

HONORABLE CHARLES MERKEL
HONORABLE CYNTHIA MITCHELL
Attorneys at Law
Post Office Box 1388
Clarksdale, Mississippi 38614

Present and Representing the Defendants:

HONORABLE JOEY LANGSTON
HONORABLE TIMOTHY R. BALDUCCI
THE LANGSTON LAW FIRM, P.A.
Post Office Box 787
Booneville, Mississippi 38829

HONORABLE STEVEN H. FUNDERBURG
JONES, FUNDERBURG, SESSUMS & PETERSON
Post Office Box 13960
Jackson, Mississippi 39236-3960

Reported by: Fran Askew, CSR
Official Court Reporter
Post Office Box 327
Jackson, Mississippi 39205
CSR NO. 1145

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

TABLE OF CONTENTS

PAGE

Style, Cause Number and Appearances	1
Table of Contents	i
Trial Commences	3
Motion	3
Ruling	19
Motion	21
Ruling	35
Settlement Announcement	39
Court Reporter's Certificate	43

1 (MONDAY, AUGUST 21, 2006 THE TRIAL COMMENCED AS
2 FOLLOWS OUTSIDE THE PRESENCE AND HEARING OF THE JURORS:)

3 BY THE COURT: Since the larger
4 courtroom is not being used this week, I
5 thought that we would be more comfortable
6 with all of the jurors during the voir dire
7 down there, but I understand there are some
8 motions.

9 BY MR. BALDUCCI: Yes, sir. May it
10 please the Court, we have a matter we would
11 like to take up with the Court before voir
12 dire.

13 BY THE COURT: Go ahead.

14 BY MR. BALDUCCI: Thank you, Your Honor.
15 Your Honor, when last we were together on
16 Friday, our appreciation of the issue that
17 would be tried today in front of the jury as
18 far as compensatory damages would be whether
19 or not plaintiffs could prove that there was
20 any interest in the form of prejudgment
21 interest due from a period of August of '92
22 to July of '94.

23 Our appreciation further of the
24 Court's order was that we would confer with
25 our experts, and the Court had instructed us

1 to produce expert opinions relative to that
2 timing and whether or not there were any
3 interest calculations due on any sums.

4 In reliance and in understanding of
5 the Court's order, the Scruggs defendants
6 have done that and have an expert report
7 prepared by our expert accountant Ms. Smith
8 which we believe is consistent with the
9 Court's instructions and orders regarding the
10 proof.

11 Prior to this hearing, this
12 ore tenis motion, we've conferred with
13 counsel for the plaintiffs and have inquired
14 of them if they have done the same, if they
15 have had their expert to make an interest
16 calculation pursuant to the Court's
17 instructions.

18 We have been advised that they don't
19 have that. We have been advised that they
20 have neither a report nor do they have an
21 opinion at this time that they can go forward
22 with.

23 That being the case, Your Honor, we
24 would submit that the Court had already ruled
25 and the Court had already set down that this

1 trial would be about, as far as compensatory
2 damages, one very limited and very discreet
3 issue.

4 It now appearing that the plaintiffs
5 cannot produce any evidence on that subject,
6 we would move the Court for a judgment as a
7 matter of law based on their failure to
8 produce any evidence to support an award.

9 We would ask the Court to enter
10 favor for the Scruggs defendants on the issue
11 of compensatory damages under phase one.

12 If the Court is so inclined to do
13 that because of the failure of proof by the
14 plaintiffs on that issue, then as a matter of
15 law we would ask the Court to reconsider the
16 motion for partial summary judgment on
17 punitive damages that Scruggs defendants have
18 filed previously that the Court has
19 considered and taken under advisement to
20 carry through this trial.

21 And the difference, the change, if
22 you will, in the circumstances, Your Honor,
23 which makes the reconsideration of that
24 motion now ripe for the Court's consideration
25 is the fact now that the plaintiffs can't go

1 forward with any evidence of compensatory
2 damages.

3 If they can't be awarded any verdict
4 on compensatory damages, then as a matter of
5 law they are not entitled to proceed on
6 punitive damages.

7 So in accordance, Your Honor, with
8 the instructions from the Court and the prior
9 rulings of the Court and the current status
10 of the case as we appreciate the facts now,
11 the Scruggs defendants move as a matter of
12 law for judgment in their favor on all issues
13 presently before the Court as I have
14 articulated now.

15 BY THE COURT: Do you have a copy of
16 this revised report?

17 BY MR. BALDUCCI: Of the defendants'
18 revised report?

19 BY THE COURT: The interest that you
20 were referring to.

21 BY MR. BALDUCCI: Yes, sir, Your Honor.

22 BY THE COURT: Can I see it?

23 BY MR. BALDUCCI: Yes, sir.

24 BY MS. SLATER: Your Honor, we would
25 like a copy. We haven't received it.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY MR. BALDUCCI: Your Honor, that's true. We haven't provided a copy to the plaintiffs in this case. Our expectation was that we would concurrently exchange expert reports.

We will be glad to share this with the Court. My hesitation in giving a copy to the plaintiffs without concurrently swapping reports is that it's their burden. It's their burden as plaintiffs to go forward.

It would be improper for us to have to disclose our opinions to them first and allow their expert to critique the opinions of our expert, who has done the job that the Court required, without the plaintiffs doing their half of pulling the load here.

So I certainly would provide it to the Court, but I ask that at this time that the Court just take it in camera without providing a copy to counsel opposite.

BY THE COURT: Let me see what the plaintiffs have to say.

BY MR. BALDUCCI: Your Honor, may I approach the bench? Do you want this now?

BY THE COURT: Not yet. Let me just

1 hear what their position is.

2 BY MR. KIRKSEY: Your Honor, first, I
3 would like to report to the Court that
4 Mr. Merkel is not present in the courtroom
5 now.

6 BY MS. SLATER: He is now, Bill.

7 BY MR. MERKEL: I am now.

8 BY MR. KIRKSEY: He is now. I'm sorry.
9 He was outside the courtroom talking with
10 Mr. Solomon at the time we started this
11 hearing.

12 Your Honor, I do not remember the
13 Court giving us a deadline on Friday at
14 approximately 5:00 as to when this report was
15 due. We do know that Mr. Solomon is working
16 on the same.

17 However, Your Honor, I would state
18 to the Court with the history of previous
19 orders entered by this Court, that if the
20 Court at some point is going to consider
21 striking Mr. Solomon's report because of the
22 tardiness or lateness of it, I would not
23 object to this Court considering that issue
24 at this time.

25 I do agree with Mr. Balducci that as

1 I understood the Court's rulings as of Friday
2 afternoon, the only limited issue for the
3 jury itself to decide is the question of any
4 interest owed on monies withheld from Bob
5 Wilson for a period of time commencing with
6 the date of the agreement, being August the
7 7th, 1992, up until the date of the filing of
8 the cross claim by Mr. Wilson, which I
9 believe is July the 18th, 1994. That would
10 be the only matter for the jury to consider.

11 Of course, I understand counsel
12 opposite's motion, Your Honor. At this point
13 I do not have a report to go forward with.
14 If the Court feels that it is going to enter
15 judgment because we don't have that, then I
16 will leave that in the Court's hands, Your
17 Honor.

18 BY THE COURT: All right. Any rebuttal?

19 BY MR. BALDUCCI: Your Honor, to
20 crystalize the issue a little further, I
21 think that the reason that it's prudent and
22 why the Court required us to have this
23 evidence ready now to move forward with this
24 trial is to determine whether or not the
25 plaintiffs, in fact, have any evidence to

1 move forward with.

2 We don't know at this point what
3 opinion, if any, Mr. Solomon is even going to
4 be able to come up with.

5 I can tell the Court that our expert
6 Ms. Smith's report for the period that the
7 time that the Court has requested for that
8 information to be calculated is that
9 Mr. Wilson was in an overpayment position of
10 over a half a million dollars.

11 So to that extent, obviously,
12 Mr. Scruggs would owe Mr. Wilson no money on
13 any wrongfully alleged withheld funds.

14 Now, we don't know as we sit here
15 before in preparation for this jury coming in
16 in the next few minutes whether or not
17 Mr. Solomon is going to have a report,
18 whether his report is going to be in
19 compliance with the Court's orders and
20 instructions.

21 History tells us that twice now the
22 Court has stricken reports of Mr. Solomon for
23 failure to comply with the Court's
24 methodology and the Court's orders concerning
25 calculation of fees due Mr. Wilson.

1 The final analysis, Your Honor, is
2 we're ready to go forward. We have done what
3 the Court asked. We've done what the Court
4 required. The calculations are there. Our
5 expert has done it.

6 We're entitled to have that same
7 information. It's not here. It's the
8 plaintiffs' burden of proof, and they can't
9 meet it, and there's no suggestion that
10 they're going to be able to meet it. And we
11 believe as a matter of law that we're
12 entitled to judgment based on that.

13 BY THE COURT: I've got a few questions.
14 Could --

15 BY MR. KIRKSEY: -- Your Honor, could I
16 interrupt the Court and announce one thing
17 based on the conversation that Mr. Merkel had
18 with Mr. Solomon?

19 BY THE COURT: All right.

20 BY MR. KIRKSEY: Judge, as I understood
21 the previous rulings of the Court, the
22 figures and methodology that the Court has
23 previously ruled should be used by
24 Mr. Solomon would be those of Stephanie
25 Smith. If I'm incorrect on that, Your Honor,

1 then I need to stop.

2 But Mr. Solomon just told us, Judge,
3 that if he uses Ms. Smith's numbers, and, of
4 course, we tried to bring to the Court the
5 fact that there were mistakes in that, but
6 the Court has already ruled, but if he uses
7 Ms. Smith's methodology, Ms. Smith's numbers,
8 his end result would be an interest payment
9 as we stand here today for the period of time
10 of August 7th of '92 to July 18th --

11 BY MR. MERKEL: -- let me do it instead
12 of trying to pass it through two hands, Your
13 Honor.

14 BY MR. KIRKSEY: With permission, Judge,
15 he just talked to him.

16 BY MR. MERKEL: I talked to Mr. Solomon.
17 And, of course, we've not seen their expert's
18 report. I don't know what her methodology of
19 doing this interest calculation is since she
20 had never previously done an interest
21 calculation.

22 But at any rate, if you use her
23 payments, her spreads, the dates of payment
24 she attributes to it, her entitlements as she
25 figures them, you convert the \$400,000.00

1 loan to a \$400,000.00 payment on asbestos
2 fees owed Mr. Wilson, as she has done
3 throughout her calculations, if Mr. Solomon
4 were to do the math in that same way, he
5 would come up with a negative figure, too.

6 Mr. Solomon has also done a
7 calculation where he takes the amounts of
8 overhead that were overcharged to Mr. Wilson
9 for every single month from June of -- I mean
10 September of 1992 through May of 1994.

11 If he does that, he finds an amount
12 of about \$600,000.00 that was owed Mr. Wilson
13 that wasn't paid, and there would be some
14 interest. \$25,000.00, \$26,000.00 worth of
15 interest would accrue on that.

16 But that is not Ms. Smith's
17 methodology, and if that's the methodology
18 that is going to stand, we will simply
19 proffer Mr. Solomon's as soon as we get it in
20 written form, but that is the way it will be
21 computed.

22 BY THE COURT: When do you expect that
23 to be?

24 BY MR. MERKEL: He called, Your Honor,
25 to tell me what the raw numbers were, and

1 he's been working on it since 8:00 this
2 morning, but he didn't give me an exact time
3 we could expect an e-mail.

4 BY THE COURT: All right.

5 BY MR. BALDUCCI: Your Honor, if I might
6 just address one point that Mr. Merkel
7 brought up just then.

8 I think it's become clear now with
9 that explanation from Mr. Merkel, Your Honor,
10 that even if there were a report that
11 Mr. Solomon did in compliance with the
12 Court's orders and the Court's rulings using
13 the same methodology that's been approved by
14 the Court that Ms. Smith used, then that
15 would be a negative number, and, obviously,
16 there would be a zero for the interest, and
17 there would be no compensable damages.

18 So to that extent, I believe that
19 the arguments I made earlier about the
20 propriety of our motion and a judgment as a
21 matter of law in favor of the Scruggs
22 defendants has become readily apparent to the
23 Court.

24 And, secondly, on that point the
25 only way, as counsel has just explained to

1 the Court, the only way that an issue can be
2 created for a jury here on the issue of
3 prejudgment interest is if Mr. Solomon goes
4 back and makes a calculation that is in
5 contravention of the Court's orders here,
6 particularly with reference to the overhead
7 numbers, which the Court has already
8 essentially quantified once more through its
9 rulings on the motion in limine last Friday
10 that that is no longer an issue in the case.

11 So to the extent that Mr. Solomon
12 would seek to introduce a report ultimately
13 that took into consideration some different
14 number from overhead than this Court has
15 already adjudicated is proper in the
16 calculation process, we would object to that.
17 We would move to strike that report as being
18 inconsistent with the Court's rulings and the
19 law of the case.

20 So I think we're left, Your Honor,
21 with the self evident point here that if both
22 sides follow the Court's rulings and follow
23 the methodology, then the number will be
24 zero, and the plaintiffs cannot rise to their
25 burden of presenting compensatory damages in

1 phase one of the trial.

2 They will not be able to obtain a
3 verdict in phase one. We are entitled as a
4 matter of law then to a verdict in phase one.

5 If the Court grants that verdict in
6 phase one, as a matter of law we're entitled
7 to a verdict in phase two in our favor and a
8 judgment in our favor as a matter of law on
9 the issue of punitive damages.

10 As the Court has already ruled upon
11 in our motion for partial summary judgment on
12 the issue of punitive damages, the Court has
13 correctly recognized and opined that you
14 cannot award punitive damages in a case where
15 there has been no award of compensatory
16 damages. The law is clear in this regard,
17 and it has been recognized correctly by this
18 Court heretofore.

19 So, in summary, Your Honor, I think
20 that there really is no factual dispute here.
21 If there was a report today in compliance
22 with the Court's instructions, it would be
23 zero. If there was a report here that said
24 anything other than zero, it would not be in
25 compliance with the Court's instructions.

1 There's no need for us to endure the
2 further proceedings in this court. We submit
3 to the Court that it's ripe and it's proper
4 at this time to enter judgment in favor of
5 the Scruggs defendants on all phase one
6 issues and on the issue of punitive damages
7 as it relates to phase two.

8 BY MR. MERKEL: Your Honor, if I might,
9 just so you are clear as to what Mr. Solomon
10 has done, and Mr. Balducci is close but not
11 quite, Mr. Solomon is not using any different
12 overhead numbers from what Ms. Smith has
13 used.

14 What he is doing is taking her
15 overhead numbers per month that should
16 properly have been charged to Mr. Wilson and
17 comparing it to what was charged to him by
18 the bookkeeping department live in real time
19 at the time this twenty month thing was going
20 on, and he was overcharged at the time.

21 Now, if you take the roughly
22 \$800,000.00 worth of payments that were made
23 early on that had nothing to do with the
24 agreement, they still -- that still wipes out
25 the errors that they made in overhead.

1 But there were clearly \$600,000.00
2 or so of errors -- \$450,000.00, let's say, of
3 errors in overhead that they charged him each
4 month from September 1992 through May of 1994
5 at the time.

6 And we would not agree either with
7 the premise that because they have now come
8 in and paid ten years late a bunch of money
9 that that eliminates the possibility of the
10 case going to the jury on punitive damages.
11 That's Mr. Balducci's position. We don't
12 agree with it.

13 BY MR. BALDUCCI: If it please the
14 Court, just so the record is clear on this
15 from our perspective, the overhead
16 calculations have been accepted by the Court
17 and ruled upon last Friday, and all of this
18 was vetted at that time.

19 The issue of whether or not there
20 were errors in calculations that were made,
21 the propriety of the calculation of overhead,
22 the Court has already passed on those issues.
23 Those are dead issues.

24 And to the extent that Mr. Solomon
25 would try to come in here once again for the

1 third time and tender a report to the Court
2 that is inconsistent and in contravention of
3 the Court's rulings and the law of this case,
4 we would object to it at that time, and it
5 would be proper for the Court to exclude it.

6 I don't think the Court -- that it's
7 incumbent upon the Court to wait on that
8 based upon what plaintiffs' counsel has
9 submitted to the Court.

10 And the law is clear relative to
11 Mr. Merkel's disagreement with me on the
12 interpretation of whether they get to go
13 forward in a phase two on punitive damages.

14 The law is clear, the Court has
15 already recognized, that in the absence of a
16 verdict in phase one, there is no
17 consideration of punitive damages in phase
18 two.

19 BY THE COURT: The principal amount of
20 what was owed has previously been determined
21 by the Court, and it's simply a matter of
22 determining interest at the rate of 4.96
23 percent from the relative dates indicated by
24 the Court in its ruling on Friday, and that
25 percentage rate was one that was selected

1 from Mr. Solomon.

2 After listening to both sides today,
3 it's evident that that would lead to a
4 negative balance concerning the report that
5 defendant says that it has from its expert
6 and considering what the plaintiffs have been
7 advised by Mr. Solomon.

8 So the Court does find as a matter
9 of law that no further compensatory damages
10 may be recoverable.

11 The Court also finds that as a
12 matter of law that the jury will be precluded
13 from considering the issue of punitive
14 damages as the Supreme Court has held that
15 the existence of actual damages in
16 Mississippi is a necessary prerequisite to
17 the jury's right to consider and assess
18 punitive damages, and actual damages would be
19 the same as compensatory damages. Since
20 there could be no jury verdict on
21 compensatory damages, the jury may not
22 consider the issue of punitive damages.

23 So I'm granting that request or each
24 of those, which leaves us with a trial by
25 jury to determine bragging rights.

1 So we'll take a few minutes to get
2 moved down to the other courtroom, and we'll
3 begin voir dire at that time. Anything
4 further?

5 BY MR. KIRKSEY: Your Honor, Judge, we
6 would ask if the Court has considered -- and
7 I know both sides have had their say. We
8 would ask that Ms. Smith's report that has
9 been referred to be marked and placed into
10 the record in this cause, Your Honor. I
11 don't believe counsel opposite would object
12 to that.

13 BY THE COURT: All right.

14 BY MR. BALDUCCI: For identification,
15 Your Honor?

16 BY THE COURT: Yes, sir.

17 (STEPHANIE SMITH REPORT RECEIVED AND
18 MARKED AS EXHIBIT NO. 1 FOR IDENTIFICATION
19 ONLY AND IS MADE A PART OF THIS RECORD.)

20 (BENCH CONFERENCE)

21 (FOLLOWING THE BRIEF RECESS, THE TRIAL CONTINUED AS
22 FOLLOWS OUTSIDE THE PRESENCE AND HEARING OF THE JURORS:)

23 BY MR. MERKEL: Your Honor, at this time
24 the plaintiff would move the Court for a
25 judgment as a matter of law that the

1 defendants are guilty of breach of contract,
2 first, in failing to account.

3 There is no evidence in the record,
4 there is no dispute in the record that the
5 last accounting was filed by them for the
6 period ended May 31st, 1992.

7 There has never been another
8 accounting tendered at any time until the
9 expert witness report was filed in this case
10 in 2005, if that even could be termed an
11 accounting, but it's certainly not an
12 accounting under the contract.

13 Paragraph, I believe, III(2)(b)
14 required a monthly accounting at all times by
15 Mr. Scruggs to Mr. Wilson. And this was more
16 or less complied with until the counterclaim
17 was brought in this lawsuit in July on July
18 the 15th, 1994.

19 Seven days later Mr. Scruggs wrote a
20 letter to Mr. Wilson and said, I'm not paying
21 you anything else, and he never did pay him
22 anything else until August of 2005.

23 We would further move for a verdict
24 as a matter of law from the Court on the
25 question of breach of contract under his duty

1 to speedily collect and pay over to
2 Mr. Wilson the monies that he was owed.

3 By the accounting report of
4 Stephanie Smith, they have now paid in the
5 last twelve months \$1,350,000.00 in round
6 numbers. All of those amounts have been due
7 on payments beginning as early as 1994 and
8 coming forward.

9 If you look at her accounting
10 records, they didn't become due in August of
11 2005 as they would have to to not be
12 untimely.

13 Defendant deliberately, purposefully
14 failed to pay any monies to Mr. Wilson under
15 the contract after writing him in July of '94
16 and telling him he wasn't going to. He
17 refused to account after that date.

18 He transferred the records to
19 another entity and even refused to produce
20 those records in this court because he said
21 they were records belonging to another entity
22 that was not a party to this lawsuit.

23 So there's no question he's breached
24 his duties to account and his breaches to
25 timely pay, notwithstanding that, according

1 to Ms. Smith, after the last \$1,350,000.00
2 has been paid, he is now supposedly current.

3 So from the standpoint of that, we
4 move the Court to enter judgment in favor of
5 the plaintiff on the issues of liability.

6 And that would then make it
7 appropriate for the Court to calculate
8 prejudgment interest. It would make it
9 appropriate for the Court to award the fees
10 that were incurred by Mr. Wilson in enforcing
11 his rights and obligations under the
12 contract.

13 And it's simply axiomatic, Your
14 Honor. You cannot take someone's money, hold
15 it for eleven years and two months, and then
16 when the matter is headed for the courthouse,
17 trot in, pay the amount you've owed the
18 entire period of time and say no harm, no
19 foul. And that's what this whole thing for
20 the last month has been about.

21 BY THE COURT: Response.

22 BY MR. LANGSTON: The Court may find it
23 odd that we disagree with Mr. Merkel's
24 rendition of facts to the Court regarding the
25 record on accounting.

1 In fact, Your Honor, from August of
2 '92 when the contract was signed until July
3 of '94 when Mr. Wilson filed his cross claim
4 against Mr. Scruggs we did provide an
5 accounting.

6 We have ready to introduce into
7 evidence defendants' exhibits numbers that
8 we've marked D-1 through D-13 which are the
9 Wilson accounting documents. We provided him
10 with full accountings.

11 The Court should also note and
12 counsel opposite knows that there was an
13 accountant named Kelly Singleton that was
14 involved in receiving monies, calculating
15 overhead, paying expenses associated with the
16 asbestos litigation, and that this accountant
17 was fully accessible to Mr. Wilson.

18 In fact, he communicated with him
19 regularly by phone calls and otherwise. He
20 questioned him. He received answers.

21 Mr. Wilson had access to all the
22 documents at all times, and he even had his
23 own employee Sandy Walker, who worked in the
24 office and was Mr. Wilson's own employee.

25 He had full access to all of the

1 asbestos money information, accounts payable,
2 accounts receivable and so forth, and he did
3 receive all access up until the time that he
4 became a litigant against Mr. Scruggs and
5 both sides hired lawyers, had independent
6 accounting experts with full access to all
7 the records.

8 And that's when the formal accounts,
9 monthly accounts, stopped, and, instead, all
10 of the records were made available to
11 Mr. Wilson, his lawyers, experts and what not
12 through the litigation.

13 In addition to that, Your Honor, in
14 July of 1994 Mr. Wilson filed his litigation,
15 and he contested the terms of the contract,
16 asking that they be reformed to include
17 provisions that were not previously included.

18 It was at that time that the parties
19 became litigants against each other and that
20 Mr. Scruggs turned over the responsibility of
21 providing monthly accounting reports to his
22 lawyers, his accountants and court appointed
23 experts and to Mr. Wilson's lawyers,
24 Mr. Wilson's accountant and court appointed
25 experts.

1 But even still, Kelly Singleton was
2 there and had instructions from Mr. Scruggs
3 to provide whatever information was needed by
4 Mr. Wilson.

5 So in regard to the accounting,
6 certainly there is at least a fact question
7 for the jury to determine whether or not
8 Mr. Scruggs complied with the terms of the
9 contract or whether it was even necessary for
10 him to do so after Mr. Wilson filed the
11 litigation challenging the validity of the
12 contract and its terms.

13 To speedily collect and pay. The
14 Court has made determinations previously
15 about what was due, and post 1994, July 1994,
16 Mr. Scruggs, as the Court knows, created a
17 set aside account in which he put various
18 monies, including monies of his own, but also
19 including monies that would be paid to
20 Mr. Wilson once it was determined whether or
21 not the contract was enforceable, and, if so,
22 on what terms.

23 Mr. Wilson is the one in violation
24 of the terms of the contract who first
25 contested it and by filing a lawsuit in July

1 of 1994.

2 The contract itself indicates that
3 neither party would contest it, and, if so,
4 that would be considered a breach. He
5 did. After that Mr. Scruggs started paying
6 it into the set aside account.

7 At the first opportunity when
8 Mr. Wilson finally acknowledged the validity
9 of the contract, only after this Court said
10 that the contract was clear and unambiguous
11 and enforceable on its face, then we started
12 making the payments to which Mr. Merkel
13 referred. And we made payments each time we
14 had an opportunity to become aware of what
15 exactly was due.

16 Mr. Wilson was claiming a lot of
17 payments and monies that the Court has now
18 determined were not due him. And as it turns
19 out, our interpretation of the contract and
20 what was due to Mr. Wilson was correct.
21 Mr. Wilson's interpretation of the contract
22 and what was due him was incorrect. And that
23 has now become the law of this case.

24 So once we had a determination about
25 what was correct to pay Mr. Wilson, we did

1 it. Once Mr. Wilson acknowledged the
2 validity and the enforceability of the terms
3 of the contract that they signed in August of
4 1992, we paid it.

5 So they're not entitled -- certainly
6 that at least creates a jury question, but
7 they're certainly not entitled, and, in fact,
8 if the Court -- and if Mr. Merkel is
9 suggesting to the Court that it's ripe for
10 determination, I think it creates a fact
11 question for the jury, but if he suggests
12 that it's ripe for determination regarding
13 those two acts and whether or not those were
14 breaches after Mr. Wilson began the
15 litigation, then I suggest that it should go
16 in favor of the defendants because only after
17 -- and I think he acknowledged that we
18 provided accountings to Mr. Wilson prior to
19 the initiation of the lawsuit in July of '94,
20 and then they became litigants against each
21 other, and their lawyers and their
22 accountants and court appointed accountants
23 were doing the accounting.

24 And the monies that were finally
25 paid to him were paid once he acknowledged

1 the enforceability and the legitimacy of the
2 terms of the contract, and once there was a
3 determination by this Court that what
4 Mr. Scruggs has always maintained was due
5 Mr. Wilson was in fact what was due him, we
6 paid him.

7 So if it's ripe for consideration by
8 the Court, I would suggest that that would go
9 in favor of the defendant as a matter of law,
10 but I think in all likelihood those two
11 issues create a jury question.

12 BY THE COURT: Rebuttal.

13 BY MR. MERKEL: From the accounting
14 standpoint, Your Honor, first, Mr. Singleton
15 on Mr. Scruggs' behalf did account until
16 through the period May 31st, 1994.

17 He is required to account to
18 Mr. Wilson every month at no cost to
19 Mr. Wilson from that day until today. The
20 fact that there is a lawsuit ongoing or was a
21 lawsuit ongoing in no way relieved that
22 obligation under that contract.

23 Mr. Wilson has never tried to
24 repudiate the contract. Mr. Wilson in the
25 letters that are attached to some of the

1 pleadings and some of the motions when
2 Mr. Scruggs wrote him and said I'm not going
3 to pay you anything else, Mr. Wilson wrote
4 him back and said pay me what's not in
5 dispute. That's what you've been doing for
6 the last twenty months.

7 They had been debating for -- well,
8 since between June of '93 and May of '94.
9 There had been alternative calculations
10 performed, accountings performed, one under
11 Mr. Scruggs' theory of what he owed, one
12 under Mr. Wilson's theory that the 10 percent
13 not Owens Corning credit portion was also an
14 entitlement of his.

15 Each month Mr. Singleton would
16 prepare one where the 10 percent was included
17 and another where it was not included.

18 Mr. Wilson each and every month
19 wrote and said send me the undisputed
20 portion. We will reserve our differences
21 about the other to be resolved at a later
22 date.

23 And every month Mr. Scruggs
24 ultimately sent the lesser amount, the
25 admitted amount. And that continued for the

1 first six months after the lawsuit was filed.

2 Mr. Singleton still calculated the
3 proper amount, put it into an escrow account,
4 and only when Mr. Scruggs in December needed
5 money for his bonus did he raid it out of the
6 escrow account and instruct Mr. Singleton to
7 begin calculating all monies owed Mr. Wilson
8 at 10 percent rather than the 40 and the 10
9 that previously had been used.

10 Mr. Langston says that the amount
11 that they have now put in is the amount they
12 always contended was owed, and that is
13 exactly right, Your Honor.

14 It's the admitted amount they have
15 owed from day one, and it should have been
16 paid every month as it came due, just like
17 they were doing before the lawsuit was filed.

18 They had a dispute then, but the
19 undisputed portion was being paid. The
20 disputed portion was being held. And
21 Mississippi law is crystal clear you can't
22 hold an undisputed amount as leverage to try
23 to force a settlement about a controverted
24 amount, which is what's been going on for
25 twelve years.

1 There has been no accounting
2 whatsoever done since July of 1994, and there
3 have been no payments made during that time.

4 And if you take Ms. Smith's
5 calculations, you'll see that Mr. Wilson was
6 earning monies during every month of this
7 interval. Take her spreadsheet. They're all
8 on there. But none of them were paid until
9 they began to unload their obligation to try
10 to get out from under a jury trial in this
11 matter.

12 And that's exactly -- it's an
13 admitted amount. They've won every issue
14 that there's ever been in this lawsuit about
15 interpretations of the contract. They've won
16 every single one.

17 And with everything taken in the
18 light most favorable to them, they owe
19 \$1,350,000.00, which they've paid within the
20 last year.

21 There is no way that's timely.
22 There is no way that's appropriate, and
23 there's no way that their failure to account
24 is appropriate.

25 They've overcharged at all times.

1 the defendants have won every issue
2 concerning interpretation of the contract, I
3 respectfully call to your attention,
4 Mr. Merkel, that the Court just this past
5 Friday found as a matter of law that the
6 contract established a fiduciary relationship
7 and had previously overruled the defendants'
8 motion for partial summary judgment on the
9 breach of fiduciary duty claim.

10 Secondly, I seem to recall that I
11 likewise overruled the defendants' motion for
12 partial summary judgment for failure to
13 provide an accounting, finding that it was a
14 question of fact if not under the terms of
15 the contract itself at a minimum under its
16 implied covenants of good faith and fair
17 dealing.

18 I also seem to recall that I
19 overruled the defendants' motion for partial
20 summary judgment at least on the conversion
21 claim at least on any funds that it could be
22 established had been segregated into a
23 separate account.

24 The Court has previously found that
25 it would be a jury issue as to whether or not

just from

1 Mr. Scruggs diligently collected and
2 disbursed fees on behalf of Mr. Wilson that
3 would pertain to the claims of breach of
4 contract, breach of implied covenants of good
5 faith and fair dealing and breach of
6 fiduciary duty.

7 The Court has previously determined
8 in addressing the accounting that it would be
9 a jury question as to whether or not the type
10 of accounting that was referred to in the
11 contract had been provided, and there were
12 similar issues of fact concerning that
13 portion of the conversion claim that I did
14 not dismiss. Those issues of material fact
15 are still in existence.

16 These are just but some of the
17 material issues of fact in this case, but
18 those in itself are sufficient to overrule
19 the motion.

20 All right. Are we ready to begin
21 the voir dire?

22 BY MR. MERKEL: Ready.

23 BY MR. KIRKSEY: Ready, Your Honor.

24 (FOLLOWING THE BRIEF RECESS, THE TRIAL CONTINUED
25 AS FOLLOWS OUTSIDE THE PRESENCE AND HEARING OF THE

1 JURORS:)

2 BY MS. SLATER: Your Honor, we're trying
3 to find it, but I believe in one of the
4 Court's July 7th orders, an order on the
5 megamotion, the Court addressed the
6 defendants' defense that Wilson somehow
7 repudiated or denied the agreement, and I
8 remember the Court's language was that while
9 this issue might have some jury appeal, it
10 has no basis in law.

11 And so as an in limine matter we
12 would ask the Court to exclude any evidence
13 on that issue.

14 In a related matter, we believe that
15 the defendants are expecting to question
16 Wilson on his pleadings and certain motions
17 filed by his counsel, and I have several
18 authorities that state that questioning a
19 witness about unsworn pleadings and motions
20 and such as that is not admissible evidence
21 and should not be allowed.

22 BY THE COURT: Is this something we
23 really need a ruling on before voir dire?

24 BY MS. SLATER: Well, I don't know how
25 the Court does voir dire, and I thought it

1 was, Your Honor, in case. I didn't know if
2 you let them ask.

3 BY THE COURT: It's better to be
4 cautious. I understand.

5 BY MS. SLATER: Yes, sir. Usually I try
6 to get into as much as I can on voir dire
7 when I do one, and I just thought it would be
8 an issue for voir dire. So I'm sorry if I'm
9 bringing it up at the wrong time.

10 BY THE COURT: That's all right. I'm
11 just asking.

12 BY MS. SLATER: I didn't know if they
13 would ask some questions about that.

14 BY THE COURT: Let me see.
15 Mr. Langston, do you intend to get into this
16 in voir dire?

17 BY MR. LANGSTON: I do not, Your Honor.
18 I won't tell the Court that we don't intend
19 to get into it because I have a whole litany
20 of points to make with the Court on that
21 issue, but I do not intend to get into it on
22 voir dire.

23 BY THE COURT: What I would like to do
24 then is just to take your authorities home
25 with me tonight and be looking over it with

1 the understanding that neither side will get
2 into that in voir dire.

3 BY MS. SLATER: Yes, sir. I apologize,
4 Your Honor, but I've never voir dired a jury
5 in your courtroom.

6 BY THE COURT: I understand. No
7 problem.

8 (OVERNIGHT RECESS)

9 (FOLLOWING THE OVERNIGHT RECESS, THE TRIAL
10 CONTINUED AS FOLLOWS OUTSIDE THE PRESENCE AND HEARING OF
11 THE JURORS:)

12 BY THE COURT: All right. I believe the
13 parties have an announcement.

14 BY MR. LANGSTON: Yes, we do, Your
15 Honor. Your Honor, this morning, August
16 22nd, we asked the Court to permit us liberty
17 of spending some of the Court's time
18 negotiating, and the parties have reached a
19 settlement agreement.

20 We would like to read generally the
21 terms of the settlement agreement into the
22 record and have all parties acknowledge it,
23 and the attorneys for the respective sides
24 will then reduce it to writing for approval
25 of both sides and then signature by the

1 Court.

2 In the case that's pending before
3 the Circuit Court in Hinds County the parties
4 have agreed that there will be a judgment in
5 favor of the defendant entered.

6 The analysis of the Court's rulings
7 and the quantification that Mr. Scruggs, in
8 fact, owed zero in compensatory damages led
9 the parties to agree that this case would end
10 with a judgment in favor of the defendant.

11 In addition to that, Mr. Scruggs has
12 offered to pay to Mr. Wilson a confidential
13 cash sum to resolve all cases and all claims
14 pending in any courts, federal, state or
15 otherwise, for the confidential cash amount.

16 The parties agree to enter into a
17 confidentiality agreement, and all parties,
18 their assigns, their heirs will be bound by a
19 confidentiality agreement, and the terms of
20 any resolution will remain confidential.

21 The parties will agree to sign
22 mutual releases of any and all claims that
23 any of them may have against -- that either
24 of them may have against the other.

25 Each side will bear their own costs.

1 Each side agrees not to make any appeals from
2 the judgment being entered in favor of the
3 defendant in this Hinds County case.

4 BY THE COURT: Does that include the
5 pending interlocutory appeal request?

6 BY MR. LANGSTON: Yes, it does, Your
7 Honor. It includes all possible or probable
8 appeals whatsoever. Our intention is to
9 tender to the Court, once the settlement
10 documents are completed and signed by the
11 parties and the consideration has been paid,
12 is to tender to this Court a judgment as I've
13 described which will act as a resolution of
14 this case fully and finally, and we announce
15 on the record that no party will take an
16 appeal from that judgment.

17 BY MR. KIRKSEY: One second, Your Honor.

18 (PAUSE IN PROCEEDINGS)

19 BY MR. LANGSTON: The money that is the
20 consideration will be paid forthwith. I
21 don't happen to have it on me, but I will, in
22 fact, pay it right away.

23 BY MR. KIRKSEY: Your Honor, the only
24 thing I would add on behalf of Mr. Wilson is
25 that the only other pending claim against

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Mr. Scruggs that we are aware of is the case pending in the Southern District federal court in front of Judge Lee, and that is the case that the confidential sum is being paid to settle, Your Honor.

~~★~~
~~★~~

BY THE COURT: All right.

BY MR. LANGSTON: The parties mutually release each other from any and all claims that either may have or contemplate in any court whatsoever, but we're paying the money for that case.

Each side would bear their own cost. No cost is being assessed to either side.

* * * * *

