

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS**

CITY OF HATTIESBURG, MISSISSIPPI

APPELLANT

VS.

CASE NO. 2014-CA-01671

PRECISION CONSTRUCTION, LLC

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY,
MISSISSIPPI; CAUSE NO. CI13-0068

ORAL ARGUMENT NOT REQUESTED

**BRIEF FOR
APPELLEE**

SUBMITTED BY:

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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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Precision Construction, LLC., Appellee;
2. Nathan Smutzer, Owner-Precision Construction, LLC;
3. City of Hattiesburg, Mississippi, Appellant;
4. Kim Bradley, Deborah Denard Delgado, Carter Carroll, Mary Dryden and Henry Naylor, Councilpersons for the City of Hattiesburg;
5. Mark D. Herbert, Attorney for Appellee;
6. Shannon S. McFarland, Attorney for Appellee;
7. James W. Gladden, Jr., Attorney for Appellant;
8. Charles E. Lawrence, Jr., former City Attorney and Attorney for the City during the arbitration hearing;
9. Hon. Robert B. Helfrich, Trial Court Judge.

So certified this, the 10th day of August 2015.

By: /s/ Mark D. Herbert
Mark D. Herbert

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STATEMENT OF THE ISSUES

Issue No. 1: Whether The Appellant Properly Preserved At The Trial Court Level The Issues It Now Cites As Error.

Issue No. 2: Whether the Appellant Failed to Challenge the Arbitrator's Award or Seek its Modification Under the Limited Grounds Permitted by Mississippi Code Ann., Sections 11-15-133 and/or 11-15-135 (1972).

Issue No. 3: Whether the Award of the Arbitrator Demonstrates Any "Evident Miscalculation of Figures."

Issue No. 4: Whether the Appellant has Established Any Grounds for Modifying or Correcting the Arbitrator's Award Under Section 11-15-135.

Issue No. 5: Whether the Arbitrator Properly Applied the Twenty (20) Day Time Limitation of Section 11-15-123, or if There was Error, was it Harmless Error.

STATEMENT OF THE CASE

This action was initiated by Precision Construction, LLC ("Precision") by way of a Demand for Arbitration filed on March 6, 2013 pursuant to the provisions of its construction contract with the City of Hattiesburg, Mississippi ("Hattiesburg"). Hattiesburg did not acknowledge the Demand for Arbitration and on September 29, 2013 Precision filed a Complaint in the Circuit Court of Forest County seeking damages for breach of contract and to compel arbitration pursuant to Section 11-15-101, *et. seq.* Precision brought its Motion to Compel Arbitration on for hearing and after the hearing, the Court entered its Order of June 6, 2013 compelling the parties to Arbitration pursuant to Section 11-15-101. When Hattiesburg refused to participate in selecting arbitrators, Precision filed its Motion for Appointment of Arbitrators

on June 10, 2013. The Court granted Precision's Motion on June 6, 2013. Thereafter on August 5, 2013, the parties did agree by way of an Arbitration Agreement to submit the dispute of the parties to binding arbitration before the Honorable Donald C. Dornan, Jr. The parties agreed that the arbitration would be governed by the Mississippi Construction Arbitration Act, Sections 11-15-101 through 11-15-143.

Hattiesburg was represented in the arbitration proceedings by the Honorable Charles E. Lawrence, Jr.

After both written discovery and depositions, the matter was heard before Mr. Dornan on June 3-4, 2014 in Gulfport, Mississippi. Both parties submitted post-hearing briefs in support of their positions on the issues. On June 25, 2014, Arbitrator Dornan announced his decision in the presence of both parties, generating a thirty-nine (39) page written transcript and opinion. Arbitrator Dornan's final decision and final award was entered on July 2, 2014 and he granted Precision an award against Hattiesburg in the amount of \$843,929.55. Dornan's award granted Precision's claim for attorney's fees, plus arbitration costs in excess of \$5,000 and allowed Precision to petition for an amount of attorney's fees pursuant to Section 11-15-119(4). Lodestar Affidavits were filed by counsel for Precision and Hattiesburg filed its opposition to Precision's claims for attorney's fees on July 16, 2014. On July 24, 2014, the arbitrator issued his five (5) page Supplemental Decision and Award of Attorney's Fees and Expenses and Arbitration Fees, granting Precision an additional award of \$76,257.65 for attorney's fees and expenses and ordering Hattiesburg to pay the remaining arbitration fees of \$7,032.74.

On August 5, 2014, Precision filed a motion in the Circuit Court of Forest County for Confirmation of the Arbitration Award and Entry of Judgment and Costs.

On August 6, 2014, Hattiesburg retained new counsel to represent it in the proceeding going forward and the Honorable James W. Gladden, Jr. entered his appearance as counsel for Hattiesburg.

On August 11, 2014, new counsel for Hattiesburg filed in the arbitration proceedings a Motion for Reconsideration of Arbitrator's Decision and Supplemental Decision. Precision filed its Response in Opposition to the Motion for Reconsideration on August 26, 2014. On August 29, 2014, the arbitrator entered his Order Denying Hattiesburg's Motion for Reconsideration.

On September 16, 2014, Hattiesburg filed its Motion to Stay Hearing and Defer Disposition of Precision's Motion for Confirmation of the Arbitration Award. On the same day, Hattiesburg filed its Motion with Authorities to Amend, Modify and/or Correct the Arbitrator's Decision and Supplemental Decision. On September 23, 2014, Precision filed its Opposition to Hattiesburg's Motions. The hearing was conducted on all of these motions on September 26, 2014 before the Honorable Robert B. Helfrich, Circuit Court Judge. By Orders dated October 22, 2014, Judge Helfrich granted in part and denied in part Hattiesburg's Motion to Modify the Award and Precision's Motion for Confirmation of the Award and granted judgment in favor of Precision against Hattiesburg in the amount of \$856,666.46, with interest running at the rate of 8% per annum from and after September 26, 2014 until paid and awarding to Arbitrator Donald C. Dornan, Jr. arbitration fees in the amount of \$7,032.74.

On November 19, 2014, Hattiesburg filed its Notice of Appeal to this Court.

STATEMENT REGARDING ORAL ARGUMENT

The Appellee does not desire Oral Argument and given the limited record and simple issues raised by this appeal, does not believe such would be helpful to the disposition of the case.

STATEMENT OF FACTS

On January 30, 2012, Precision Construction, LLC (“Precision”) and the City of Hattiesburg, Mississippi (“Hattiesburg”) entered into a construction contract. The contract called for Precision to rehabilitate certain designated sections of water and sewer lines in selected areas of the City of Hattiesburg. During the course of the project, Precision ran into numerous areas of unexpected conditions such as undisclosed pipes that had to be removed, easements that the City had failed to obtain and even unknown deposits of toxic creosote. Hattiesburg’s engineer acknowledged these changed conditions and directed Precision to submit change orders requests, which it did. However, the City refused to pay these change orders, even when the amounts were undisputed. Subsequently, Precision also ran into a differing site condition which involved extremely poor soil conditions caused by an undisclosed water line belonging to the City. (R-0008) Precision gave notice of the differing site conditions under appropriate provisions of the parties contract. Hattiesburg’s engineer refused to take any action. Precision suffered severe delay and additional costs. (R 107)

A detailed statement of the various breaches of contract by the City is found in the arbitrator’s July 2, 2014 award. (R 107) Appellee incorporates these findings by reference.

The parties’ contract required arbitration of any dispute. On March 6, 2013, Precision filed its Demand for Arbitration pursuant to Section 11-15-101, Miss Code Ann *et. seq.* (R 0077) Hattiesburg did not acknowledge the Demand for Arbitration, so on March 29, 2013 Precision filed suit in the Circuit Court of Forest County for both the breach of contract, but also to compel arbitration. (R 0008) Precision brought forth its motion to compel arbitration before the Honorable Robert B. Helfrich, Circuit Judge. After a hearing on the motion, Judge Helfrich entered his Order compelling arbitration pursuant to Sections 11-15-101, *et. seq.* (R 83) Hattiesburg then refused to participate in naming agreed Arbitrators, so on June 10, 2013, Precision filed a Motion in the Circuit Court for Appointment of Arbitrators. (R 85) Hattiesburg

eventually conceded and on August 5, 2013, the parties entered into a written Arbitration Agreement for arbitration of all issues in the Circuit Court action before the Honorable Donald C. Dornan, Jr. of Gulfport, Mississippi. (R 151) By order of the Court all proceedings in the Circuit Court were stayed pending the arbitration. (R 103) After discovery, the Arbitration Hearing was held on June 3-4, 2014 in Gulfport, Mississippi. At the hearing, Precision put on both sworn testimony and documentary evidence of the unexpected conditions and the differing site condition as well as extensive proof of its damages in eight (8) discrete categories.

All totaled, Precision claimed damages of \$1,079,299.92, plus attorney's fees and costs of arbitration. Precision called four (4) witnesses, including an expert witness in support of its claims.¹ Counsel for the City cross-examined Precision's witness and called the City Engineer as its sole witness. (R 107)

By agreement of the parties, there was no transcript made of the proceedings. (R 107)

After the close of the hearing, both parties submitted Post-Hearing Memorandums in Support of their positions. (R 107)

On June 25, 2014, Arbitrator Dornan called all parties to a hearing in Gulfport during which he read his Opinion and Decision to the parties. (R 107) His Opinion and Award was preserved by way of a thirty-nine (39) page transcript which was issued on July 2, 2014. (R 107) In his opinion and award, Dornan reviewed in detail each of the claims for breach of contract by Precision and Hattiesburg's defenses. He concluded that Hattiesburg had breached the contract in multiple instances. Dornan reviewed in even more detail Precision's claims of damages, including its claims for lost profits. (R 106-148) Importantly, included in his initial decision,

¹ Precision called its President, Nathan Smutzer, live and called Hattiesburg's engineer as an adverse witness. It also offered the testimony of its expert by video deposition and the testimony of Hattiesburg's inspector by deposition transcript.

Dornan granted Precision's claim for attorney's fees and then gave Precision seven (7) days to submit a petition for fees and costs and he gave Hattiesburg seven (7) additional days to respond. (R 142-144) As to the claim itself, Dornan awarded Precision \$843,929.55 in damages. Dornan also asked each party if they were satisfied with how the proceedings were handled and each party said they were. (R 110)

In his opinion, Dorman reviewed the proof and noted that in both its handling of the construction project and the ensuing litigation with Precision, Hattiesburg appeared to have played "rope-a-dope" with Precision. (R 105, 134)

Precision's counsel filed their Lodestar Affidavits. (R 173-199) Hattiesburg filed an opposition to the award of attorney's fees. On July 24, 2014, Dornan rendered his Supplemental Decision, granting in part and denying in part Precision's prayer for attorney's fees. His Supplemental Decision awarded Precision \$76,257.65 in attorney's fees and expenses and rendered an award against Hattiesburg in the amount of \$7,032.74 for arbitration fees. (R 173)

On August 7, 2014, Precision filed its Motion for Confirmation of the Arbitration award and for entry of a Final Judgment pursuant to Section 11-15-125. (R 097)

Throughout the proceeding until the Arbitrator's decision and supplemental decision, including the proceedings in the Circuit Court, the agreement to arbitrate, discovery and the arbitration hearing itself, Hattiesburg had been represented by the Honorable Charles E. Lawrence, Jr. After Precision filed its Motion for Confirmation of the award, Hattiesburg replaced Mr. Lawrence with the Honorable James W. Gladden, who entered his appearance for the first time on August 6, 2014.

On August 12, 2014, some forty-five (45) days after the arbitrator's initial award, and thirty-nine (39) days after his written decision by way of the transcript, Hattiesburg's new

counsel filed with the arbitrator a Motion for Reconsideration of the Arbitrator's Decision and Supplemental Decision. (R 157) In its Motion, Hattiesburg, for the first time:

a) challenged the Arbitration Award of \$155,000.00 in mobilization/demobilization damages awarded to Precision and **even offered four (4) new exhibits** on Hattiesburg's behalf attacking and asserting that these damages should have only been \$62,000.00;

b) challenged the arbitrator's award of lost profits as an incorrect application of Mississippi law relative to the difference between "net profits" and "lost profits";

c) challenged the arbitrator's award of prompt payment penalties based upon Hattiesburg's wholly new contention that the period for calculation of these damages should have been based on another date because Hattiesburg needed time to process Precision's payment application and **once again offered a new exhibit** on behalf of the City of Hattiesburg; and

d) challenged the award of attorney's fees and expenses to Precision contending now that some of the services rendered by different counsel for Precision were duplicative.

Importantly for the purposes of this appeal, Hattiesburg did not premise its Motion for Reconsideration to Mr. Dornan on **any** of the grounds specified for modifying an arbitration award as set forth in Section 11-15-135 (1)(a)-(c) or for vacating the award under Section 11-15-133. In fact, in contrast to its appeal herein, nowhere in its Motion for Reconsideration to the Arbitrator do the words "evident miscalculation of figures" even appear. (R 157-162) To the contrary, Hattiesburg's Motion asserted:

There are several points of contention with the calculations of damages with respect to the proper amounts based upon the facts and law considered by the Arbitrator.

(R 157)

and

Such calculations or “estimates” of “lost profits” are contrary to the usual expert reports or testimony required to distinguish between the two types of profits.

(R 159)

On August 29, 2014, Arbitrator Dornan entered his order, denying Hattiesburg’s motion for reconsideration, finding that pursuant to Section 11-15-123 Hattiesburg’s motion was untimely as to his initial decision. However, the arbitrator considered Hattiesburg’s arguments and Precision’s response as to his supplemental award of attorney’s fees and expenses, but found the fees sought by Precision not to be duplicative or excessive and he denied Hattiesburg any relief. (R 203)

On September 16, 2014, Hattiesburg and its new counsel filed two (2) motions in the Circuit Court. The first motion was to Stay the Hearing and Defer Motion which sought to postpone final disposition of Precision’s Motion to Confirm Award and for Entry of Judgment (R 191)

Hattiesburg’s Second Motion was entitled Motion with Authorities to Amend, Modify or Correct Arbitrator’s Decision and Supplemental Decision. (R 193-202) The Motion asserted that it was being made pursuant to sections 11-15-125 and 11-15-135. However, in its Motion, Hattiesburg made the identical arguments it had made to the Arbitrator in its Motion for Reconsideration. Again, and even more importantly, for purposes of this appeal, although Hattiesburg claimed that its Motion was made pursuant to Section 11-15-135, nowhere in its Motion to the Circuit Court does it cite to **any** of the grounds specified in that section for modifying or correcting an award. Moreover, although Hattiesburg now on this appeal seeks modification of the award on the basis of “evident miscalculation of figures,” (11-15-135(1)(a) those words are not found anywhere in Hattiesburg’s Motion to the Circuit Court. In a very real sense, the trial court was never presented with any contention of “evident miscalculation of

figures.” This issue is being raised for the first time in this appeal. On September 23, 2014, Precision filed its Memorandum in Opposition to Hattiesburg’s Motion. (R 224) In its response, Precision acknowledged pursuant to Section 11-15-135 (1)(a) that the Arbitrator had made an “evident miscalculation” as to his calculation of lost profits on Precision’s claim relative to its 30 inch pipe. Prior to the hearing, Precision had submitted a preliminary itemization of its damages. At the hearing, a revised version of this itemization was offered and accepted as an exhibit. The figures for lost profits on 30 inch pipe on these two documents differed by \$63,250.74. It appeared that Mr. Dornan had used the preliminary itemization on awarding lost profits on this one item, rather than the subsequent version which had been offered and accepted as an exhibit. To this limited extent, Precision agreed that a modification of the arbitrator’s award was in order. (R 238) Otherwise, Precision argued that Hattiesburg had failed to show any bases for attacking or amending the arbitrator’s award allowed by Section 11-15-135. Hattiesburg was, in essence, attempting to retry parts of the arbitration, **even offering new proposed exhibits**, a process not contemplated by Section 11-15-101, *et. seq.* and especially not by 11-15-135.

After the hearing before the Court on September 26, 2014, the Circuit Court entered his Order granting in part and denying in part Hattiesburg’s motion and granting Precision’s Motion to Confirm the Award and for Entry of Judgment. (R 320) The Court noted that its “scope of judicial review of an arbitration award is quite narrow and every reasonable presumption will be indulged in favor of the validity of the arbitration proceedings [“][a] the Court cannot simply go outside the stated grounds in the statute for challenging an arbitration award absent a contrary provision in the contract.” (R 321) The Court noted that Precision did not dispute that under Section 11-15-135 (1)(a) that there was an “evident miscalculation” of the award of lost profits on the 30 inch pipe and he reduced the award by the sum agreed to by Precision or \$63,520.74. (R 321) On the same date, the Court entered its Order *Nunc Pro Tunc* granting Precision a

judgment of and from Hattiesburg in the final amount of \$856,666.46, with interest accruing at the rate of 8% per annum from and after September 26, 2014. He also awarded arbitration fees to Arbitrator Dornan in the amount of \$7,032.74 to be paid by Hattiesburg. (R 323)

SUMMARY OF THE ARGUMENT

This appeal involves the not uncommon attack on an arbitration award by a disappointed defendant against which an award of \$856,666.46 was given in a thirty-nine (39) page detailed decision and award. The attack is based solely on the Appellant's contention that the arbitrator's decision was wrong on both his findings of fact and his application of the law, especially as to the measure of damages. The well settled decisions of the Court foreclose such an attack.

This arbitration was conducted pursuant to Sections 11-15-101 through 11-15-143, commonly known as the Mississippi Construction Arbitration Act (R 151). Claims to **vacate** an award under that Act are allowed only upon the very limited grounds set forth in Section 11-15-133. Similarly, claims to **modify** or **correct** an award are allowed only upon the limited grounds of Section 11-15-135(1)(a)-(c). In neither its Motion for Reconsideration to the Arbitrator, nor its Motion to Amend, etc. made to the Circuit Court below did Hattiesburg make any effort to come within any of these provisions. It utterly failed to make any argument or claim of "evident miscalculation of figures" as set forth in 11-15-135(1)(a), but upon which it now attempts to premise its appeal. Appellant's failure to make the claim of "evident miscalculation of figures" below is fatal to its attempted appeal on that issue now.

However, even if the City had properly made an assertion of "evident miscalculation of figures" to either the arbitrator or the trial court and properly preserved that issue for appeal, the facts presented and the arbitrator's detailed thirty-nine (39) page decision and award do not support such a conclusion.

The arbitrator properly applied the twenty (20) day time limitation of Section 11-15-123 since his initial decision, handed down on June 25, 2014 and transcribed and issued in writing on July 2, 2014, already contained his decision granting Precision an award of attorney's fees. Only the amount of fees was left to be decided by subsequent petition. Once again, however, the City failed to raise this issue at the trial court level and the Circuit Judge was never asked to vacate, correct or modify the arbitrator's decision on this point. It is being raised for the first time on this appeal and it is being raised as an error on the part of the arbitrator, not the court below. It is respectfully submitted that under 11-15-133 and 11-15-135, this Court does not now have jurisdiction to second guess the arbitrator or delve again into the merits of the arbitration award, only to review the decision of the Court below.

Finally, even if the Arbitrator improperly applied that twenty (20) day time limitation of 11-15-123 (which is not admitted), it was harmless error. Pursuant to that section, any motion directed to the arbitrator to modify or correct his award must be premised on the limited grounds allowed by Section 11-15-135(1)(a)-(c). However, nowhere in its Motion for Reconsideration directed to the arbitrator does the City even mention 11-15-135, nor does it claim relief under any of its three (3) limited grounds. Specifically, although the City now claims on the appeal that the **arbitrator** committed an "evident miscalculation of figures," those words are not found anywhere in its Motion for Reconsideration to the Arbitrator. And, as noted above, there is nothing in the arbitrator's decision that would support such a conclusion. Thus, under the facts presented by the record, it would have been error for the arbitrator to consider the City's motion and certainly error to grant it. Therefore, even if this Court should find that the arbitrator misapplied 11-15-123 (which is not admitted), it should find that it was harmless error and not a ground for reversal.

STANDARD OF REVIEW

This Court's appellate review of this arbitration award is governed and limited by the provisions of the Mississippi Construction Arbitration Act, particularly Sections 11-15-133 and 11-15-135. In as much as the Appellant does not seek to vacate the award, this Court's review is therefore limited to those grounds for modification or correction of an award set forth in Section 11-15-135(1)(a)-(c). *Hutto v. Jordan*, 36 So. 2d 809, 810 (Miss. 1948) and *D'Angelo v. Hometown Concepts*, 791 So. 2d 270, 272-273 (Miss. App. 2001).

Generally, this Court sits, only as an appellate court, not as a trier of fact *ab initio*. *Allgood v. Allgood*, 473 So. 2d 416 (Miss. 1988). This Court does review the trial court's interpretation of statutes as a question of law *de novo*. *Mississippi Ethics Comm. v. Grishman*, 957 So. 2d 997 (Miss. 2007). But, the trial court's findings of fact will not be disturbed unless manifestly wrong, clearly erroneous or an erroneous legal standard was applied, *Upchurch Plumbing v. Greenwood Utilities Comm*, 964 So. 2d 1100 (Miss. 2007) and *City of Jackson v. Powell*, 917 So. 2d 59 (Miss. 2005).

ARGUMENT

A. THE MISSISSIPPI CONSTRUCTION ARBITRATION ACT

Although Hattiesburg initially fought Precision's efforts to arbitrate this dispute, the Circuit Court eventually ordered the matter to arbitration. In its order, the Circuit Court ordered that the arbitration was to be conducted pursuant to the Mississippi Construction Arbitration Act. (R 83) Eventually, Hattiesburg and Precision entered into an arbitration agreement which provided that all proceedings would be conducted pursuant to that Act. All proceedings in the circuit court would be stayed pending the outcome of the arbitration.

B. APPELLANT FAILED TO PRESERVE ITS ISSUES BEFORE THE TRIAL COURT

1. To Be Preserved For Appeal, Issues Must Be Raised Before The Trial Court

It is axiomatic that an appellant's failure to raise an issue at the trial court level bars this Court's consideration of that issue for the first time on appeal. *Jones v. Fluor Daniel Services*, 959 So. 2d 1044 (Miss. 2007) (Supreme Court does not consider issue raised for the first time on appeal); *Allen v. National RR Passenger Corp.*, 934 So. 2d 1006 (Miss. 2006)(failure to preserve issue for appeal renders issue procedurally barred); *Prestidge v. City of Petal*, 841 So. 2d 1048 (Miss. 2003) (if not raised at trial level, issue is waived). Part of the reason for such a rule is fundamental fairness to the judicial process and the trial court. The trial court should be given the first opportunity to correct any errors in the proceedings. *See e.g. West v. West*, 891 So. 2d 203 (Miss 2004), *Southern v. Miss. State Hospital*, 853 So. 2d 1212 (Miss. 2003).

2. Appellant Never Raised the Issue of "Evident Miscalculation of Figures" to the Trial Court

As noted, nowhere in its Motion to Amend, etc. filed with the Circuit Court did Hattiesburg assert that the arbitrator's decision exhibited any "evident miscalculation of figures." In fact, these words do not appear anywhere in its Motion. The first time Hattiesburg has made **any** claim that the arbitrator's decision exhibited "evident miscalculation of figures" is in its Statement of Issues in its brief filed in this Court. (Brief p. 6)

Interestingly, Hattiesburg asserts four issues to be decided by this Court. As to issues I, II and III, Hattiesburg asserts errors by the "**Arbitrator**," not the trial court. Only in Issue IV does Hattiesburg even attempt to cite to any error of law or fact by the Circuit Court. (Brief p. 6)

Appellee will concede that in his October 22, 2014 Order, the Circuit Court found that Hattiesburg's Motion to Amend, etc. "challenges calculation of the sums awarded" and that the

success of its Motion was dependent upon it showing “evident miscalculation of figures” (R 321), even though this had **never** been argued by Hattiesburg. Of course, the court concluded that Hattiesburg failed to meet its burden under 11-15-135(1)(a). (R 321)

However, as noted above, in only Issue No. IV of its four “issues” does Hattiesburg even attempt to assert that the Circuit Court erred. Clearly, inasmuch as Issues I, II and III were never raised to the Circuit Court, under the authorities cited above, they are waived. But, its total failure to raise these issues in its Motion to Amend, etc., deprived Precision of an opportunity to ensure that the trial court had before it full arguments, authorities and evidence to support its findings that there was no “evident miscalculation of figures.” Had Hattiesburg asserted those claims in the Court below, Precision could have responded and offered the trial court both authorities and proposed findings that would further support the Court’s ultimate ruling. It is fundamentally unfair to Precision and the trial court to allow Hattiesburg to be silent on this issue in the Court below, but now, for the first time on appeal attack the sufficiency of the Court’s finding in Issue No. IV.

C. THE APPELLANT HAS FAILED TO SHOW ANY BASIS FOR MODIFYING OR CORRECTING THE ARBITRATION AWARD

This Court has succinctly stated the standard for review of arbitration awards such as the decision in this case:

The standard of review for vacating, modifying, or correcting arbitration decisions is set out in Miss. Code Ann. Sections 11-15-133 and 135. These sections contain specific grounds, and the time frame during which they must be asserted, which represents the only way a court is allowed to overturn the award of an arbitrator.

Johnson Land Co. v. C.E. Frazier Constr. Co., 925 So. 2d 80, 83 (Miss. 2006).

As early as 1948, this Court established the rule of giving great deference to the decisions of arbitrators.

The applicable general rule is announced as follows: “Errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. Nothing in the award relative to the merits of the controversy as submitted, however wrongly decided, is ground for setting aside an award in absence of fraud, misconduct, or other valid objections.”

...

”Unless the arbitrators are restricted by the agreement of submission, the general rule is that they are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either.”

Hutto, 36 So. 2d at 809 (1948), (quoting 3 Am. Jur. Section 135 Award and Arbitration). The

Hutto Court went on to hold:

In dealing with this topic, we have said that “the rights of the parties are narrower than in judicial trials, for there is no review or correction of errors of the judgment, either upon the law or facts, nor indeed would the arbitrators be absolutely barred by the strict law of the case. They might proceed altogether on views of what was right and just between the parties without following either the rules that would govern a court of law or equity in the circumstances. It is not legitimate, therefore in exceptions to the award, to inquire into the original merits in favor of one party or the other, or to show that in the evidence the award ought to have been different, or that the law of the case was misconceived or misapplied, or that the decision, in view of all facts and circumstances, was unjust.”

Id. (quoting *Jenkins v. Meagher et al.*, 46 Miss. 84 (1871)).

In *Craig v. Barber*, 524 So. 2d 974 (Miss. 1988) an arbitration conducted pursuant to Section 11-15-101 *et. seq.*, this Court held:

Articles of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings.

Id. at 977. The *Craig* Court also noted that Section 11-15-133 provides:

The fact that the relief was such that it could not or would not be granted by a court of law or equity is no grounds for vacating or refusing to confirm the award.

Id. at 978.

In *Johnson Land Co.*, this Court was presented with an appeal of a disappointed owner in a construction case arbitrated under 11-15-101, *et, seq.* Although the losing owner sought to oppose the contractor's motion to confirm the award, it did not do so on any of the grounds provided for in Sections 11-15-133 or 135. There the Court held:

...the award shall be confirmed absent the existence of a least one of the grounds listed for vacating, modifying, or correcting an award. Because Johnson did not assert any of these grounds in its response asserting that the motion to confirm was premature, its motion to set aside judgment, motion to vacate, or motion to reconsider, we agree that the circuit court properly confirmed the award.

Johnson Land Co., 925 So. 2d at 84.

As in *Johnson Land Co.*, the appellant in the instant case seeks to modify or correct the arbitrator's decision based upon appellant's contention that he made incorrect findings of fact, and that he applied the wrong measure of damages. Appellant even went so far as to offer new exhibits after the arbitration had been completed which it believes the arbitrator should subsequently consider. While it now realizes that its challenge to the decision must be upon one of the grounds allowed by 11-15-135(1)(a)-(c), it did not make any such assertion to either the arbitrator or the circuit court below. In fact, the words "evident miscalculation of figures" are nowhere found in either its Motion for Reconsideration to the Arbitrator or its Motion to Amend, etc. to the trial court. Appellant has failed to show any basis for this Court to modify or correct the arbitrator's decision.

D. THE ARBITRATOR'S AWARD DEMONSTRATES NO "EVIDENT MISCALCULATION OF FIGURES"

Even should this Court find that the challenge to the arbitrator's decision on the basis of "evident miscalculation of figures" was preserved by the trial court's ruling, the appellant has wholly failed to offer any facts or argument to support that conclusion.

No decision of this Court has ever directly construed "evident miscalculation of figures" under Section 11-15-135(1)(a). However, in *D'Angelo*, a homeowner challenged the arbitrator's decision awarding it certain damages. In challenging the award, the D'Angelos contended that the arbitrator's award was too low because he did not consider their additional costs to replace and re-shingle their roof. According to the D'Angelos, the failure of the arbitrator to consider these costs constituted an "evident miscalculation of figures." The trial court declined to modify the award, finding that the amount of damages was a contested issue of fact decided by the arbitrator. On appeal, the D'Angelos urged the Court of Appeals to adopt a broad interpretation of "evident miscalculation of figures" adopted by some federal courts. The Court of Appeals declined. While not specifically adopting its own definition of the term under 11-15-135(1)(a), the Court held:

In the present case, the amount of damages the arbitrator awarded was not the product of an evident miscalculation of figures; rather, the amount was simply based upon the lowest repair estimate submitted by the D'Angelos. The amount of damages to which the D'Angelos were entitled was a contested issue of fact, and any judicial correction of the damages award would affect the merits. Because it is not appropriate for this Court to inquire into the evidentiary basis of the award, and because we must indulge every reasonable presumption in favor of the validity of the arbitration, we hereby affirm

The wording of 11-15-135(1)(a) is identical to the wording of statutory arbitration acts in many other states and the appellate courts of those states have had opportunities to construe the

identical language.² In all of these jurisdictions, “evident miscalculation of figures” is limited to uncontested or “evident” mathematical errors where the underlying principal or measure of damages is not in dispute. However, where the dispute is over the legal standard, principle or measure of damages applied by the arbitrator, there is no “evident miscalculation of figures.” In other words, 11-15-135(1)(a) is limited to those situations where there is a pure mathematical error clearly evident on the face of the decision. *See e.g. Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 255 S.E. 2d 414 (NC App 1979)(North Carolina version of 11-15-135(1)(a) refers only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court, not an avenue to review the evidence and reach a different result); *Foust v. Aetna Casualty & Ins. Co.*, 786 P 2d 450 (Colo. App. 1989)(“evident miscalculation of figures” refers only to mathematical errors which would be patently clear to a reviewing court); *School City of East Chicago, Indiana v. East Chicago Federation of Teachers*, 622 N.E. 2d 166 (Ind. 1993) (school does not assert any improper application of mathematical principles, only the substantive merits of the arbitration); *Vernon E. Faulconer, Inc. v. HFI Limited Partnership*, 970 So. 2d 36 (Tx App. 1998)(“evident miscalculation of figures” implies inadvertence or an error caused by oversight; if amount of award is rationally inferable from facts before arbitrator there is no “evident miscalculation”); *North Boulevard Plaza v. North Boulevard Associates*, 526 SE 2d 203 (NC App. 2000)(use of wrong formula to calculate award was not “evident miscalculation of figures”); *Jones v. Sunbelt Ltd P’ship Five*, 635 N.W. 2d 267 (Neb. 2001) (“evident miscalculation of figures occurs when there is a mathematical error in the arbitration award that is both obvious and unambiguous.”); and *Cranney v. Mutual of Enumclaw Ins.*, 175 P. 3d 168 (Idaho 2007)(“evident miscalculation of figures” refers to a mathematical error in

² Although Mississippi has never formally adopted the Uniform Arbitration Act, the language of much of 11-15-101 through 11-15-143 is identical to that uniform act which has been adopted in many states.

calculating the amount of the award, not a legal error in calculating the amount of the award, nor a legal error in the elements or measure of damages.)

Thus, it is abundantly clear that those states that have considered the identical language of 11-15-135(1)(a) find it refers only to open and obvious mathematical errors on the face of the award. It does not permit a reviewing court to delve into the proof submitted to the arbitrator or to challenge his determination of the applicable legal standards, or measure of damages.

In the instant case, it is clear that Hattiesburg has presented no facts to show any open or obvious mathematical error committed by the arbitrator in his thirty-nine page decision, except the \$63,520.74 error in picking up the wrong figure which Precision has conceded and the Circuit Court's decision reflected. (R 322)

Rather than demonstrate any obvious mathematical errors, Hattiesburg makes only substantive challenges to the findings of fact and conclusions of law by the arbitrator. First, it asserts that the arbitrator failed to give it credit for \$93,000 in payments it allegedly made as to mobilizations. (Brief pp 19-20) In support of its arguments as to the number of extra (over the contract allowances) mobilizations Precision had to incur because of Hattiesburg's breach, Hattiesburg offered to the arbitrator and to the trial court, new exhibits in the form of "Daily Observation Reports" by the engineer's inspector. (Brief pp 20-21) Obviously, Hattiesburg failed to present this evidence at trial and because no record was made, new counsel for Hattiesburg, nor this Court, have the benefit of the sworn testimony of Precision's President, Nathan Smutzer, as to the additional mobilizations caused by Hattiesburg's breach. Far from pointing out to this Court an obvious mathematical error, Hattiesburg would have this Court retry this issue, second guess the arbitrator without the benefit of a record and consider evidence it failed to offer at the hearing. This is clearly not an "evident miscalculation of figures."

Secondly, Hattiesburg asserts that the arbitrator made an “evident miscalculation of error” when he allegedly awarded “lost profits” without a credit for amounts it now alleges were paid to Precision. (Brief pp 25-26) To support its argument that the resulting damages award to Precision is so “egregious” as to constitute an “evident miscalculation,” Hattiesburg offers the following arguments:

“The notion of a 60-70 percent “lost profit” on a construction contract defies reasonableness and credulity.” (Brief p. 27)

“It is further evident from the decision and the testimony that no effort whatsoever was made to calculate or estimate “net profits” as opposed to “gross profits.” (Brief p. 27)

“Such calculation or “estimate” of “lost profits” are contrary to the requirements for proper documentary evidence and/or testimony required to distinguish between two types of “lost profits.” (Brief p. 27)

“It is reasonable to conclude that Precision’s failure to meet its burden of proof by establishing “lost net profits” significantly hindered the arbitrator in making proper calculation of “lost profits” in this matter.” (Brief p. 30)

“The City desires only that “lost net profits,” if applicable in this case, be calculated according to the rules set out by our state courts and the construction industry.” (Brief p. 30)

“...Precision produced no evidentiary proof with certainty that would substantiate Precision’s lost net profits.” (Brief p. 30)

It is clear that, despite the Court’s rulings in *Hutto* and *Johnson Land Co., et al*, Hattiesburg is challenging the arbitrator’s finding of fact as to credits due it and his application of legal principles concerning the measure of damages he applied. This challenge by Hattiesburg is foreclosed by these decisions. Further, Hattiesburg has not pointed to a single open and obvious mathematical error made by the arbitrator.

E. THE ARBITRATOR PROPERLY APPLIED THE 20 DAY LIMITATION OF SECTION 11-15-123

1. Section 11-15-123

Section 11-15-123 provides:

Upon request by a party to the arbitration, mailed by registered or certified mail to the arbitrators and opposing party(s) within twenty (20) days of the receipt of the award, to modify or correct the award on any or all of the grounds enumerated in Section 11-15-135, the arbitrators shall, within ten (10) days, modify, correct or affirm the award as they find proper.

2. Facts

The arbitrator orally announced his decision and award to the parties with a court reporter present on June 25, 2014. His opinion and award was transcribed and issued on July 2, 2014. As part of his thirty-nine (39) page detailed award, the arbitrator granted Precision's claim for attorney's fees, gave Precision seven (7) days to petition for fees and Hattiesburg seven (7) days to respond in opposition. On July 24, 2014, the arbitrator issued his Supplemental Award granting Precision attorney's fees and expenses, though less than it had petitioned for.

On August 11, 2014, forty-five (45) days after the arbitrator's oral ruling and thirty-nine (39) days after issuing the transcribed opinion and award, Hattiesburg filed its Motion for Reconsideration of the Arbitrator's Decision and Supplemental Decision. Hattiesburg's motion did not mention 11-15-135, nor did it cite to or assert any of the limited grounds for modifying or correcting an award under 11-15-135(1)(a)-(c). On August 29, 2014, the arbitrator entered his order denying Hattiesburg any relief as to his decision because its motion had been filed outside the twenty (20) day timeframe set forth in 11-15-123. He did consider Hattiesburg's arguments as to his award of attorney's fees and costs, but ultimately denied it any relief.

On September 16, 2014, Hattiesburg filed its Motion to Amend, etc. before the Circuit Court. Nowhere in its Motion does Hattiesburg complain as to the arbitrator's decision to apply

11-15-123's twenty (20) day time limitation. It is not mentioned and the trial court was never asked to grant any relief as to that issue.

On July 13, 2015, Hattiesburg filed its Brief for Appellant in this cause. In its brief, it set for as Issue No. 1:

I. Whether the Arbitrator erred in not allowing the City's motion for reconsideration of his Decision under § 11-15-123, MCA to be heard when it had been filed within 20 days of his Supplemental Decision?

Brief p. 6.

3. Appellant Failed to Preserve this Issue for Appeal

As argued in Section B above, Hattiesburg failed to raise this issue to the trial court and raises it for the first time on this appeal. Under the authorities cited above, Hattiesburg should be procedurally barred from raising this issue now for all of the reasons set forth above.

Perhaps in recognition of the fact that it failed to present this issue first to the trial court, Hattiesburg's Issue No. I seeks review of and appeals the decision of the **arbitrator**, not the trial court. It is submitted that this is something this Court cannot and should not do. As this Court has previously noted, its sole role as an appellate court considering a challenge to an arbitration award, is to determine if the trial court properly applied the very limited grounds for vacating, modifying or correcting an award under 11-15-133 or 11-15-135. *Hutto*, 36 So. 2d at 810 and *D'Angelo*, 791 So. 2d at 272-273.

4. The Arbitrator Correctly Applied 11-15-123

By July 2, 2014, the arbitrator's decision on all substantive issues was complete. He had decided all claims and defenses assert all claims and defenses asserted by the parties. Most importantly, he had ruled on and granted Precision's claim for attorney's fees. (R 105) Only the amount of the fees were left to be decided by past award petition.

This Court has recognized that when the decision of a trial court disposes of all substantive issues in a proceeding, but leaves open a final adjudication of a related issue, that decision is “final” for purposes of appeal. *See e.g. Heigle v. Heigle*, 654 So. 2d 895, 898 (Miss. 1995)(under MRCP 54(b) an appeal is permitted if one issue on which there has been a final judgment even though other issues remain).

In the instant case, the arbitrator’s July 2, 2014 decision was substantively and sufficiently complete to allow the arbitrator to properly apply 11-15-123’s twenty (20) day limitation. There was no error on the arbitrator’s part.

5. Even If The Arbitrator Misapplied 11-15-123, It Was Harmless Error

This Court will not reverse a decision below, even if there was error, if the ultimate result would have been the same. Such would be “harmless error.” *See e.g. Phillips v. Illinois Central R. Co.*, 797 So. 2d 231 (Miss. 2000). No trial is completely free of error, but to justify reversal, the error must be of such magnitude as to leave no doubt that the appellant was unduly prejudiced. *Burr v. Miss. Baptist Medical Center*, 909 So. 2d 721, rehearing denied, (Miss. 2005). Error is only grounds for reversal if it affects the final result and works adversely to a substantial right of the appellant. *City of Natchez v. Jackson*, 941 So. 2d 865, rehearing denied (Miss. 2006). Even if error has occurred, appellate court will not reverse if decision below is supported by the overwhelming weight of the evidence. *Kroger v. Scott*, 809 So. 2d 679, rehearing denied, certiorari denied (Miss. 2001).

Section 11-15-123 requires that any motion for modification or correction of an award directed to the arbitrator **must** specify and be premised upon one of the three (3) limited grounds allowed under 11-15-135(1)(a)-(c). In the instant case, Hattiesburg’s Motion for Reconsideration failed to do that. As noted, its Motion wanted to reargue the proof, offer new exhibits and objected to the measure of damages adopted by the arbitrator. Its motion did not

reference 11-15-135, not did it assert any of the limited grounds for modifying or correcting the award set forth therein.

It would have been error on the arbitrator's part to consider Hattiesburg's Motion for Reconsideration, and even greater error to grant it any relief. Thus, the ultimate outcome of the matter would have been the same. And since Hattiesburg presented the same arguments to the trial court (although again, without reference to 11-15-135(1)(a)-(c), it cannot be said that Hattiesburg's rights were unduly prejudiced.

Thus, if there was error (which is not admitted) on the arbitrator's part (not the trial court), it was harmless error and not grounds for either reversal, modifying or correcting the award.

CONCLUSION

For all the reasons set forth above, the award of the arbitrator and the decision of the Circuit Court below should be affirmed.

This the 10th day of August 2015.

Respectfully Submitted:

PRECISION CONSTRUCTION, LLC

By: /s/ Mark D. Herbert
Mark D. Herbert (MSB# 2370)

CERTIFICATE OF SERVICE

I, Mark D. Herbert, do hereby certify that I have this day served via U.S. Mail, a true and correct copy of the foregoing pleading upon the following counsel of record:

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Hon. Robert B. Helfrich
Forrest County Circuit Court Judge
P.O. Box 309
Hattiesburg, MS 39403

THIS the 10th day of August, 2015.

/s/ Mark D. Herbert
Mark D. Herbert