COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2014-CA-01671

CITY OF HATTIESBURG, MISSISSIPPI **APPELLANT**

versus

PRECISION CONSTRUCTION, LLC **APPELLEE**

APPEAL
from Judgment of the
Circuit Court for Forrest County, Mississippi

REPLY BRIEF FOR APPELLANT

[ORAL ARGUMENT REQUESTED]

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II. 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)?

III. Whether the award of the Arbitrator demonstrates any "evident miscalculation of figures"?

IV. Whether the Appellant has established any grounds for modifying or correcting the Arbitrator's award under Section 11-15-135?

V. 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 FOR ORAL ARGUMENT

The City of Hattiesburg, Mississippi ("City") requests oral argument in this case and, contrary to Precision Construction, LLC's ("Precision") position for no oral argument, suggests the following reasons for this Court to grant oral argument in this matter:

1. The absence of the extensive record from the arbitration hearing supports the need for oral arguments because of the divergent views of the parties on common issues.
2. The possibility that two of the issues being raised on appeal may be of first impression, namely, (a) whether the bifurcation of the 20-day time limit of § 11-15-123, MCA, was improperly applied when the arbitrator denied the City's motion for reconsideration his award and decision; and (2) whether the mathematical errors made by the Arbitrator attain to the level of "evident miscalculation of figures" and how should the application of this rule be construed.
3. The complexity of the issues raised by the City and the even greater complexity of the counter issues raised by Precision.

The undersigned counsel for the City of Hattiesburg believes that this case, because of the issues raised therein, is important enough to justify oral argument.

STATEMENT OF THE CASE

Both the City and Precision have set out in their initial briefs their versions of the "Statement of the Case." It is not prudent for the City to repeat its statement of the case in this reply brief. However, it does bear noting that Precision in its initial brief makes it clear that the City did not agree to the underlying arbitration, but was ordered to do so by the trial court. Precision states that it had to bring "its Motion to Compel Arbitration," that "Hattiesburg refused

to participate in selecting arbitrators," and that it had to file a "Motion for Appointment of Arbitrators." Paragraph 9.11 of the contract states in part, "[e]ither the OWNER or the CONTRACTOR, if the other agrees, **may request arbitration** with respect to any such claim, dispute or other matter . . . ." (emphasis added) (R. 059). It is clear that the City opposed the arbitration at all of its initial phases until ordered by the trial court to participate in the arbitration proceeding.

The City accepts the arbitrator's determination that the City breached its construction contract with Precision, and, to a much lesser extent than the award granted by the arbitrator to Precision, the City also anticipated a fair and reasonable award of damages against the City for the breach of contract. However, the City never anticipated an egregious award from the arbitrator giving Precision what appears to be an unmerited and unjust windfall in this case.

STATEMENT OF FACTS

As with the "Statement of the Case," both the City and Precision gave extensive renditions on the statement of facts in their initial briefs. The City believes its initial statement of the facts to be accurate, and will only comment on Precision's statement of facts in a context where it believes the statements to be inaccurate or in need of further elucidation.

Precision sets out in its statements of facts the reasons for the breach of contract in the underlying proceeding. The City may not agree with these stated facts, but does accept the fact that the arbitrator found the City had breached part of its contract with Precision. Further, the City did not challenge these findings on breach of contract made by the arbitrator.

The City disagrees with Precision's assessment that "[t]he parties' contract required arbitration of any dispute." An examination of the arbitration provision of that contract shows

clearly that arbitration was not mandatory. (R. 059). Indeed, Precision went to great pains in showing that the City did not agree with nor approve of arbitration when it stated that "Hattiesburg did not acknowledge the Demand for Arbitration," "Precision filed . . .to compel arbitration," "Precision brought forth its motion to compel arbitration," "Judge Helfrich entered his Order compelling arbitration," the City "refused to participate in naming agreed Arbitrators," and "Precision filed a Motion . . . for Appointment of Arbitrators."

In its brief on page five, Precision asserts that the parties agreed to dispense with a transcript of the underlying proceedings and cites page 107 of the Record as the source for this statement. The City has been unable to find this observation on the cited page nor on the next seven succeeding pages of the Record. (R. 107-114).

Precision remarked in its initial brief that the City's Motion for Reconsideration of the Arbitrator's Decision and Supplemental Decision was "filed thirty-nine (39) days after [the] written decision" of the arbitrator. What Precision did not state is the fact that City filed its motion with arbitrator within twenty days of the receipt of the supplemental decision and award from the arbitrator. Further, this is one of issues the City has raised in its appeal, namely, does the twenty-day time limitation of § 11-15-123, Mississippi Code of 1972, as amended ("MCA") begin to run when the final and complete decision of the arbitrator is furnished or can that time limitation be bifurcated to cover a decision and, potentially, additional supplemental decisions.

Precision suggests that the City raised a variety of issues "for the first time" with the filing of the above motion. With the absence of a record or transcript for the arbitration proceedings, it is difficult to prove the veracity of Precision's statement. Regardless of the boldness of Precision's statement, § 11-15-123, MCA, is included in the Mississippi statutes to permit a party to ask an arbitrator to correct or modify its award. Generally, the City had requested the arbitrator

to consider his alleged miscalculation of figures in the award of damages for (1) mobilizations, (2) lost profits, (3) proper payment penalties and (4) attorneys' fees. In the present appeal by the City, it has chosen not to raise the issue of errors in calculating attorneys' fees since the arbitrator did consider the City's Motion for Reconsideration with respect to these fees and concluded his calculations were accurate.

However, had the arbitrator not peremptorily denied the City's motion on other issues, Precision's observation about whether the corroborating exhibits were new would have been resolved by the arbitrator. Without a record, it is not possible to ascertain whether these documents were exhibits introduced to the arbitrator or part of the "Daily Observation Reports" book given to the arbitrator. In retrospect, the City does not need additional exhibits to corroborate the "evident miscalculation of figures" by the arbitrator with his damages award for mobilizations. Precision's exhibits are sufficient to support the finding of "evident miscalculation of figures" by the arbitrator.

Precision is making an issue of the City not using the exact language of § 11-15-135(1)(a), MCA, in its motion to the arbitrator to reconsider his award and its subsequent motion to the trial court to amend, modify or correct the arbitrator's decision and supplemental decision. The statutory grounds used for amending, modifying or correcting the arbitrator's decision whether by the arbitrator under § 11-15-123, MCA or by the trial court under § 11-15-135 are the same and, in part, are as follows:

> **§ 11-15-123. Modifying or correcting award.**
>
> Upon request by a party to the arbitration, mailed . . . 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, ...

§ 11-15-135. Grounds to amend; remedies available.

(1) Upon application made by a party to the arbitration withing ninety (90) days after the receipt of a copy of the award, the court shall modify or correct the award where:

(a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted: or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If such application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected; . . . .

. . . .

Neither statutory section makes it mandatory that a a party moving to modify or correct an arbitrator's award shall cite the exact words of § 11-15-135(1)(a)-(c), MCA, in order to pursue such motions. The statutes only require that the movant argue for modification or correction based on "any or all of the grounds enumerated in Section 11-15-135 . . . ."

In the City's motion for reconsideration made to the arbitrator and its motion to the trial court to correct or modify the award, the City never requested the award be corrected or modified because of "a matter not submitted to" the arbitrator nor that the award was imperfect in a matter of form. However, the entirety of both motions, the virtual entirety of Precision's responses to these motions and the hearing before the trial court focused almost entirely on the "evident miscalculation of figures" made by the arbitrator in his award. Obviously, the rule of substance over form" is applicable in this context because counsel for the City, counsel for Precision and the trial court treated all the issues by the City in its two motions as arguments based on "evident miscalculation of figures" by the arbitrator.

Precision, rather than presenting the facts of this case, chose to argue that the City did not use the exact words–"evident miscalculation of figures"– in its motions. Yet, counsel for Precision argued against "evident miscalculation of figures" by the arbitrator in the motion hearing before the trial court. Indeed, Precision even conceded in this hearing that the arbitrator had made two mathematical errors which attained to the level of "evident miscalculation of figures." (RE. 10).

As a offshoot of Precision's faulty analysis of the grounds asserted by the City in its two motions as being insufficient, Precision also argues in its statement of the facts that the City raised the issue of "evident miscalculation of figures" for the first time on this appeal. This is a totally inaccurate assessment or a misapprehension of the factual bases of the City's two motions, Precision's two responses and the hearing before the trial court. The City is not trying to retry parts of the arbitration. It is simply complying with statutory remedies available to parties in arbitration proceedings under Title 11, Chapter 15 of the Mississippi Code of 1972, as amended.

SUMMARY OF THE ARGUMENT

Precision restates the arguments it made in its "statement of facts" as to (1) the City's failure to cite in its motions to the arbitrator and the trial court the words "evident miscalculation of figures" contained in § 11-15-135(1)(a), MCA, and (2) the City's purported failure to preserve the issue of "evident miscalculation of figures" at the trial court level and before the arbitrator. Finally, Precision argues that the issue of how to apply the 20-day time limitation in § 11-23-123, MCA, when an arbitrator is requested by a party to reconsider his award under the above Code section was properly applied by the arbitrator, *supra.* Precision further argues, that if the arbitrator misapplied the 20-day limitation, then the arbitrator's action was harmless error.

It is difficult to square Precision's assertion that if there was a misapplication of a significant statutory section by the arbitrator then it was only harmless error when one notes that Precision earlier in its brief asserts that the City is "a disappointed defendant against which an award of $856,666.46" was given in arbitrator's decision and award.. Yes, the City is disappointed in the egregious magnitude of the award, but not without justification.

Precision has conceded, and the trial court has agreed, that the arbitrator made, at least, two "evident miscalculation of figures" in the amounts of $63,520.74 and $270.00. (RE. 10). The City contends that other obvious and "evident miscalculation of figures" were made by the arbitrator in his award. Therefore, the City asserts that the decision of the arbitrator to peremptorily deny its motion for reconsideration due to the 20-day time limitation in § 11-15-123, MCA was, in fact, error and not **harmless**. (emphasis added). The purpose of this statutory section appears to provide a party with the opportunity to allow the one who made the award to take necessary action to amend, correct or modify it.

STANDARD OF REVIEW

The City asserts that this court has the right to review all appropriate issues raised on appeal under §§ 11-15-101 to 11-15-143, MCA. The specific sections which may be applicable to the issues raised on appeal are §§11-15-123, 11-15-135 and 11-15-141, MCA. In *Hutto v. Jordan*, 204 Miss. 30, 36 So.2d 809, 810 (1948), the Mississippi Supreme Court noted that "[t]he only grounds for setting an arbitration award aside, or if modifying it, are prescribed by statute." Since *Hutto* is a a 1948 case, it precedes the current statutes which are applicable to current arbitration awards and their modification. The court observed the following:

> As to modifying it [award], there must be an evidence miscalculation of figures; or an evident mistake in the description of any person, thing, or property referred to in the award; an award upon a matter not submitted, or not affecting the matter submitted; imperfection in some matter of form not affecting the merits of the controversy, ... *Id.*, *citing,* Section 291, Code 1942.

The issue on appeal in *Hutto* revolved around the allegation of usury, which the Court determined that usury was not an issue of "miscalculation or erroneous computation." *Id.,* at 811.

In the case of *D'Angelo v. Hometown Concepts, Inc.*, 791 So.2d 270, 271-272 (Miss.Ct.App.2001, the court of appeals noted the "court may modify an arbitration award if: '(a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award; . . . .'" *Citing,* Miss.Code Ann. § 11-15-135(1) (Supp.2000). This case is one in which the complaining party asserted that the arbitrator selected the amount contained in a lower cost estimate versus a higher one. The court said the damages "the D'Angelos were entitled was a contested issue of fact," and was not an evident miscalculation of figures. *Id.,* at 272-273.

ARGUMENTS

The issues raised by the City in its appeal of the matter its initial brief are:

A. 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;

B. Whether the Arbitrator made material and evident miscalculations in determining the award for claims against the City for Precision's mobilizations without deducting a previous payment to Precision of $93,000.00 for mobilizations;

C. Whether the Arbitrator made material and evident miscalculations in determining the award for the "lost profits" claims against the City for unused 30" PVC pipe when the cost for pipe had been previously paid to Precision by the City; and

D. Whether the Forrest County Circuit Court erred in denying the City's motion to correct material and evident miscalculations in the Arbitrator's decision to award $93,000.00 in excessive damages to Precision for its mobilizations.

The City considers these to be the primary issues raised on appeal in this case. It reaffirms its arguments in its initial brief as to these issues. Responses to Precision's arguments in its initial brief will be related, as much as possible, to above issues, and these responses are supplemental to those contained in the City's initial brief.

I. Appellant preserved its issues before the trial court.

Precision's persistence in stating the City failed to raise the issues on appeal before the trial court are disingenuous at best. The entire substance of the City's motion for reconsideration filed with the arbitrator; Precision's response to said motion; the City's motion to amend, correct or modify the arbitrator's award filed with the trial court; Precision's response to said motion; and the hearing on the latter motion before the trial court on September 26, 2014 clearly speaks to the fact that City raised with great particularity the last three issues shown above. As to the issue of the 20-day limitation under § 11-15-123, MCA, the City discussed this matter in the hearing before the trial court, and the lower court observed "[a]s to the miscalculations and the review of

the arbitrator's decision, . . . I don't have the power to reconsider that. That can be taken up with another court–a higher court than this." (Tr. 10-11). The City contends that all issues it has raised in its appeal were properly before the trial court.

The City fully understands and appreciates that a issue never raised at the trial court level may not be appealed. All of the issues raised by the City in this appeal were before the trial court and could have been before the arbitrator had not he peremptorily denied the City's motion for reconsideration on the basis of the 20-day time limitation of § 11-15-123, MCA.

II. Appellant raised the issue of "evident miscalculation of figures" to the trial court.

All of the issues raised in this appeal by the City have been submitted to the arbitrator and the trial court by motion. The entirety of the motions filed, the responses filed and the hearing before the trial court focused only on "evident miscalculation of figures" and the misapplication of the 20-day time limitation under § 11-15-123, MCA The fourth issue raised by the City is applicable to the trial court. The City is of the belief that there was sufficient evidence before the trial court on the award for mobilizations to show clearly that an "evident miscalculation of figures" by the arbitrator occurred because the City was not given a $93,000.00 offset for money it had already paid to Precision for mobilizations.

There are no issues raised by the City to which Precision has not had the opportunity to respond. Further, in its response to the City's motion to the arbitrator for reconsideration of the award on miscalculation of figures, it never asserted that the City's motion was filed beyond the 20-day time limitation of § 11-15-123, MCA, and, therefore, should be have been denied. Finally, upon the reason given by the arbitrator for denying the City's motion, Precision knew that denial was based upon an interpretation of a statutory time limitation. Because this issue may be one of first impression, the City deemed it a matter which the trial court could not or would not

address, and this proved to be true. (Tr. 10-11). If it were an issue of first impression, it would appear to be one best resolved by the court in this appeal.

Precision raises concerns about the City's fourth argument on appeal. It alleges that, somehow, this issue was not raised with the trial court and is, therefore, unfair in raising it on appeal. Section 11-15-141(1)(d), MCA, permits an appeal from a trial court based on "[a]n order modifying or denying confirmation of an award." The City felt as if sufficient "evidence of miscalculations of figures" by the arbitrator existed on the erroneous calculation of the award on mobilizations. This issue was also presented to the trial court. (Tr. 7). There was certainly no unfairness to the trial court nor Precision. Indeed, the trial court even asked counsel for Precision did he agree with the City's argument that the arbitrator made an "evident miscalculation of figures" with respect to an overpayment of $93,000.00 to Precision. Counsel for Precision replied, "[h]e's simply wrong," and then attempted to show reasons why the City is wrong on this issue. (Tr. 9).

Since the trial court purposefully refused to consider this issue raised by the City, the City felt as if the trial court had erred. The trial court stated "[a]s to the miscalculations . . .I don't have the power to reconsider that." (Tr. 10-11). However, §§ 11-15-135(1) and 11-15-135(1)(a), MCA, provide that a trial court "shall modify or correct the award where: . . . [t]here is an evident miscalculation of figures. . . ." The trial court concluded it did not have the power to reconsider this assertion of the City that Precision's award for mobilizations was excessive in the amount of $93,000.00 due to "evident miscalculation of figures" of the arbitrator. The City believes the trial court had the power to review the arbitrator's award on this matter and rendered a decision on it under § 11-15-135, MCA.

III. The appellant has shown a basis for modifying or correcting the arbitration award.

The City acknowledges the standard of review cited by Precision is accurate. However, *Johnson Land Co. v. C.W. Frazier Const. Co., Inc.,* 925 So.2d 80 (2006) also notes that § 11-15-135(1), MCA, "states in relevant part, the following additional grounds upon which an arbitration award shall be modified or correct:

"(a) There is an evident miscalculation of figures . . .;

"(b) . . .; or

"(c) . . . ."

The City asserted its grounds and evidence to both the arbitrator and the trial court to correct or modify the arbitration based on "evident miscalculation of figures" with respect to several categories of damages, including mobilizations and lost profits.

The issue raised in the *Hutto* case was an allegation that a contract rate of interest in excess of 20 percent was not "evidence miscalculation of figures." *Hutto*, at 38. *Craig v. Barber,* 524 So.2d 974, 975 (Miss.1988) is a case where the arbitrator sought a writ of prohibition to get relief from a court order requiring the arbitrator to explain and clarify his arbitration award. The *Johnson* case is one prosecuted by the appellant challenging the facts the trial court (1) "confirmed the award within the ninety-day time period" in § 11-15-125, MCA, and (2) did not make "findings of fact and conclusions of law. . . ." *Johnson,* at 86.

The City acknowledges that Precision's quotations from these case are accurate, but none of these cases dealt with the factual issues raised by the City in the instant case. The City has shown that the actual pleadings filed and the hearing in this case completely relate to its assertions that the "evident miscalculation of figures" in arbitrator's award were related to (1) mobilizations, (2) lost profits, (3) prompt payment penalties and (4) attorneys fees. (R. 157-162; 194-201).

Again, Precision alleges that the City's failure to include the words "evident miscalculation of figures" contained in § 11-15-135(1)(a), MCA, is failure to plead on that ground. Presumably, Precision thinks the City's two motions, its two responses to these motions and the trial court's hearing on the City's motion were about issues totally unrelated to "evident miscalculation of figures" in the arbitrator's award.

The appellate courts of Mississippi have long upheld a common sense "substance over form" approach to dealing with the issues like that raised by Precision. These courts have also discussed instances of when their application of this liberal rule of "substance over form" does not apply. In *Peavey Electronics Corporation v. Baan U.S.A., Inc.,* 10 So.3d 945, 956 (¶ 26) (Miss.Ct.App.2009), the court noted the application of this liberal rule would not apply in situations where procedural safeguards are required to protect a litigant's constitutional right to a trial by jury. *See, Ground Control, LLC v. Capsco Industries, Inc.,* 120 So.3d 365, 373 (¶ 21) (Miss.2013); *Chevis v. Mississippi Farm Bureau Mutual Insurance Company,* 76 So.3d 187, 190 (¶ 9) (Miss.Ct.App.2011); *Jones v. Regency Toyota, Inc.,* 798 So.2d 474, 476 (¶ 7) (Miss.Ct.App.2001).

In the case of *Golden v. State,* 968 So.2d 378, 386 (¶ 28) (Miss.2007), the Mississippi Supreme Court acknowledged "that, when dealing with indictments, that we employ a rule of substance over form." In *Martin v. Martin,* 751 So.2d 1132, 1135 (¶ 14) (Miss.Ct.App.2000), the court of appeals applied its rule of substance over form in certain aspects of a divorce case. Given the content of City's motions to the arbitrator, the content of Precision's responses to these motions and the content of the hearing held by the trial court there is clear support for the application of the rule of substance over form as to the absence of City citing the exact words of § 11-15-135(1)(a), MCA. Additionally, the City contends that these exact words do not have to

be cited verbatim, but only that the movant argue on or more of the permissible grounds in its motions.

IV. The arbitrator's award demonstrated "evident miscalculation of figures."

Precision notes that the phrase "evident miscalculation of figures" has never been directly construed by the court of appeals. Precision follows this thought with a presentation of an moderately extensive argument from *D'Angelo v. Hometown Concepts,* 791 So.2d 270, 273 (¶ 11) (Miss.Ct.App.2001) noting the court did not find an "evident miscalculation of figures" in the arbitrator's award based on the acceptance of a lower estimate of making house repairs over that of a higher one. In the City's motions, the grounds asserted for correcting or modifying the arbitrator's award are based on clear, "evident miscalculation of figures" because each of the damage awards in question was a product of erroneous calculations of the arbitrator.

Precision cites a number of out-of-state cases offered for the premise that "evident miscalculation of figures" must not be a product of inadvertence or error caused by mere oversight. In *Carolina Virginia Fashion Exhibitors, Inc. v. Gunter,* 255 S.E.2d 414, 419 (N.C.App.1979), the North Carolina appellate court decided its case on the basis that the appellant's arguments "do not show a *miscalculation* of figures," but, rather, "a *misinterpretation* of the evidence by the arbitrators." In *Foust v. Aetna Casualty & Insurance Company,* 786 P.2d 450, 451 (Colo.App.1989), the Colorado appellate court was not dealing with "evident miscalculation of figures" by the arbitrator. The arbitrator merely decided that the right to interest and costs was not part of the contract. Therefore, they were not awarded. There were no calculations made on this determination.

In *School City of East Chicago, Indiana v. East Chicago Federation of Teachers,* 622 N.E.2d 166, 167-168 (Ind.1993), the court decided that the arbitrators' choice of 39-week over

a 38-week on a contract dispute was not an "evident miscalculation of figures." The *Vernon E. Faulconer, Inc. v, HFI Limited Partnership*, was decided on a number of different issues, of which one was "evident miscalculation of figures." However, Faulconer presented an expert witness who stated what he thought the range of the award should be. The award was within the range projected by Faulconer's witness, and the court concluded there was no "evident miscalculation of figures." 970 S.W.2d 36, 40 (Tex.Ct.App.1998). The remaining three cases cited by Precision are similar to those referred to above. None presented actual evidence of miscalculations by the arbitrators. They were, typically, decided on the bases of the arbitrator choosing the wrong method to determine damages, such as not permitting prejudgment interest in the award.

The City has presented evidence from the very exhibits Precision used in the hearing of this matter to show the existence of "evident miscalculation of figures" by the arbitrator. Precision's Pay Application No. 5 is shown as Exhibit D in the City's motion to the trial court to correct or modify. (R. 210-212). This pay application is part of the exhibits presented to the arbitrator at the hearing, identified as Exhibit 33, titled "Collective Exhibit–Pay Applications 1-12." (R. 247). Item No. 82 on this pay application shows that the final installment (final 50%) on the lump sum mobilization was billed to City on July 02, 2102. Precision's budget progress report shows that payment on this pay application was received on or about July 13, 2012. (R. 317).

Precision's owner was its primary witness on damages. The arbitrator stated in his decision that "[i]t was undisputed that plaintiff remobilized five times." (R. 284). Further, Mr. Smutzer testified that each mobilization was valued at $31,000.00. This resulted in an award of $155,000.00 to Precision without any offset for the $93,000.00 already paid by the City to

Precision. (R. 284). This is not only an "evident miscalculation of figures" by the arbitrator, but it also an unfair and unreasonable damage award, being tantamount to unjust enrichment and definitely thwarting the objectives of the contract between the City and Precision. If anything, an arbitration award should be fair and reasonable and should not obviate the objectives and purposes of the contract.

Precision accuses the City of wanting to retry the case–which it is not doing! Yet, we find Precision trying to change the testimony of its primary witness from what is shown in the arbitrator's decision and award as being "undisputed." (R. 284).

Precision also asserts that the arbitrator made no "evident miscalculation of figures" in calculating the award for "lost profits." Precision's short list of quotes from the City's brief, purportedly, are demonstrable of the basic arguments of the City with respect to the "evident miscalculation of figures" made by the arbitrator in its award. The City acknowledges that it is difficult to find specific evidence showing "evident miscalculation of figures" to the calculations on "lost profit" for (1) select fill, (2) base course asphalt and (3) surface course asphalt. The arbitrator did not calculate the "lost profit" on these, but, simply, accepted Precision's itemization of damages. Precision admitted that the arbitrator had made a $270.00 error in one these items and conceded at the trial court hearing that this error was an "evident miscalculation of figures." (R. 238; Tr. 4-5).

A copy of an itemization of damages is attached as Exhibit A to Precision's response to the City's motion to amend, modify and/or correct the arbitrator's decision. (R. 249-250). This itemization, combined with other evidence, presents proof of "evident miscalculation of figures" on the calculation of lost profits for these three items, but this evidence is not necessarily

overwhelming for each of these three items. However, as to the "evident miscalculation of figures" on lost profit for the 30-inch PVC pipe is very compelling.

An examination of "Claim No.2" on lost profit for select fill with "Claim No. 1" on lost profit on 30-inch pipe shows a glaring error in the calculation lost profit on "Claim No. 1." (R. 249). As part of calculating "lost profit" on select fill, there was a reduction in the amount for "**Cost of Fill** and Installation Per Yard." (emphasis added). If one were going to calculate the loss of gross profit on product or a service, the very first deduction to be made toward calculating "lost profit" on that product or service would be the cost of the product or service. In the case of a construction contract, after the cost of the product or service is deducted, then the costs of labor, equipment, fuel, etc. are deducted. The calculation for lost profit on select fill in the arbitrator's award accounts for both the cost of the product and cost for labor, equipment and fuel. It does not account for these deductions in the calculation of lost profits for base course asphalt or surface course asphalt. Instead, there is a totally different calculation for lost profits on these two items presented by Precision, with no demonstration of how these lost profits were calculated.

In addition, when "Claim No. 1" on "lost profit" on 30-inch pipe is examined, there are no deductions shown for the cost of the pipe nor for costs of labor, equipment and fuel. In Precision's collective exhibit on twelve pay applications (Exhibit # 33) (R. 247), the first pay application dated March 01, 2012 contains an invoice from Southern Waterworks Supply, Inc., dated February 16, 2012, itemizing the unit cost and total cost of PVC pipe. This invoice showed the cost for the 30-inch pipe used on this construction project as equaling $311,382.82. According to Precision's budget progress report, this pay application was paid by the City on March 22, 2012 in the amount of $427,447.52. (R. 317). As part of its twelve pay applications to the City, Precision included a "Stored Materials" report. As part of its final pay application,

this "Stored Materials" report was included. Item 2 of this report is on "30" PVC Sewer Pipe" which shows that 3,654 linear feet of pipe is still stored and the value of the pipe is shown as $277, 375.14.

These values for the initial cost of the 30-inch pipe and at the termination of project, are extremely reasonable and consistent with one another. An examination of Addendum No. 2 to the contract shows, unequivocally, that the "extension value" of 30-inch pipe under the contract is $657,508.00. (R. 023-025). Under one of the most basic of mathematical principles, the "extension value" of the 30-inch pipe less the cost or value of this pipe remaining in storage equals $380,132.86. Taking the smallest calculation for labor, equipment and fuel used by Precision in its exhibits for installing the 30-inch pipe given by Precision, there should be a reduction of $40.02 per linear foot for these additional costs, which equals $146,233.00. (R. 238; Tr. 4-5). Again, the resulting number for purported "lost profit" would then equal $233,899.86 after this deduction. When this amount is compared to the "extension value" of the 30-inch pipe the percentage of "lost profit" would be 35.57 percent.

This final number and percentage are without any deductions for the usual costs of overhead, depreciation, taxes and inflation in determining profits associated with running a construction business. The City further believes the arbitrator made "evident miscalculation of figures" in not making these additional deductions. The failure to properly calculate deductions for the cost of the pipe; the cost of labor, equipment and fuel used in installing the pipe in question; and costs of overhead, depreciation, taxes and inflation has resulted in an award for "lost profit" on 30-inch pipe that represents an egregious and unjust windfall to Precision at the cost of the City and its taxpayers.

V. The arbitrator did not properly apply the 20 day limitation of Section 11-15-123.

The City has already set out in its initial and reply briefs its rendition of the facts which relate to arbitrator's failure to apply correctly the 20-day time limitation in § 11-15-123, MCA. Simply put, the City filed its motion for reconsideration with the arbitrator within twenty days of the receipt of the arbitrator's supplemental decision and award.

This matter was properly and adequately preserved by the City when (1) it filed its motion with the arbitrator (R. 157-179), (2) the arbitrator peremptorily denied it on the basis of the 20-day time limitation (R. 203), and (3) the trial court concluded the arbitrator's decision on the 20-day time limitation was a matter he did not "have the power to reconsider . . . ." (Tr. 11). Further, the City suggests that this issue may be one of first impression best decided by the court of appeals. Indeed, the conclusion of the trial court that it did not have the power to consider this issue may be correct. In any event, by deciding that he did not have the power to do so is, in fact, a decision made by the trial court that is ready for consideration of this appeals court.

The City asserts that the correct reading of the statutory sections in Title 11, Chapter 15 on "Arbitration and Award" lends itself to an award under arbitration being single award which is final as to all substantial claims asserted in the arbitration. Section 11-15-119(2), MCA, states that the "award shall be in writing and signed by the arbitrator . . . ." This section addresses the "award" as completed single award. In § 11-15-119(3), MCA, it is stated that the "award shall be made within the time fixed therefor by the agreement or provision for arbitration . . . ." Again, this section appears to suggest that an award is to be complete in order to be an award under these statutes. Section 11-15-119(3) states that an "arbitrator may award attorney's fees and costs to a prevailing party." This seems also to clearly suggest that if the arbitrator decides to grant attorney's fees and costs to a prevailing party, then it should be part of the award.

The City contends that Precision's complaint and request for arbitration asked for a granting of attorney's fees and costs. This was perceived by Precision to be important and substantial enough to be sought time and again in this case. In its Supplemental Decision and Award of Attorney's Fee, the arbitrator awarded the sum of $76,257.65 in attorney's fees and expenses to Precision. It also awarded additional arbitration fees in the amount of $7,032.74 against the City. Section 11-15-121, MCA states that "the arbitrator's reasonable expenses and fees, together with other reasonable expenses, . . ., incurred in the conduct of the arbitration shall be paid as provided in the award." It would appear that in a case such as the current one, the award should have been considered complete and final on July 24, 2014. The City, on July 02, 2012, did not know what the arbitrator would include in his supplemental award. It was reasonable to believe that a motion to the arbitrator to reconsider his award should apply to the final and complete award, especially where the arbitrator added more than $83,000.00 to the award against the City.

If the arbitrator misapplied the 20-day time limitation in § 11-15-123, most assuredly the error would be extremely harmful to the City. Had the arbitrator considered the issues in the City's motion for reconsideration and found just one point to be valid–such as the excess award on mobilizations–the subsequent modification in the award would be meaningful to the City. In *Phillips v. Illinois Central Railroad Company*, 797 So.2d 231, 238 (¶ 18) (Miss.Ct.App.2000), the court noted that an isolated statement early in the trial regarding the introduction of disability payments was not error and, if it were, it was harmless because it was cured by the granting of a remittitur by the court. In the case of *Burr v. Miss. Baptist Medical Center,* 909 So.2d 721, 730-731 (Miss.2005) the Mississippi Supreme Court, in looking at the cumulative error issue in a wrongful death case, decided that there was not cumulative error which prejudiced the Burrs. The

facts of the present case and the alleged errors against the arbitrator are relevant to all of the issues raised on appeal.

In *City of Natchez v. Jackson,* 941 So.2d 865, 874-875 (Miss.2006), the Mississippi Supreme Court concluded that, if any error occurred with respect to testimony on the fact of the injury, the medical record and damages, it was harmless in that witnesses for both parties agreed as to these essentials. In *Kroger v. Scott,* 809 So.2d 679, 684 (Miss.2001), the court decided that the overwhelming evidence supported the jury verdict in a slip and fall case resulting from rain on a store floor. The placement of a door and its design had no bearing on the verdict. Even if the admission of such evidence was error. It was harmless error. *Id.,* at 689. It is clear that the error of the arbitrator is not harmless if there was misapplication of the 20-day time limitation of § 11-15-123, MCA when the arbitrator bifurcated the hearing period for the award (which was not yet final) and the supplemental award.

CONCLUSION

There are four issues raised by the City in its appeal of the lower court action and the results of the binding arbitration ordered by the circuit court. These are discussed in the City's initial brief for this appeal. The City contends nothing of substance has been presented by Precision in its initial brief to obviate the full consideration by the court of the issues raised by the City. The additional support and authorities presented by the City as refutation of the Precision's arguments buttress its position that the errors were made by the arbitrator in his award and in the trial court's decision not to consider the City's argument for a correction in the amount of $93,000.00 on the damage award on mobilizations.

Therefore, the City of Hattiesburg requests that the judgment of the Forrest County Circuit Court be reversed as to the award for damages for mobilizations for Precision, and that the arbitrator be ordered to hear the City's motion for reconsideration or, in the alternative, the arbitrator's decision be corrected and modified to correct for the material and evident miscalculations made in his determination of damages for mobilizations by Precision and for damages for "lost profits" awarded to Precision against the City.

DATED this 28th day of September 2015.

Respectfully submitted,

CITY OF HATTIESBURG, MISSISSIPPI

S/ James W. Gladden, Jr.

by _____
JAMES W. GLADDEN, JR., Counsel for the Appellant

CERTIFICATE OF SERVICE

I, **JAMES W. GLADDEN, JR.**, attorney for the Appellant, hereby certify that a true and correct copy of the foregoing Reply Brief for Appellant has been mailed, postage prepaid, and has been filed electronically *via* **ECF FILING** to the following attorneys of record:

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I also certify that a true and correct copy of the foregoing Reply Brief for Appellant has been mailed, postage prepaid to the Forrest County Circuit Court Judge:

Honorable Robert B. Helfrich
Forrest County Circuit Judge
Post Office Box 309
Hattiesburg, Mississippi 39403-0309

GIVEN on this 28th day of September 2015.

S/ James W. Gladden, Jr.

JAMES W. GLADDEN, JR.