Corporation breached its contract with Steel Services Corporation.
- C. Whether the trial court erred in calculating the measure of damages to which Industrial Steel Corporation was entitled to receive from Steel Services Corporation.
- D. Whether the trial court erred in finding that Steel Services Corporation was the "prevailing party" and entitled an award of attorneys' fees and expenses.
- E. Whether the circuit court erred in finding that Steel Services Corporation properly applied for and was entitled to an award of attorneys' fees and expenses incurred in its appeal.

II. STATEMENT OF THE CASE

A. Nature of the Case

This appeal requires the Court to determine whether Steel Services Corporation ("SSC") breached its contractual obligations to Industrial Steel Corporation ("Industrial Steel") and frustrated Industrial Steel's ability to adhere to the time sensitive deadlines set forth in the Purchase Order. The Purchase Order agreed to by the parties set forth

specific duties and obligations each party owed to the other to enable their complete and timely performance of the work. Performance of Industrial Steel's obligations was contingent upon SSC timely satisfying its duties under the terms of the Purchase Order. SSC's failure to completely and promptly perform its obligations was a material breach, which hindered and delayed Industrial Steel's performance and precluded SSC from recovering damages from Industrial Steel.

B. Course of Proceedings and Disposition in the Courts Below

Upon receiving neither full nor partial payment for an invoice submitted by Industrial Steel to SSC for work performed pursuant to the Purchase Order, Industrial Steel filed its Complaint in the County Court of Rankin County, Mississippi. **(Trial Record at 00008)** Following a bench trial before the Honorable Kent McDaniel, the County Court entered its Bench Opinion which found SSC's delays and defective materials not to be a material breach of the contract, Industrial Steel's delay to be a material breach, Industrial Steel to be entitled to additional compensation for its work in the amount of \$9,655.60, SSC to be the prevailing party and entitled to attorneys' fees, expenses and costs in the amount of \$23,731.55. **(Trial Record at 00161 and 00233).**

Industrial Steel timely filed a Notice of Appeal with the County Court appealing the County Court's decision to the Circuit Court of Rankin County, Mississippi. **(Trial Record at 00216).** The issues were thoroughly briefed by the parties and oral arguments were not entertained. The Circuit Court affirmed the County Court's decision and further awarded SSC its attorney fees and expenses incurred on appeal in the amount of \$10,370.82. Industrial Steel timely appealed to this Court.

C. Statement of the Facts

The Plaintiff-Appellant, Industrial Steel, is a steel fabricator with its business office and primary fabrication facility located in Pearl, Mississippi. Defendant-Appellee, SSC is also a steel fabricator with its business office and primary fabrication facility located in Flowood, Mississippi. The dispute between the parties, which resulted in a bench trial before the Honorable Kent McDaniel, involves the fabrication of steel for two separate canopies at a service station island located in Chicago, Illinois—one for the O'Hare exit to the service station island and the other for the Belvidere exit.¹ (**Trial Transcript at 204**) SSC was responsible for the performance of this work but decided to solicit bids from other steel fabricators.² (**Trial Transcript at 353**)

On or about October 14, 2003, SSC sent a letter requesting a quote from Industrial Steel to perform a portion of the steel fabrication for the project. (**Plaintiff's Exhibit P-2**) Industrial Steel initially submitted a price of \$83,369.00 for the work which was rejected by SSC.³ (**Trial Record at 00029, and 00209-11**) However, subsequent negotiations between the parties resulted in Industrial Steel and SSC reaching an agreement for Industrial Steel to perform the work at a price of \$68,000.00. SSC's selling price for Industrial Steel's scope of work was \$64,756.00. (**Defendant's Exhibit**

¹ A photograph of the completed facility is appended hereto as **Exhibit "A"** for illustrative purposes only.

² The prime contractor for the entire project was James McHugh Construction Co. of Chicago, Illinois. SSC had a contract to perform a portion of the steel fabrication with HLM Steel Fabrication of Naperville, Illinois (hereinafter sometimes referred to as SSC's customer).

³ See generally, SSC's Base Bid-Budget Summary and the item described as "Total Fabrication Cost". (**Defendant's Exhibit D-36**)

D-36) The parties subsequently entered into a contract (Purchase Order) on October 28, 2003. **(Plaintiff's Exhibit P-3)**

The Purchase Order provided, *inter alia*, that time was of the essence in the performance of the work. There were specified delivery dates for both the O'Hare and Belvidere work which are set forth below. **(Plaintiff's Exhibit P-3)**

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.

The Purchase Order, however, also required SSC to "provide all shop drawings, material, paint and freight." **(Plaintiff's Exhibit P-3)** Industrial Steel's performance was therefore contingent upon SSC's timely performance of its promise to provide accurate shop drawings and material (in a suitable condition) necessary to complete the scope of work within the schedule. SSC failed to timely deliver *all* of the required material thereby impacting Industrial Steel's ability to complete the work within the scheduled time.⁴

Industrial Steel notified Steven Tillery and reaffirmed several times via telephone that SSC's failure to fulfill its delivery requirement could impact Industrial Steel's ability

⁴ A graphic illustration identifying the first date on which material necessary to perform Industrial Steel's work was delivered by SSC (October 28, 2003) and the last date on which materials were delivered is appended hereto as **Exhibit "B"** for convenient reference. There is no dispute that the first delivery date for material was October 28, 2003.

to meet the promised delivery date. These communications began on November 10, 2003, ten (10) days after the originally promised delivery date of steel to Industrial Steel.

Six (6) days after SSC was notified by Industrial Steel the delivery delays could impact its ability to complete the work, SSC decided to perform selected portions of the remaining work and back-charged Industrial Steel for this work.⁵ Industrial Steel was therefore left with the balance of the fabrication work to complete. There is no evidence in the record that SSC ever provided written notice of Industrial Steel's alleged default or that SSC sought an extension of time from its client for the delays.

After the work was complete, Industrial Steel presented an invoice for \$61,104.00 to SSC because it refused to respond to requests by Industrial Steel to meet and discuss the job cost. (**Plaintiff's Exhibit P-15**) SSC refused to pay Industrial Steel for any portion of the invoice, marked it "void" and returned the invoice to Industrial Steel with a note stating: "Not Steel Service's". No further verbal communication or written explanation was attempted by SSC. Industrial Steel was therefore left with no alternative but to file suit against SSC. It was only after the commencement of Industrial Steel's lawsuit that SSC "voluntarily" paid \$21,942.90 for that portion of the work which SSC determined Industrial Steel was due and owing under the Purchase Order.

(Plaintiff's Exhibit Nos. 18 and 19)

⁵ In fact, based upon a review of the Contract Change Proposals sent by SSC to its customer, HLM Construction (**Defendant's Exhibit D-32**), the back-charges claimed by SSC against Industrial Steel (**Defendant's Exhibit D-15**) and cross-examination of Steven Tillery (**Trial Record at 310-40**) it should have been apparent to the trial court that much of the selected work SSC contends its was forced to take over from Industrial Steel, was change order work for which SSC attempted to recover additional compensation at premium prices from its customer, while also back-charging Industrial Steel for this same work.

On June 22, 2005, a bench trial was commenced before the Honorable Kent McDaniel. At the end of the day, trial was scheduled to continue until October 6, 2005. Upon completion of the trial, Judge McDaniel determined that Industrial Steel had breached its contract with SSC by failing to timely deliver the fabricated steel within the schedule set forth in the Purchase Order. The trial court determined Industrial Steel had earned \$31,598.50 of its original \$68,000.00 contract amount, but because Industrial Steel had previously been paid \$21,942.90, the trial court awarded Industrial Steel a judgment against SSC in the amount of \$9,655.60 ($\$31,598.50 - \$21,942.90 = \$9,655.60$). The trial court further determined that SSC was the prevailing party and entitled to recover of attorney fees and expenses. (**Trial Record at 00161-65**)

III. SUMMARY OF THE ARGUMENT

Industrial Steel respectfully submits the trial court's decision is not supported by substantial, credible, and reasonable evidence and must be reversed with a judgment rendered in favor of Industrial Steel for not less than \$39,161.91 ($\$61,104.00$ balance due - $\$21,942.09$ payments = $\$39,161.91$), 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 attorneys' fees and expenses to which Industrial Steel is entitled to recover from SSC.

IV. ARGUMENT

A. Standard of Review

Despite the overwhelming weight of the evidence that SSC had breached its contract with Industrial Steel, the trial court found "Plaintiff [Industrial Steel] breached the contract between the parties with regard to the essential element of time for

performance." It is the duty of a trial judge sitting without a jury to "wear two hats". The judge must consider the legal issues and the evidence presented at trial. The standard by which an appellate court reviews factual determinations made by a trial judge sitting without a jury is the substantial evidence standard. *Classic Coach, Inc. v. Johnson*, 823 So.2d 517, 520 (Miss.2002); *UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc.*, 525 So.2d 746, 753 (Miss. 1987). This has been determined to mean that a trial court's findings will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence. *Donaldson v. Covington County*, 846 So.2d 219, 223 (Miss. 2003); *Maldonado v. Kelly*, 768 So.2d 906, 608 (Miss. 2000). However, a *de novo* standard of review is applied to questions of law, see *G. B. "Boots" Smith Corp. v. Cobb*, 860 So.2d 774, 777 (Miss. 2003), legal conclusions, see *Andrew Jackson Life Insurance Co. v. Williams*, 566 So.2d 1172, 1183-84 (Miss. 1990), and jurisdictional questions, see *McCain Builders, Inc. v. Rescue Rooter, LLC*, 797 So.2d 952, 954 (Miss. 2001).

In this instance, the appellate court must also review a trial court's ruling on attorneys' fees and expenses. This review is subject to an abuse of discretion standard. *Mississippi Dep't of Wildlife, Fisheries and Parks v. Mississippi Wildlife Enforcement Officers' Ass'n, Inc.*, 740 So.2d 925, 937 (Miss. 1999) (quoting *Bank of Miss. v. Southern Mem'l Park, Inc.*, 677 So.2d 186, 191 (Miss. 1996) (citing *Barber v. Barber*, 234 Miss. 89, 105 So.2d 630 (1958))); *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So.2d 954, 970-71 (Miss. 1999).

B. The Trial Court Failed to Apply the Correct Legal Standards in Finding that Industrial Steel had Breached its Contract with Steel Services Corporation

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) the Mississippi Supreme Court defined good faith as follows:

Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness.

Id. at 1272.

The implied covenant of good faith and fair dealing imposes certain duties upon each party. As explained by the Court of Appeals:

[T]he duty may not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty not only to refrain from hindering or preventing the occurrence of conditions of his own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals. Farnsworth, *Contracts*, §§ 7.17, 526-27 (1982).

Mississippi Commission on Environmental Quality v. Desai, 868 So.2d 381,386-87 (Miss. Ct. App. 2004). Stated differently,

[d]elay to the critical path caused by the failure of the owner or those for which it is legally responsible, to deliver conforming and defect-free materials or equipment or related material or equipment drawings on time is "compensable." Where owner-furnished materials, equipment, services or related drawings are critical to contract performance, delivery dates usually are worked out between the owner and contractor and when agreed upon, are reflected on the contractor's construction schedule.

* * *

Should the parties fail to agree upon express delivery dates, the owner

nevertheless is charged by its implied duties of cooperation and nonhindrance to provide its materials or equipment as reasonably needed by the contractor to maintain the progress of the work.

5 Bruner & O'Connor Construction Law § 15:54 (2007).

The overwhelming weight of evidence presented to the trial court establishes beyond question that SSC breached its duty of good faith and fair dealing owed to Industrial Steel. SSC not only failed to do anything to ensure faithful performance of its obligation to timely furnish Industrial Steel with *all* of the material to perform the work, SSC breached its payment obligations to Industrial Steel. (**Defendant's Exhibit D-7 and Trial Transcript at 196-7**).

First and foremost, the trial court erred by not giving due consideration to SSC's admitted untimely delivery of suitable materials to Industrial Steel. The testimony of both Robert Donald (the president of Industrial Steel) and the evidence offered by SSC make it clear that none of the raw rolled material was delivered to Industrial Steel in a timely manner. (**Trial Transcript at 31, 313 and Defendant's Exhibit D-7**) The testimony from both parties also demonstrates that raw material which was delivered by SSC on or before October 31, 2003, was not suitable for immediate fabrication. (**Trial Transcript at 44-5 and 223**) Despite substantial and credible evidence to the contrary, the trial court concluded "I don't find that any of these things like rust or the rolling or any of those kinds of things have been shown by Industrial to have been a major impediment to them doing more work than they got done at least." (**Trial Record at 00436**) It is unreasonable for the trial court to reach such a conclusion where the performance is already compressed and there is compelling testimony to the contrary.

At trial Robert Donald testified concerning the impact on Industrial Steel's plan for

performance and delay in the scheduled completion of the work.

Mr. Fiser: So did that [the 11/7/03 delivery of rolled material for the O'Hare] take any time out of the amount of time that you had to work on this project?

Mr. Donald: Well, actually, yes. It'd be like trying to put a roof—build a house by starting with the roof. We couldn't do anything without the rolled material to make the product. We could make pieces, but we could not assemble anything and weld anything complete.

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Mr. Fiser: You mentioned some of the material was rusty and that you had to send it back to Steel Services.

Mr. Donald: Right.

Mr. Fiser: Was there a delay relating to the work performed because of the material being defective?

Mr. Donald: Well, they did keep the material overnight. It's not like we just sent it over there and waited and they blasted it and sent it back. It was about two days from the time they got it until we got it back.

Mr. Fiser: So you're delayed again several hours?

Mr. Donald: Yes.

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Mr. Fiser: And then the last you mentioned that there were some problems in the dimensions that you were provided or the length of some steel. Can you explain that?

Mr. Donald: Yeah. These bottom chords, these 70-foot-long chords, we—our people in our shop we call fitters—the ones that put these items together—laid them out and they didn't work. The holes weren't in the right places as indicated on the drawings. And, you know, we go through a process of doing this for a day, a day and a half or so because we're trying to find out what's wrong, make sure it's not something overlooked, because it can be a little tricky.

After that time, we were sure we didn't—we hadn't overlooked anything, and we called Steel Service, made them aware of the problem and were told to change a chord dimension to an arc dimension and that would fix the problem, and there were eight of these to do. So we made

all eight of these as they told us to make them, and then as we went to assemble them on the whole truss, we found out this fix was not correct.

(Trial Transcript at 42-6)

The delays to the schedule were caused solely by SSC and which were described by Mr. Donald during his testimony emasculated Industrial Steel's ability to schedule and manage an extremely time sensitive project. SSC knew this, yet neither took any affirmative measures to facilitate Industrial Steel's performance nor sought an extension of the performance schedule from its customer. Succinctly stated, there was no margin for error or delay.

During cross-examination of SSC's witnesses, there was no unequivocal denial of the delay in the delivery of the rolled material, the rusted raw material or the design issue. SSC's John Oxley readily admitted that the long trusses which were "rolled" by Whitefab did not arrive at Industrial Steel's facility until November 11, four days prior to the delivery due date.

Mr. Fiser: Well, we're talking about any of the ones used for the O'Hare project.

Mr. Oxley: No, you would have received all the short trusses on the 7th.

Mr. Fiser: All of the short trusses, but not any of the long trusses?

Mr. Oxley: Correct.

Mr. Fiser: And the O'Hare project was due on the 18th, right?

Mr. Oxley: Yes.

Mr. Fiser: And so you're saying the 11th was the WhiteFab delivery; 18th was the ship date. So we're talking one, two, three - - four work days, unless you count Saturday and Sunday, between the time that you got the last material to work on to complete the project and the time for delivery to O'Hare; isn't that right?

Mr. Oxley: For the long trusses, yes, sir.

Mr. Fiser: For the long trusses. So they had four days to complete that work?

Mr. Oxley: Unless you count the weekends like you said.

(Trial Transcript at 234-35).

When Mr. Oxley was shown pictures of the steel delivered to Industrial Steel from which it was to fabricate the work and cross-examined, he readily admitted the materials were unacceptable. **(Plaintiff's Exhibit 20(A)-(C))**

Mr. Fiser: And looking at the rust that's on those steel beams, is that standard for steel that goes out of your facility?

Mr. Oxley: It wouldn't leave like that, no.

Mr. Fiser: It wouldn't leave and go to a –

Mr. Oxley: End product.

Mr. Fiser: --subcontractor?

Mr. Oxley: End product is what I'm talking about. It wouldn't be finished that way.

Mr. Fiser: But, in fact, it was shipped to Steel Service—I mean to Industrial Steel that way, right?

Mr. Oxley: Un-uh.

(Trial Transcript at 240-41)

In addition to the late delivery of materials and delivery of defective materials, the drawings which Industrial Steel was provided and spent countless hours attempting to comply with proved deficient.

Mr. Fiser: On the drawing G2 where you made the note "arc" or you instructed - or okayed the note "arc" instead of "chord," how long did you say it took you to figure that out?

Mr. Oxley: About five minutes.

(Trial Transcript at 239) The instructions given by Mr. Oxley to Industrial Steel compounded the problem rather than solving it. Nonetheless, Industrial Steel sought to mitigate the impact of the defective plans, rusted materials, and late delivery of the rolled material had on its ability to complete the work within the schedule.

It is apparent that the trial court's finding that these *admitted* delays were not a "major impediment" confirms the court's lack of understanding of steel fabricating procedures.⁶ **(Trial Transcript at 161)** Nor did the trial court apparently have a sufficient knowledge of the steel fabrication industry to appreciate the substantial impact these "minor" items would have on Industrial Steel's ability to execute its plan for performance.

When a contracting party makes time of the essence in the performance of a contract, the burden is on that party, in this instance SSC, to establish it has fulfilled the conditions within its control necessary for the timely performance. *Cenac*, 609 So.2d at 1272. When, as here, there is no dispute that SSC failed to furnish to Industrial Steel *all* of the material necessary to perform the work in a suitable condition and in a timely manner, there has been a material breach excusing Industrial Steel from further performance. *Gulf South Capital Corp. v. Brown*, 183 So.2d 80-05 (Miss. 1966); *McCroy v. Gibson*, 836 So.2d 978, 980 (Miss. Ct. App. 2003). The trial court put the

⁶ The entire issue of material being delivered late to Industrial Steel could have been avoided. During discovery, SSC provided Industrial Steel with documents which confirm that SSC had the beams to be rolled up to four (4) weeks before attempting to self perform the rolling process. SSC knew the delivery date for its customer and its significance. SSC also would have had time to overcome its lack of knowledge of its own ability to roll the material had SSC attempted to roll the material prior to contracting the work to Industrial Steel. These issues clearly would have been resolved and the rolled material delivered to Industrial Steel no later than October 30, 2003, with all of the steel necessary to perform the work had SSC acted responsibly. It was therefore unreasonable for the trial court to either consider the delivery delay de minimus or something that Industrial Steel should have anticipated.

cart before the ox. SSC's duty to deliver *all* of the material in a suitable condition and in a timely matter was a condition precedent to Industrial Steel's duty to comply with the performance schedule. Accordingly, the trial court erred in finding that SSC did not breach its duty of good faith and fair dealing owed to Industrial Steel and must be reversed.

C. The Substantial, Credible and Reasonable Evidence does not support the Trial Court's Decision

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 misleading and inconsistent statements from SSC's witnesses which 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.

As a preliminary matter, the trial court found that Industrial Steel failed to provide the required notice of delays to the performance schedule but arbitrarily decided that SSC was not required to comply with its contractual three (3) day written notice requirements prior to back-charging Industrial Steel for work.⁷ However, the trial court excused SSC's failure to provide written notice in stating that "Plaintiff was on actual notice of what work was taken over by Defendant as a result of Plaintiff's failure to timely perform." (**Trial Record at 00162**) The trial court did not grant the same benefit to Industrial Steel concerning written notice requirements caused by SSC's delays which impacted Industrial Steel's ability to meet the completion schedule.

⁷ Interestingly, SSC's own proposal to its customer provides that "we [SSC] accept no back-charges without first being given the opportunity to correct the problem with our personnel or without giving our written acceptance of the back-charges prior to the commencement of work." (**Defendant's Exhibit D-1**)

The record demonstrates that SSC was also on actual notice of the delays to the project since it controlled the delivery of the materials to Industrial Steel. (**Trial Transcript at 236**) The trial court's disparate treatment of Industrial Steel and finding that SSC was not required to comply with the three (3) day written notice requirements before recovering back-charges from Industrial Steel is inequitable and manifestly erroneous. The trial court's decision to award SSC any damages must therefore be reversed.

Further, when the record is reviewed with an understanding of applicable steel fabrication industry standards, it is apparent that the delays for which SSC contends Industrial Steel was responsible can be traced directly back to SSC. For example, SSC repeatedly failed to comply with the AISC/AWS codes which delayed and complicated Industrial Steel's performance.⁸ The AISC/AWS codes were incorporated into the Subcontract. (**Plaintiff's Exhibit P-5**) SSC's Steve Tillery testified that SSC encountered problems with the radius for rolled material and the gusset plates. (**Trial Transcript at 335 and 269**) Both of these problems required changes to the approved shop drawings. Yet, there was no testimony from Mr. Tillery that it received the appropriate authority to make these critical changes as required by the AISC.⁹

4.2 Approval

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⁸ AISC refers to the American Institute of Steel Construction and AWS refers to the American Welding Society. These codes set forth the industry standard and guidelines generally applicable to steel fabrication. Even the AISC requires notice and an opportunity to correct alleged errors. See *generally*, American Institute of Steel Construction (9th ed.), Steel Buildings and Bridges, para 7.12, Section 5, page 239.

⁹ These are some of the problems that raised concerns with Industrial Steel about whether the SSC had compromised the structural integrity of the product and which counsel for SSC raised in her opening statement. (**Trial Transcript at 16**)

4.2.2. Unless specifically stated to the contrary, any additions, deletions or changes indicated on the approval of shop and erection drawings are authorized by the owner to release the additions, deletions or revisions for construction.

American Institute of Steel Construction (9th ed.), Steel Buildings and Bridges, para 4.2, Section 5, page 229.

In addition, SSC's witnesses frequently became confused by what actually occurred and what they thought should have occurred. Contrary to SSC's representations to the trial court, Industrial Steel made every effort to perform its work within the schedule. However, without the rolled material which was to be provided by SSC, Industrial Steel had no alternative but to work on the deliveries which were scheduled for two (2) weeks later. It was only when the second delivery of rolled material arrived at Industrial Steel's facility on November 10, 2003, did they have the material required to fabricate trusses -- which Industrial Steel did immediately upon the delivery.

The testimony from SSC's own witnesses verifies that Industrial Steel kept SSC advised of the fabrication delays. In fact, SSC's John Oxley admitted that on November 12, 2003, he had received a telephone call from Robert Donald of Industrial Steel to report a problem with the rolled material. At trial, desperate to sell its story that Industrial Steel did not diligently execute its work, SSC's John Oxley, initially testified Industrial Steel should have raised an issue concerning the dimensions pertaining to the roll material *before* this material had even been delivered. He subsequently corrected himself when he realized that the problem could not have been identified until Industrial Steel began work on that item.

Ms. Hall: All right. Would there have been any way for Industrial to have

identified the problem on G2 any earlier than November 11 or November 12?

Mr. Oxley: Yeah. I mean, it just depends on when you start working on it.

Ms. Hall: Okay. So it would have come up when he [Industrial Steel] started working on it?

Mr. Oxley: Yeah. I mean, if you look at it, I mean, it's definitely confusing.

Ms. Hall: Right.

Mr. Oxley: It's definitely confusing.

(**Trial Transcript at 229**) The Court absolutely ignored the testimony of Industrial Steel's President, Robert Donald, who testified on numerous occasions that the delays by SSC would affect Industrial Steel's performance. (**Trial Transcript at 137 and 418**). Despite this testimony, the Court concluded "it is uncontested in the evidence that Plaintiff never provided any notice to Defendant of such delay(s)." (**Trial Record at 00223**). The trial court's conclusion that the delays were never communicated to SSC is not supported by the substantial and credible evidence introduced at trial.

SSC further attempts to minimize its own admitted delays in providing conforming materials and accurate shop drawings by alleging Industrial Steel was not efficiently performing other work which could be accomplished while Industrial Steel waited on SSC.

Ms. Hall: Did you -- were you able to determine whether they were being efficient in their work?

Mr. Fiorilli: In my opinion, they weren't.

Ms. Hall: Why do you say that?

Mr. Fiorilli: There were things -- the chords could have been fit up prior to going into the jig, welded out and ready to go into the jig to form the truss.

*

*

*

Mr. Fiorilli: You could have broken that truss into three pieces, fit it to the drawings with the chords and the plates, welded the plates out, and then jointed the three pieces together to make a truss.

Ms. Hall: That's how you would have done it?

Mr. Fiorilli: That's how I would have done it.

Ms. Hall: How was it being done?

Mr. Fiorilli: No rhyme or reason in some cases. . . .

(Trial Transcript at 364-65) However, Industrial Steel did exactly what Mr. Fiorilli described and all of the evidence offered at trial supported Industrial Steel's efforts to perform as much work as it could while waiting on conforming materials from SSC. In fact, SSC introduced a picture taken by Industrial Steel which unequivocally establishes that the cords were welded out. **(Defendant's Exhibit D-31)**. More importantly, Industrial Steel began this work before it returned the rusted steel to SSC for shot blasting. None of SSC's witnesses could deny or say with any certainty that Industrial Steel did not begin performing this work prior to returning the materials. **(Trial Transcript at 315, 360, and 239)**. Industrial Steel completed two short trusses and completely assembled two more short trusses sufficiently to transport back to Steel Service. These were completed and returned to Steel Service on November 17, one day before they were scheduled to ship. **(Plaintiff's Exhibit P-11)**.

SSC's Vice President of Fabrication, Mr. Fiorilli, in an attempt to shift SSC's delays to Industrial Steel, testified that Industrial Steel had only completed twenty percent of the total work on the top cords (beams) which were being worked on in Laurel, Mississippi. **(Trial Transcript at 367)**. Mr. Fiorilli's testimony is entirely

contradicted by SSC's own exhibit and Mr. Tillery, who accompanied Mr. Fiorilli when this assessment was made by SSC. (**Defendant's Exhibit D-31**). The top cord or straight beam which Mr. Fiorilli is referring to is pictured in **Defendant's Exhibit D-31** which shows said beam being completed. Not only does SSC's picture show the work was completed, SSC admits the **entire** short trusses which included these cords were 89.7% completed. (**Defendant's Exhibit D-25**). Mr. Tillery even admitted to only taking back two of the short trusses. (**Trial Transcript at 280**). Mr. Fiorilli's testimony that only 20% of the work had been performed on the top chords is completely unsupported and contradicted by Mr. Tillery.

Mr. Tillery also contradicts himself as he describes the work Industrial Steel performed in fabricating the columns on the O'Hare Project.

Ms. Hall: So as of November 17th, what work was a hundred percent complete by Industrial on these wide flange columns?

Mr. Tillery: There were three columns.

(**Trial Transcript at 280**) Mr. Tillery's statement and veracity are certainly called into question in light of SSC's correspondence with its customers where it informs them that three truck loads of columns will be shipped the next day on November 18.

(**Defendant's Exhibit D-17**). All ten (10) of the columns for the O'Hare Project were completed by Industrial Steel. The only columns Steel Service took back were columns used on the Belvidere Project which was not due until two weeks later. SSC's testimony that Industrial Steel was not properly manning and vigorously working on this project is unreliable and not supported by the substantial evidence introduced at trial.

Finally, and most importantly, on cross-examination, SSC's Steven Tillery

admitted that there had been no penalty assessed against SSC for the late delivery of the steel. (**Trial Transcript at 312-13**) Absent any proof SSC was harmed by Industrial Steel's alleged failure to meet the scheduled completion date, the trial court was required, as a matter of law, to find that SSC's decision to "take back" a portion of Industrial Steel's contract by SSC was wrongful. The trial court's decision must therefore be reversed and judgment rendered in favor of Industrial Steel.

D. Industrial Steel Corporation is Entitled to the Full Measure of Damages Presented to the Trial Court

Industrial Steel is entitled to be paid for the work performed under the contract. The trial court's finding that Industrial Steel earned \$31,598.50 of the \$68,000.00 contract amount is insufficient and not supported by the substantial, credible, and reasonable evidence presented by Industrial Steel at trial. The damages awarded to SSC by the trial court are premised upon Industrial Steel's alleged breach of contract by failing to comply with the performance schedule. Nonetheless, SSC's damage calculations were performed *after* Industrial Steel filed its lawsuit and are unsupported by the record and based upon 20-20 hindsight.¹⁰ Succinctly stated, much like SSC's witnesses, its damage calculations are replete with errors and inaccuracies.

The consequences of the trial court's reliance upon SSC's Exhibit D-4 and Exhibit D-25 (**Trial Record at 00225**) are illustrated below. The mathematical calculations on each exhibit are correct. However, when carefully examined together and with the other evidence introduced at trial concerning the work completed by

¹⁰ Defendant's Exhibit D-32 includes all of SSC's back-charges asserted against Industrial Steel. There is not one shred of backup documentation (invoices, time cards, or cancelled checks) to support the charges set forth in the Contract Change Proposals prepared by SSC.

Industrial Steel, the unit numbers are incorrect. In fact, if the trial court had correctly performed the calculations based upon Exhibit D-4 and Exhibit D-25, Industrial Steel should have been awarded an additional \$10,948.00.

DEFENDANT SUMMARY OF WORK PERFORMED BY ISC¹¹

	Exhibit D-25	vs.	Exhibit D-4	
CATEGORY	ISC HOURS	PERCENT	ISC HOURS	SSC CREDIT
O'Hare Columns (Pipe & Wide Flange)	296.62	75%	464.00	348.00
Belvidere Columns (Pipe & Wide Flange)	395.50	100%	464.00	464.00
Pipe Columns	62.93	100%	62.93	62.93
Pipe Columns	62.93	100%	62.93	62.93
Dwg. 28	27.80	100%	27.80	27.80
Dwg. 28	27.80	100%	27.80	27.80
O'Hare Short Trusses (2 completed, 2 partial)	195.04	89.7%	192.00	172.22
O'Hare Long Trusses (1 Complete, 3 Partial)	84.30	36%	200.00	72.00
Belvidere Short Trusses (4 Partial)	106.568	48.99%	192.00	94.06
Belvidere Long Trusses (4 Partial)	76.752	32.83%	200.00	65.66
	1,154.78	63.75%		1,397.40
Actual man hours worked as reflected in Exhibit D-4				1,397.40

Exhibit D-26 illustrates SSC's planned production schedule of 1750 total man-hours. Therefore, 1397.40 man-hours divided by 1750 man-hours equals 79.85%. This represents the actual percentage of work completed by Industrial Steel using SSC's Exhibit D-4. This is supported by Industrial Steel's Exhibit P-4, which credits SSC with 21% of the work. (100% - 21% of work completed by SSC = 79% of work completed by Industrial Steel) Applying the percentage of completed work by Industrial Steel to the

¹¹ Items identified in bold italics are taken from SSC's Exhibit D-4 and were not included by SSC on Exhibit D-25.

subcontract amount of \$68,000.00, Exhibit D-25's "Calculation of Contract Value Earned by ISC", if calculated correctly, would be \$54,298.00, not \$43,350.00. This means the trial court (relying on Exhibit D-4 and Exhibit D-25) should have considered \$10,948.00 more worked performed using SSC's man hours. These calculations are set forth below.

\$68,000 x .7985% =	\$54,298.00
SSC credit – Exhibit D-25	43,350.00
Additional amount due per SSC	\$10,948.00

SSC's determination that Industrial Steel completed only 63.75% of the total work (Exhibit D-25) has no mathematical foundation. It is merely the total of SSC's estimated percentage of the work completed as set forth on Exhibit D-25 divided by six, which is the total number of items for which SSC has identified a percentage. (75% + 100% + 89.7% + 36% + 48.99% + 32.83% = 382.52% divided by 6 line items = 63.75%). This "simple math" skews the actual percentage completion because it does not take into consideration the relative value of each item of work listed in Exhibit D-25. For example, if the first line item identified in Exhibit D-25 is 75% of the total project work and it is 100% complete, then the minimum amount of work completed for the entire project is 75%. However, if the percentage completed for each of the other line items is less than 75%, when you divide the total percentage completed for all six line items by 6, it reflects the project is less than 75% complete. This is wrong! It was therefore incorrect for the trial court to use SSC's completion percentage when the overwhelming weight of the evidence established the percentage of the work completed by Industrial Steel to be not less than 79%. Succinctly stated, the trial court's mathematical calculations are incorrect because it blindly relied upon SSC's Exhibit D-4 and Exhibit

D-25.

SSC's Executive Vice President, Jim Simonson, testified that he used Industrial Steel's Simplex Time Cards to calculate the time Industrial Steel spent to perform its work on this project. (**Trial Transcript at 410**) This is impossible since a cursory review of these documents reveal no job codes are identified on the Simplex Time Cards. (**Plaintiff's Exhibit P-23 and Defendant's Exhibit D-14**) This is the reason Industrial Steel did not produce the time card until specifically requested by SSC. These time cards provide no detailed information relating to this or any other job. SSC's analysis also fails to take into consideration all of the documented labor expended by Industrial Steel in its Laurel facility in an effort to comply with SSC's schedule. Accordingly, the trial court's reliance upon SSC's analysis of the percentage of work complete (**Defendant's Exhibit D-25**) is not supported by substantial, credible, and reasonable evidence.

The trial court also apparently failed to compensate Industrial Steel for the numerous overtime hours it expended as a consequence of the delays caused by SSC. Industrial Steel is entitled to this additional cost under the AISC Code, by which the work was to be performed. The relevant provisions provide in pertinent part as follows:

9.5 Scheduling

*

*

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9.5.3 If the fabrication or erection is significantly delayed due to design revisions or for other reasons which are the owner's responsibility, the fabricator and erector are compensated for additional costs incurred.¹²

¹² In the instant case, SSC is standing in the position "owner" and Industrial Steel would therefore be entitled to additional compensation from SSC under this provision of the ASIC.

American Institute of Steel Construction (9th ed.), Steel Buildings and Bridges, para 9.5, Section 5, page 243. The trial court dismissed Industrial Steel's claim for compensation for additional costs incurred and overtime due to insufficient documentation. (**Trial Record at 00225**) However, the documentation the Court deemed insufficient was the same documentation the Court relied upon to decide that Industrial Steel did not properly man the job. The Court relied upon Industrial Steel's time cards and summaries of the same to reach its conclusion that Industrial Steel did not properly man the job. (**Trial Record at 00222**) But, when it came time for the Court to consider compensating Industrial Steel for its additional costs and overtime expenses, the Court refused to rely on the same documentation, time cards and summaries of the same.

Further, the trial court's Bench Opinion awards SSC "additional freight costs of \$2127.00". (**Trial Record at 00163**) The award of freight costs is without factual or legal support. The contract between SSC and Industrial Steel unequivocally states that SSC will "provide all shop drawings, material, paint and *freight*." Moreover, there is no evidence in the trial record to support SSC's entitlement to these costs even if such costs were incurred¹³. The only documentation presented at trial in support of these charges is SSC's back-charge Contract Change Proposal (**Defendant's Exhibit D-23**) which does not include any delivery tickets, invoices or cancelled checks to support this back-charge. These documents should have been produced at trial since SSC did not ship this material but subcontracted the shipment of this material to the Holmes Co., a local trucking company. It is "incumbent upon the party seeking to prove damages to

¹³ Notably, SSC budgeted \$1,783.78 in freight costs for each load it sent to Chicago, Illinois. (**Exhibit D-36 - Freight Recap**) However, SSC has back-charged Industrial Steel \$2,127.00 for freight costs for one trip from Laurel, Mississippi to Flowood, Mississippi. In the absence of the actual delivery ticket, SSC's freight back-charge should not have been awarded to SSC by the trial court.

offer into evidence the best evidence available [for] each and every item of damage. If he has records available, they must be produced. While certainty is not required, a party must produce the best that is available to him." *Caver v. Brown*, 818 So.2d 376, 379 (Miss. App. 2002). SSC failed to satisfy its burden and the trial court's award of \$2,127.00 is unsupported by any credible evidence.

Finally, under cross-examination, SSC's Steven Tillery admitted to double billing—that is charging its client for what SSC submitted as extra work and back-charging Industrial Steel for this same work—and other billing irregularities that were clearly intended to maximize SSC's recovery from its client and reduce SSC's payment to Industrial Steel. (**Trial Transcript at 310-39**) SSC was "caught with its hand in the cookie jar" but the trial court failed to grant Industrial Steel any legal or equitable relief. The substantial, credible, and reasonable evidence does not support an award of *any* damages to SSC. Industrial Steel is entitled to a judgment against SSC for not less than \$39,161.91 (\$61,104.00 balance due - \$21,942.09 payments = \$39,161.91).

E. Steel Service Corporation was not the Prevailing Party and Entitled to Attorney Fees

On January 11, 2006, the trial court entered a Bench Opinion stating that it had found Industrial Steel to be in breach of its contract with SSC. (**Trial Record at 00161-65**) The trial court also determined Industrial Steel was entitled to \$31,598.50 for work for which it had not been compensated for prior to filing the Complaint. The trial court concluded that for the purpose of assessing attorneys' fees SSC was to be considered the "prevailing party" since Industrial Steel did not recover the entire \$68,000 contract amount which it demanded in its Complaint. The trial court reasoned that none of the

litigation would have been necessary had Industrial Steel not breached its contract with SSC. The trial court's rationale and findings are not supported by the evidence or the law.

Contrary to the trial court's findings, SSC's breach of contract did not stop with its untimely delivery of sufficient materials for the fabrication of the work. SSC admitted it closed out the project and was paid by its client in December 2004. (**Trial Transcript at 305**) SSC also admitted that by their own calculations, Industrial Steel was due not less than \$38,756.60. (**Trial Transcript at 296-7**) Nonetheless, SSC continued to withhold payment of any amount until after Industrial Steel filed its lawsuit on February 3, 2004. The trial court recognized that such a refusal to pay was a clear breach of contract by SSC. Thus, even if Industrial Steel was not the prevailing party, SSC's refusal to make *any* payment to Industrial Steel after completion of the project when such amounts were admittedly due is sufficiently egregious to warrant an award of attorneys' fees to Industrial Steel, not SSC.

The trial court's finding SSC to be the prevailing party in the litigation also fails to consider the fact that if Industrial Steel would not have instituted this action, SSC would not have paid any portion of the \$68,000.00 contract amount. The trial court seems to have overlooked the fact that prior to February 3, 2004, when Industrial Steel filed its Complaint, Industrial Steel had not received *any* compensation from SSC for work which admittedly had been performed by Industrial Steel. Moreover, SSC returned Industrial Steel's invoice without any explanation or indication that SSC desired to reach an amicable resolution of the matter.

On or about January 24, 2005, SSC acknowledged it was wrongfully withholding

\$14,451.45 and paid that amount to Industrial Steel. On or about June 10, 2005, twelve days prior to trial, SSC again acknowledged it was wrongfully withholding amounts due and owing to Industrial Steel for work performed on the project and made another payment in the amount of \$7,767.90. Finally the trial court determined on January 11, 2006, that prior to the Complaint, SSC owed Industrial Steel \$31,598.50. The trial court therefore awarded an additional judgment in favor of Industrial Steel and against SSC in the amount of \$9,655.60.

Although the trial court found SSC to be the "prevailing party" on the breach of contract claim, the trial court found that Industrial Steel was entitled to recover \$31,598.50 of the original \$68,000.00. If Industrial Steel had not instituted this action and incurred its own attorneys' fees, SSC would have continued to have wrongfully withheld \$31,598.50 without just cause.

SSC was not the prevailing party. After the smoke cleared, the Court entered a judgment against SSC in favor of Industrial Steel in the amount of \$9,655.60. **(Trial Record 00219)**. Industrial Steel recovered \$21,942.90 from SSC which SSC acknowledged was due and owing prior to trial but only after Industrial Steel initiated legal proceedings. Industrial Steel recovered \$31,598.50 of the \$68,000.00 it demanded in its Complaint. "Prevailing party" is defined as "[t]he party who successfully prosecuted the action or successfully defends against, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one whose favor the decision or verdict is rendered and judgment entered." Black's Law Dictionary 1188 (6th ed.1994). "A 'prevailing party' is one who has been awarded some relief by the court." *Buckhannon Board and Care Home, Inc., et al, v. West*

Virginia Department of Health and Human Resources, et al., 532 U.S. 598, 603 (2001).

In a civil rights action context in which the "prevailing party" is entitled to its attorneys fees and expenses, the Mississippi Supreme Court has articulated the definition as:

"[P]laintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Cruse v. Nunley*, 699 So.2d 941, 945 (Miss.1997).

"[P]laintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought." *Id.* Accordingly, Industrial Steel was the "prevailing party."

The trial court further compounded its error in considering SSC's counsel's unsupported assertions that \$10,000.00 was offered to Industrial Steel two weeks prior to trial to settle the outstanding claims. First, SSC never made such an offer. SSC did not offer any correspondence to substantiate such an offer, only the arguments of its counsel. See *Lee v. State*, 837 So.2d 781, 785 (Miss. App. 2003) ("[A]rguments of counsel were not evidence and should be disregarded if not supported by the evidence."). Even if an offer was made prior to trial, the Court should not have considered the offer in its assessment of the amount of attorney's fees to award since Industrial Steel's trial counsel was not present to verify or deny this representation by SSC's counsel. See Miss. R. Evid. 408. Instead, the Court presumably treated SSC's alleged offer as an Offer of Judgment, Miss. R. Civ. Pro. 68, and allowed SSC to recover all of its attorneys' fees and expenses after such date. However, there is absolutely no Offer of Judgment in the record and the Court's consideration of an alleged offer was improper in its consideration of an award of attorneys' fees and

expenses.

Industrial Steel recognizes the decision of who a “prevailing party” is within the discretion of the trial court. *See Johnson v. Columbia Properties Anchorage*, 437 F.3d 894, 902 (9th Cir. 2006) (judge did not abuse discretion in not allowing attorneys’ fees even though Court found defendant was “prevailing party.”) The Mississippi Supreme Court has also stated that attorneys’ fees awarded to a “prevailing party” “are allowable unless special circumstances would render such an award unjust.” *Cruse v. Nunley*, 699 So.2d 941, 945 (Miss. 1997). Notwithstanding the trial court’s finding Industrial Steel to be in breach, which is disputed, it is unreasonable to expect Industrial Steel not to have instituted this litigation when it had incurred not less than \$31,598.50 in costs and had not been paid a single dime by SSC. 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. The trial judge abused his discretion in finding SSC to be the prevailing party and must be reversed.

F. The Circuit Court Erred in Awarding Steel Services Corporation its Attorney Fees and Expenses Incurred on Appeal

On appeal to the Circuit Court, SSC filed a Motion to Remand to the trial court upon the Circuit Court affirming the trial court's decision for consideration of entitlement to attorneys' fees and expenses incurred on appeal. **(Circuit Court Record - 00058)**. Industrial Steel contested SSC's motion to remand and challenged the trial court's authority to award attorneys' fees and expenses incurred on appeal. **(Circuit Court Record - 00075)**. It is well settled in Mississippi that “[the appellate court] retains

discretion to award attorney's fees on appeal." *Riddick v. Riddick*, 906 So.2d 813, 829 (Miss. App. 2004) (Appellate court denying appellee's request for attorney's fees when the trial court's award of fees was sufficient to compensate appellee's attorneys for appeal.)

SSC was unable to cite any authority which divested Circuit Court of its discretion to award attorneys' fees and expenses and required remand to the trial court for this determination. SSC's lack of legal authority in support of its entitlement to attorneys' fees and expenses incurred on appeal bars its request. *See Lauro v. Lauro*, 847 So.2d 843, 851 (Miss. 2003) ("[Appellee] has failed to cite any legal authority which supports her entitlement to attorney's fees for defending this appeal. . . . We certainly see no reason to consider [Appellee's] request for attorneys fees incurred on appeal inasmuch as she has chosen to cite no authority in support of this issue. Therefore, this issue is without merit.") Nonetheless, after industrial Steel exposed the frailties in SSC's Motion, SSC filed a Reply and *new* Motion for Award of Attorneys' Fees and Expenses on Appeal.

The Circuit Court agreed with Industrial Steel and held that SSC's motion to remand was improper. However, the Court erred in allowing SSC to correct its procedural deficiency in its subsequently filed Reply and new Motion for Award of Attorneys' Fees and Expenses on Appeal and awarded SSC an additional \$10,370.82 in attorneys' fees and expenses. 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. *See Blevins v. Bardwell*, 784 So.2d 166, 180 (Miss. 2001). The court should not allow the moving party to correct its fatal error in a subsequent pleading only

after being exposed by the respondent. A movant's failure to cite any authority in support of its position in its *initial* pleading will bar the Court's review of such issue. See *Blevins v. Bardwell*, 784 So.2d 166, 180 (Miss. 2001).

In *Blevins*, the party requesting relief failed to cite any authority in support of its position in its initial brief. After the opposing party exposed the deficiencies in the brief, the moving party attempted to correct its error by addressing the issue in its reply brief. The Court held that the moving party's failure to cite any legal authority in support of its position in its *initial* brief barred the Court's review of the issue. "[T]his Court is unable to assess this issue on the merits and treats it as procedurally barred." *Id.* See also *Mack v. State*, 784 So.2d 976, 978 (Miss. App. 2001) ("The State asserts that Mack's arguments should not be reviewed by this Court because he failed to cite any legal authority in his initial brief to support his arguments. . . . However, it appears that after the State pointed out this fatal error, Mack submitted a rebuttal brief where he randomly cites to several cases for numerous propositions of law. This Court has held when this is the situation, '[a]rguably, this issue is not properly before this Court.'").

The procedure employed by Steel Service is identical to the steps taken by the movant in *Blevins* which the Supreme Court ruled as procedurally barred. Otherwise, if it was proper for the circuit court to allow and grant Steel Service's untimely motion, the Court would be punishing Industrial Steel for identifying Steel Service's fatal legal errors and giving Steel Service a second bite at the apple. As the Mississippi Supreme Court has recognized, "Ignorance of the law is no defense." *Mississippi Com'n on Judicial Performance v. Chinn*, 611 So.2d 849, 853 (Miss. 1992). The fact that Steel Service was unaware of the circuit court's authority to grant attorneys' fees and expenses on

appeal or the law's requirement that legal authority be cited in support of its position in its initial pleading is no excuse for its error. Steel Service's failure to acknowledge the discretionary authority of the circuit court to award attorneys' fees and expenses is fatal and renders this Court "unable to assess the issue on the merits and treats it as procedurally barred." *Blevins*, 784 So.2d at 180. Accordingly, Steel Service's subsequent Motion for Attorneys' Fees and Expenses on Appeal should have been dismissed as procedurally barred.

V. CONCLUSION

The trial court's decision does not reflect the substantial, credible and reasonable evidence presented at trial and must be reversed and a decision rendered in favor of Industrial Steel. Industrial Steel is entitled to a judgment against SSC for not less than \$39,161.91 (\$61,104.00 balance due - \$21,942.09 payments = \$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.

THIS the 4th day of September, 2007.

Respectfully submitted,

INDUSTRIAL STEEL CORPORATION

By: 

Christopher Solop, MSB # 
One of its Attorneys

OF COUNSEL:

Robinson, Biggs, Ingram, Solop & Farris, PLLC
P.O. Box 14028
Jackson, MS 39236-4028
Telephone No. (601) 987-4822
Facsimile No. (601) 713-9920

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 Brief of Appellant to the following:

Mary Elizabeth Hall, Esq.
Mockbee, Hall & Drake, PA
Lamar Life Building, Suite 1000
317 E. Capitol Street
Jackson, MS 39201

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 4th day of September, 2007.



Christopher Solop

2007-CA-648

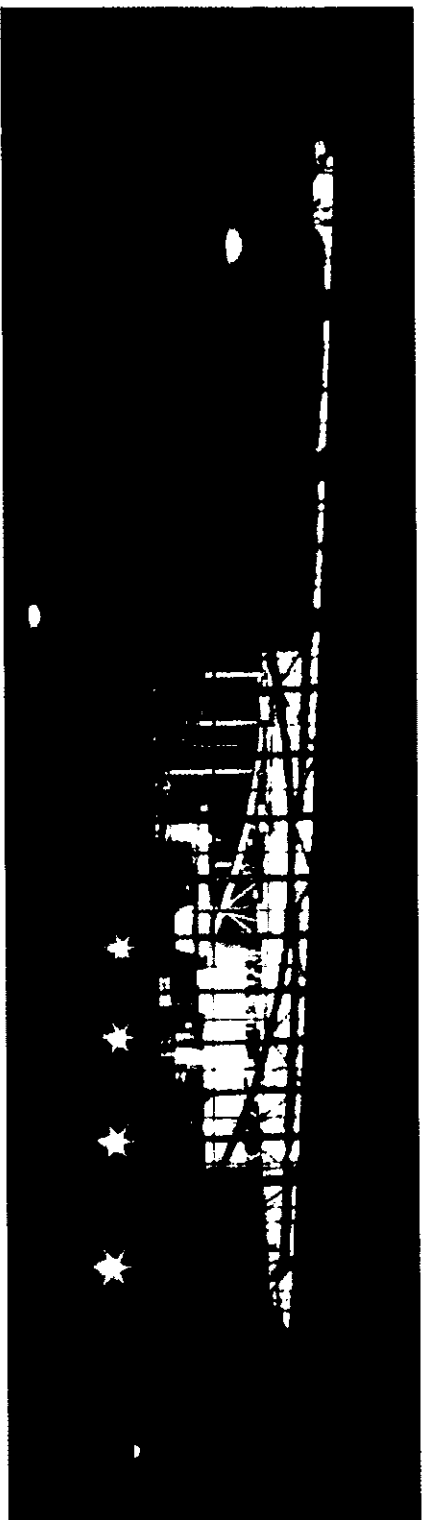
FILED

SEP 07 2007

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

EXHIBIT "A"

Belvidere



O'Hare:

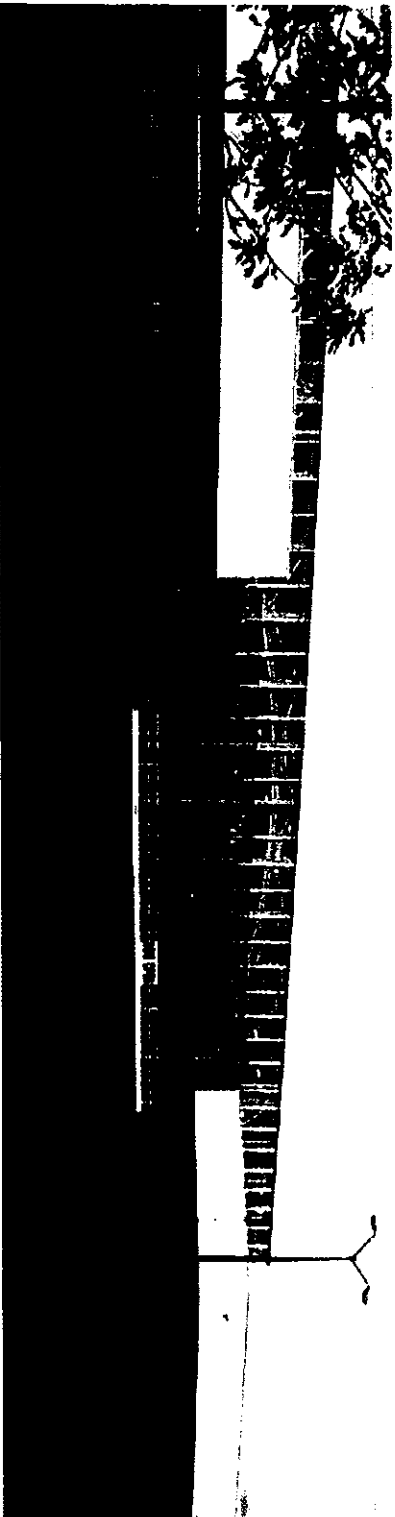
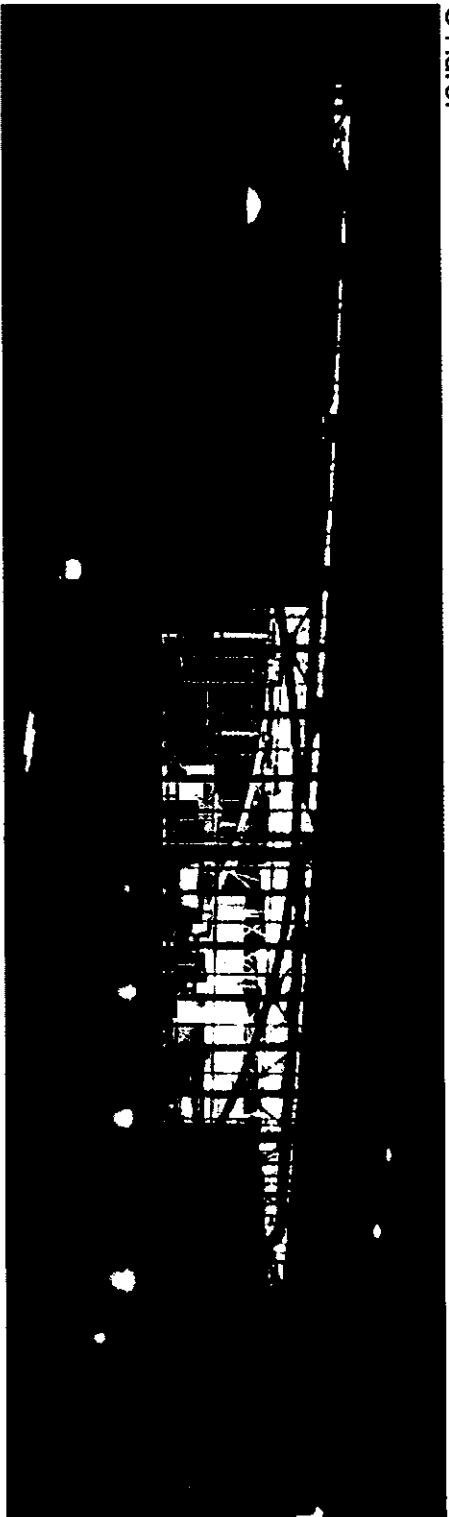


EXHIBIT "B"

INDUSTRIAL STEEL

DESCRIPTION

DATE SHIPPED	DESCRIPTION
10/20/2003	4) 29M1
10/22/2003	1) W 18 X 35 X 60'
10/24/2003	1) W 18 X 35 X 40'
10/26/2003	9) W 18 X 35 X 60'
10/28/2003	8) W 18 X 71 X 34'
10/30/2003	8) W 18 X 71 X 57'
11/1/2003	8) W 18 X 71 X 59'
11/3/2003	8) W 18 X 71 X 34'
11/5/2003	8) W 18 X 71 X 57'
11/7/2003	8) W 18 X 71 X 59'
11/9/2003	4) W 27 X 129 X 28'
11/11/2003	16) W 18 X 175 X 28'
11/13/2003	11) L 6 X 4 X 1/2 X 40'
	2) L 4 X 4 X 1/2 X 40'
	1) L 3 1/2 X 3 X 3/8 X 20'
	9) W 18 X 35 X 60'
	1) W 16 X 57 X 60'
	12) W 27 X 129 X 28'
	8) L 6 X 4 X 1/2 X 40'
	38) L 5 X 3 1/2 X 3/8 X 40'
	4) 12 PL .500 X 28'-2"
	1) W 18 X 35 X 40'-0"
	9) W 18 X 35 X 50'-0"