IN THE SUPREME COURT OF MISSISSIPPI

STROUD CONSTRUCTION, INC. — APPELLANT

VS. — No. 2009-CA-00725

BILL AND CINDY WALSH — APPELLEES

On Appeal from the Circuit Court
of Madison County, Mississippi

BRIEF OF APPELLEES BILL AND CINDY WALSH

ORAL ARGUMENT REQUESTED

Robert T. Higginbotham, Jr. (MSB #[redacted]
J. Wilbourn Vise (MSB # [redacted])
MASSEY, HIGGINBOTHAM, VISE & PHILLIPS, P.A.
3003 Lakeland Cove, Suite E
P.O. Box 13664
Jackson, Mississippi 39236-3664
Telephone: (601) 420-2200
Facsimile: (601) 420-2202

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VS. **No. 2009-CA-00725**

BILL AND CINDY WALSH **APPELLEES**

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

1. Bill Walsh, Appellee;
2. Cindy Walsh, Appellee;
3. Stroud Construction, Inc., Appellant;
4. Robert T. Higginbotham, Jr., Attorney of Record for Appellees Bill and Cindy Walsh; and
5. C. Maison Heidelberg and Susan S. Copeland, Attorneys of record for Appellant Stroud Construction, Inc.

ROBERT T. HIGGINBOTHAM, JR., MSB #[redacted]
Attorney of Record for Appellees
Bill Walsh and Cindy Walsh

STATEMENT REGARDING ORAL ARGUMENT

Stroud, Inc.'s issues on appeal are not novel, do not involve or express facts not available and/or fully considered by both the County Court, the trier of fact at trial, and the Circuit Court on appeal; and, therefore, **do not** warrant the additional time and resources required for oral argument.

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STATEMENT OF THE CASE

In May of 2000, Bill Walsh bought a lot at 169 Lake Caroline Point Boulevard in Madison, Mississippi. (R. 239).[1]

In 2001, Bill and Cindy Walsh began to accept bids for the construction of a new home on the lot. Lance Stroud ("Mr. Stroud"), as the owner and sole employee of Stroud Construction, Inc. ("Stroud, Inc.") submitted an offer to build the house on behalf of Stroud, Inc. in the amount of $950,458.00 (R. 287-88; Ex. D-2, R.E. 0002).[2] The Walshes rejected Mr. Stroud's initial offer because it exceeded the amount of money the Walshes had budgeted for the construction of their new home. Bill Walsh informed Lance Stroud ("Mr. Stroud") that the Walshes simply "couldn't afford that." (R. 290).

Subsequently, Mr. Stroud submitted a second offer in the amount of $752,145.00. (Ex. D-4; R.E. 0003-0004). The contract and the budget contained a line-by-line analysis of the costs.[3] Much of the work was to be completed by subcontractors, and several of the line items in the second offer were lower than Mr. Stroud's initial offer. Mr. Stroud made the change by fraudulently lowering budgeted items without seeking any revised bids from his subcontractors. For example, James Minter ("Mr. Minter") bid on the iron railing portion of the project. Mr. Minter made a bid to Stroud, Inc. in the amount of $16,124.50, the amount included in Mr. Stroud's initial offer to the Walshes. This is the only bid that Mr. Minter offered to Mr. Stroud. (R. 590). However, Mr. Stroud's second offer to the Walshes reflected an estimate of $12,125.00. (Ex. D-4; R.E. 00004, para. 26). Mr. Minter never provided Mr. Stroud with the

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[1] All references to trial testimony include the page number where the testimony was recorded, (R. __).
[2] All references to trial exhibits are designated by party and number, (Ex.D-_) and record excerpts, (R.E. __).
[3] Contrary to Stroud, Inc.'s arguments in its Brief at p. 14, the budget did include Stroud's input on both the electrical plans and the boat house (para. 24 and 36). (Ex. D-4).

amount reflected on Mr. Stroud's second offer to the Walshes. Accordingly, Mr. Stroud understood from his conversations with the Walshes that Stroud, Inc. would have to complete the project for a negotiated price, and Mr. Stroud misrepresented to the Walshes that he could complete the project for $752,145.00.

Further, both parties understood that the $752,145.00 price would include certain items to be paid for directly by Bill and Cindy Walsh. (R. 292). Bill and Cindy Walsh gave Mr. Stroud a list of certain items they were going to pay for directly, and these items were included on the line items on the contract budget. (R. 292). The Walshes spent $241,778.84 directly on items which were installed in their home. (R. 300; R. 408; Ex. D-15; R.E. 0005).

Mr. Stroud informed Mr. Walsh that he was going to build the Walshes' new home for $752,145.00 (R. 303). Bill Walsh understood that the house would be built for that amount of money. (R. 298). Cindy Walsh also understood that Stroud, Inc. would build the house for the amount Mr. Stroud proposed in his second offer. (R. 396).

Rather than just agreeing to go along with Mr. Stroud's contract, Bill Walsh initialed some rather significant changes to the contract proposed and drafted by Mr. Stroud and returned it to Mr. Stroud to commence work. For example, he crossed out Mrs. Walsh's name on the first page, reduced the percentage for changes in the work from 15% to 7.5%, and, significantly, completely struck out paragraph 17 dealing with the document being the entire agreement of the parties. (Ex. P-1; R.E. 0006-0008).[4] Thus, Bill Walsh and Stroud, Inc. understood the $752,145.00 contract to build the house to include the budgeted items to be paid for directly by the Walshes as well as a cost fee of 1.25% and a builder's fee of $52,000.00. (R.300; Ex. D-4;

[4] Ironically, Stroud, Inc. references an unsigned contract in its Brief and excerpts upon which it would have this Court rely.

Ex. D-15; Ex. P-1; R.E. 0003-0004; R.E. 0005; R.E. 0006-0008).

Thereafter, construction of the new home began in June, 2001. Pursuant to the terms of the contract, the home was supposed to be completed within one year. (R. 292). In July, 2001, Mr. Stroud applied for and was issued a building permit. (R. 302; Ex. D-5; R.E. 0009). Consistent with the contract price, the building permit reflected that the total value of all Stroud, Inc's work would be $525,000.00. Mr. Stroud clearly represented to Madison County that he understood that his contribution to the project would cost $525,000.00. When the jury subtracted the amount that the Walshes paid directly for certain items from the total budget of $752,145.00, the amount equals $539,832.35, which would include Mr. Stroud's builder's fee and the cost fee of 1.25%. (R. 422-23).

Throughout the construction of the home, the Walshes communicated to Mr. Stroud that the roof of the house leaked. The Walshes moved into their home in August, 2002. After the Walshes moved into their home, the roof continued to leak. The Walshes sent a list of problems with the home to Mr. Stroud. The list included the leakage problems with the roof. (R. 316-17). At one point the leakage was so extensive that the Walshes were catching ten gallons of water with a bucket. (R. 319). Mr. Stroud came to the Walshes home numerous times to try to repair the leakage problems, but the home continued to leak in the attic, roof, doors, and chimney. (R. 321). In January, 2003, the leakage was so bad that it caused part of the master bedroom ceiling to fall in on the Walshes in the middle of the night while the Walshes were asleep. (R. 328). At times, Mr. Walsh had to watch a football game on television in his living room while holding an umbrella. (R. 328). The Walshes sent additional letters to Mr. Stroud pleading with Mr. Stroud to stop all of the leakage immediately. (R. 327-28). Still, the leakage continued.

In addition to failing to repair the roof and stop the leakage, Stroud, Inc. also overcharged the Walshes for some of the work performed by his subcontractors. Some of these charges were indeed exorbitant. For example, the Walshes had contracted for $25,780.00 for framing labor. (D-4; R.E. 0003, para. 4). Mr. Stroud actually spent $86,444.80 on framing labor, a difference of almost $60,000.00. (R. 428; Ex. D-18; R.E. 0010). Similarly, the Walshes budgeted $42,550.00 for the roof, but Mr. Stroud actually charged them $67,569.06 (a difference of $25,019.06) for a roof that never worked properly. (R. 428-30; Ex. D-18; R.E. 0010). Altogether, the Walshes paid more than $80,000.00 in excess of the contract price. (R. 435; R. 606). Mr. Stroud's delays in the construction of the home also caused the Walshes to accumulate an additional $28,174.54 in interest on the construction loan. (R. 609).

Paragraph 16 of the contract unambiguously states that the builder (*i.e.* Lance Stroud) has the "exclusive control" of "construction and work on the property." (Ex. D-4; R.E. 0003). Keep in mind, the Walshes, through this lawsuit, asserted both negligence and breach of contract claims against Stroud, Inc., as well. Two Courts and the jury below were well aware of the mutual claims going both ways. Accordingly, the Courts and jury considered the testimony of Larry Sistrunk ("Mr. Sistrunk), who was an expert witness for the Walshes and who has been licensed in Mississippi as a residential builder for more than twenty years. Sistrunk convincingly testified that it was Mr. Stroud's duty as the general contractor on the project to make sure that the job was completed within the budget. (R. 698; R. 709-09). Mr. Sistrunk also testified that Mr. Stroud was not on the jobsite in his capacity as the project supervisor as often as he should have been. (R. 710). As a consequence, Mr. Stroud failed to reasonably supervise the costs of

the project. (R. 706). Thus, Mr. Sistrunk concluded and testified, without logical and reasonable opposition, that Mr. Stroud's failure to reasonably supervise the project proximately resulted in excessive costs to the Walshes. (R. 704-05). For example, the labor cost for framing exceeded the budget by $60,000.00 as result of Mr. Stroud's failure to supervise the project reasonably. (R. 706). Mr. Sistrunk testified that since the material costs did not really increase, the cost of labor should not have been that high on the labor. Mr. Sistrunk also concluded that Mr. Stroud also unreasonably allowed the cost of the foundation and cleanup to exceed the budget. (R. 704-06). Importantly, Mr. Sistrunk also testified before the Jury that there was nothing in the construction of the home or in the construction plans that would justify these excessive charges over the contract budget. (R. 708-09).

By May, 2002, about six weeks before construction was supposed to be completed, the Walshes had paid Mr. Stroud $544,779.16. (R. 406-07). The Walshes had also paid $241,778.84 directly for certain items. (R. 408). However, the Walshes also had to make some of the payments that Mr. Stroud was supposed to pay. For example, the jury heard that Mr. Stroud failed to pay Mr. Minter (recall, iron railing). (R. 591). Consequently, the Walshes directly paid Mr. Minter more than $5,000.00 for the work he performed. (R. 591; R. 416). Ironically, this figure is close to Mr. Minter's only bid and Mr. Stroud's second offer to the Walshes. Mr. Stroud did not and could not contest these facts. This begs the question. Was Mr. Stroud planning to cheat his subcontractors, the Walshes, or both?

According to the Walshes and Mr. Sistrunk, Mr. Stroud constructed the Walshes' home in a slipshod manner. Mr. Stroud's lack of workmanship, failure to supervise the subcontractors and the construction in a reasonable manner, failure to complete the project in a timely manner,

failure to pay the subcontractors timely, and the exorbitant overcharges resulted in damages to the Walshes. (R. 706-10). As Stroud, Inc. repetitively points outs in its Brief, the Walshes consistently paid Mr. Stroud's invoices. (Stroud's Brief at 2, 4, 8, etc.). However, it was only **after** Mr. Stroud exceeded their contract price and failed to repair the roof that the Walshes refused to pay any additional money to Mr. Stroud. Clearly, the only party to breach the contract was Mr. Stroud. Further, Mr. Stroud, as the president and only employee of Stroud, Inc., fraudulently lowered the bids from his subcontractors and then misrepresented to the Walshes that he could complete the project for $752,145.00.

Stroud, Inc. filed its complaint on or about December 3, 2003, seeking an additional $127,321.81 from Bill and Cindy Walsh. The Walshes filed their Answer and Counterclaim on or about January 9, 2004, correctly claiming that Stroud was negligent and in breach of contract.

The trial of this matter commenced on June 5, 2007, the Honorable William S. Agin presiding. After hearing of all of the witnesses and reviewing all of the documents and evidence presented at trial, the Madison County jury returned a verdict, and found against Stroud, Inc. on all of its claims against the Walshes. Prior to deliberations, it was counsel for Stroud, Inc., who argued against the Court using a special verdict form or interrogatories. The jury found in favor of the Walshes on their counterclaim against Stroud, Inc. and awarded the Walshes $90,000.00 in damages. Final judgment on this claim was entered on December 19, 2007. On January 15, 2008, Stroud, Inc. filed its first Notice of Appeal with the Madison County Circuit Court. On March 27, 2009, the judgment of the trial court was affirmed by the Honorable Judge William E. Chapman, III. Now, Stroud, Inc., has filed its second Notice of Appeal with this Honorable Court. However, as has been the case thus far, the appeal should be denied and dismissed.

SUMMARY OF THE ARGUMENT

At the time that Mr. Stroud presented his second offer to the Walshes, he was the president and sole employee of Stroud, Inc. Mr. Stroud directly participated in and authorized the fraudulent inducement of the Walshes into the contract with Stroud, Inc. (See, Minter-iron railing bids). The evidence suggested that Mr. Stroud believed he could make a significant profit based on how he drafted his contract, ran his project, and treated his subcontractors. Accordingly, Stroud, Inc., breached its contract, at best, or otherwise committed fraud against the Walshes.

Following three days of testimony, and after having reviewed all of the documents and evidence in this case, the Madison County jury returned a verdict against Stroud, Inc. on all of its claims against the Walshes, and in favor of the Walshes on their counterclaim against Stroud, Inc. In its Brief, Stroud, Inc. now complains that the jury should not have been permitted to hear any testimony from the Walshes or their experts that the contract was anything other than a "cost-plus" contract. Stroud, Inc.'s contention is contrary to well-settled Mississippi law.

Ironically, in its Brief, Stroud, Inc., characterizes the contract as "cost-plus" no less than eighteen times! However, the parties to the contract never referred to the contract as "cost-plus." In fact, the term "cost-plus" appears **nowhere** in the contract![5]

The contract itself states the "estimate price" for the construction is $745,145.00, which was clearly adopted from a negotiated budget. (Ex. P-1; D-4; R.E. 0006-0008; R.E. 0003-0004). This Honorable Court has long held that the term "estimate price" or "estimate cost" is by

[5] Recall, Stroud, Inc., would have this Court refer to an unsigned contract.

definition ambiguous and susceptible to more than one meaning, including a definite cost. Both Bill and Cindy Walsh testified that they believed that Mr. Stroud would complete the project for $745,145.00, a figure which was negotiated between the parties and included the items for which the Walshes paid directly. (Ex. D-15; R.E. 0005) Indeed, Mr. Stroud represented to Madison County that the value of his work on the project would only be $525,000.00. (Ex. D-5; R.E. 0009). The parties, the County Court, the jury, and the Circuit Court all knew and appreciated what was going on here.

Further, as Mr. Sistrunk plainly testified, the project got out of control because of Mr. Stroud's lack of supervision and oversight, and perhaps his desire to profit off of the Walshes or his subcontractors. That is, his negligence and/or breach of contract. Accordingly, the trial court correctly denied Stroud, Inc.'s motion for a directed verdict that this was a cost plus contract. For the same reasons, the trial court also correctly denied Stroud, Inc.'s motion in limine that would have prevented the Walshes from testifying that the contract was anything other than cost-plus. Stroud, Inc. did not then nor can it now meet its legal burden to overcome Judge Agin's decisions, the reasoned verdict of the jury, nor Judge Chapman's learned review on appeal.

In conclusion, the jury verdict should be sustained because, as restated here, the evidence overwhelmingly pointed in favor of the Washes.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED STROUD, INC.'S MOTION FOR A DIRECTED VERDICT ON THE MEANING OF "ESIMATED PRICE."

Stroud, Inc. made a motion for a directed verdict that the contract was cost-plus. The trial court correctly denied Stroud, Inc.'s motion and allowed the jury to consider all of the evidence

regarding the contract so that it could decide what the contract was. Accordingly, the contract in this case was negotiated and agreed upon, as evidenced by the documents, the testimony of the witnesses, and the findings of the jury.

"The grant or denial of a directed verdict is reviewed *de novo.*" *White v. Stewman*, 932 So.2d 27, 32 (Miss. 2006) (citations omitted).

"De novo means 'anew' or 'afresh.'" Black's Law Dictionary 226 (5th ed. 1983). De novo review allows the court to reexamine the evidence decided by the finder of fact, which is viewed ***in a light most favorable to the nonmoving party*** as opposed to being bound by the fact finders' determination. *Jones v. State*, 972 So.2d 579, 580 (2008) (citations omitted). [emphasis added].

The Mississippi Supreme Court has held that under the de novo review, an appellate court "will consider the evidence ***in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. . . . If there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.*** *Sperry-New Holland, a Div. of Sperry Corp. v. Prestage*, 617 So.2d 248, 252 (Miss. 1993) (citations omitted). [emphasis added].

In the case of *F.P. Baylot Co. v. Habeeb*, 245 Miss. 439, 149 So.2d 847 (1962), the Mississippi Supreme held that "estimated cost" is by definition an ambiguous term. The Court stated that:

> Where there is dispute between the parties as to the meaning of "estimated costs", it can only mean that an ambiguity arose from the terms of the contract.
>
> We believe that it is a question that should be submitted to the jury.

Such a situation was presented in New Orleans Terminal Company v. Dixie Rendering, Inc., 179 So. 98 (La. 1938), where a detailed estimate of the cost of making repairs to a railroad track was submitted for $2,070.00. When the repairs were actually made it cost $796.21 more and the court gave judgment for additional amount. Part of [sic] opinion is as follows:

"When we decided the question presented by the exception of no cause of action, we realized that there may be instances where the word `estimate' could have been intended as a `bid' or a definite offer as well as being used in its ordinary sense to denote an approximation of the cost for which certain work would be done. It was for this reason that we felt that, in view of the controversy between the parties, it was necessary and proper for parol evidence to be introduced in order that the true intention of the obligor and obligee might be resolved. But without the aid of parol evidence, we would have been prompted to hold that the word `estimate' was used in the plaintiff's letter in its ordinary and usual sense. Bouv. Law. Dict., Baldwin's Library Edition, p. 365, defines the word `estimate' to be: `A word used to express the mind or judgment of the speaker or writer on the particular subject under consideration. It implies a computation or calculation. (People v. Clark) 37 Hun (201) 203

"`A rough valuation; an appraisement. English. Equivalent to "assess". Both mean "to fix" the amount of the damages or the value of the thing to be ascertained. 11 A. & E. Ency. 2nd Ed., 383; (Roddy & Dahm v. McGetrick) 49 Ala. (159) 162.

"`Estimated cost of a building held to mean the reasonable cost of a building erected in accordance with the plans and specifications referred to, and not necessarily the amount of some actual estimate made by a builder, nor an estimate agreed upon by the parties, nor yet an estimate or bid accepted by the defendant. Id.; (Lambert v. Sanford) 55 Conn. 437, (12 A. 519).'

"In the syllabus of the case of Egleston v. Hirsch, No. 9549 of our Docket, see Louisiana and Southern Digest, which involved a question somewhat similar to the one now under review, we said:

"`A clause in a building contract reading: "My maximum estimate of the cost of your work is six thousand dollars, including my commission, though I expect to get through with less money, possibly as little as five thousand dollars," carries no warranty as to the ultimate cost, and cannot be pleaded as such by the owner when he is sued for an unpaid balance due the builder as commissions based on ten per cent of the maximum estimate.'

"In Bautovich v. Great Southern Lumber Co., 129 La. 857, 56 So. 1026, 1027, Ann. Cas. 1913B, 848, our Supreme Court had occasion to consider the word `estimate' as used in a contract. In defining its meaning, the court observed:

"`The word "estimate" precludes accuracy, and its ordinary meaning is to calculate roughly or to form an opinion from imperfect data. Words and Phrases, (First Series) vol. 3, p. 2493. The word "estimate" has no more certainty than the terms "about" or "more or less".'"

In the case of Texas Co. v. Jackson,174 Miss. 737, 165 So. 546, the Court said:

"* * * The evidence of the practical construction placed by parties on their contracts is admissible as an aid in its interpretation when the contract is ambiguous or its meaning not clear, * * *."

"Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the intent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract. * * *" 20 Am. Jur., Evidence, Sec. 1147. The ambiguity may arise from words which are uncertain when applied to the subject matter of the contract. Traders' Ins. Co. of Chicago v. Edwards Post 1905, 86 Miss. 135, 38 So. 779. 53 Am. Jur., Trial, Sec. 266, states: "Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its meaning is obscure, and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury, under proper instructions." It is for the jury to determine what is the agreement of the parties, where there is uncertainty in a written contract because of ambiguity or doubtfulness. 53 Am. Jur., Sec. 267, 269; Harris v. Williams (Miss. 1949), 43 So.2d 364; Frisby v. Grayson, 1953, 216 Miss. 753, 63 So.2d 96. This case was specially followed in Hadad v. Booth, 225 Miss. 63, 82 So.2d 639 (1955); and Covington Cadillac Company v. South Aire, Inc., 136 So.2d 866.

F.P. Baylot Co. v. Habeeb, 245 Miss. 439, 445-447, 149 So.2d 847 (1962).

In this case no reasonable person could disagree that Stroud, Inc., directly participated in the original fraudulent inducement of the Walshes into the contract. Mr. Stroud was the president and sole employee of Stroud, Inc. The Walshes rejected Mr. Stroud's initial offer because it was too expensive. Mr. Stroud, determined to induce the Walshes into a contract with Stroud, Inc., submitted a second contract that was nearly $200,000 less. Mr. Stroud failed to contact his subcontractors to determine whether it was possible to construct the Walshes'

residence for the lower amount. For example, James Minter of B & O Machine and Welding testified that his only bid to Mr. Stroud was $16,124.50. (R. 590). Mr. Minter did not make any other offers to Mr. Stroud. (R. 590). However, Mr. Stroud's second contract offer reflected that Mr. Minter had bid $12,125.00. Mr. Minter testified that he never made the lower bid to Mr. Stroud. (Compare, Ex. D-2, R.E. 0001 at para. 26 with Ex. D-4, R.E. 0003 at para. 26)

Accordingly, Mr. Stroud knowingly misrepresented the actual cost of the project that he was contracting. This is fraud. The Walshes reasonably relied on Mr. Stroud's misrepresentations, entered a contract, and suffered damages as the proximate result of Mr. Stroud's misrepresentations.

According to Mr. Sistrunk, Mr. Stroud, as Stroud, Inc.'s only employee, also had a contractual and legal duty to regularly oversee the construction and management of this project, which Mr. Stroud failed to do in a reasonable manner. (R. 709-10).

Nevertheless, in its Brief, Stroud, Inc. argues that the Walshes should have been prohibited from testifying that that the contract price of $752,145.00 was a firm price. (Stroud, Inc.'s Brief, 17). Although "estimated price" is not defined anywhere in the contract, Stroud, Inc. argues that the terms of the contract were clear. (Stroud's Brief, 16). However, the Mississippi Supreme Court has recognized that the word "estimate" by definition "precludes accuracy." *Habeeb*, 245 Miss. 439, 446, 149 So. 2d 847. The meaning of "estimated cost" or "estimated price" is a question that must be presented to the jury. *Id.* at 445. "It is for the jury to decide what is the agreement of the parties where there is uncertainty in a written contract because of ambiguity or doubtfulness." *Id.*

The Walshes' testimony and Mr. Stroud's testimony concerning the negotiations between

the parties were all presented to the jury. Mr. Stroud had his say too. The evidence, however, reflected to Judge Agin, the jury, and Judge Chapman that the parties in this case disputed the meaning of "estimated price." For example, Mr. Stroud informed Mr. Walsh that he was going to build the Walshes' new home for $752,145.00 (R. 303). Bill Walsh testified that he understood that the house would be built for that amount of money. (R. 298). Consistent with his understanding of the contract, Bill Walsh struck out that portion of the contract which stated, in essence, that their entire agreement was contained within the four corners of the two-page contract. Indeed, this is further evidence that their negotiated and total-price-to-build budget ($752,154.00) was also a part of the contract. Cindy Walsh also testified that she understood that Stroud, Inc. would build the house for the amount Mr. Stroud offered in his negotiated and agreed upon budget. (R. 396).

Further, estimated price is not defined anywhere in the contract. Stroud, Inc. drafted and presented the contract to the Walshes, and any ambiguity should be construed against it. *Banks v. Banks,* 648 So. 2d 1116, 1121 (Miss. 1994) ("When the terms of a contract are vague and ambiguous, they are always construed more strongly against the party preparing it.").

Under well-settled Mississippi law, the Walshes were entitled to present evidence to the jury concerning their interpretation of the contract and the meaning of "estimated cost." Reviewing all of this in the light most favorable to the Walshes (Appellees), it is clear that Judge Agin did not err by denying Stroud, Inc.'s motion for a directed verdict, nor did Judge Chapman on appeal.

II. THE TRIAL COURT CORRECTLY DENIED STROUD, INC'S MOTION *IN LIMINE.*

At trial, Stroud, Inc. made a motion *in limine* to prevent the Walshes from testifying that

the contract was anything other than a cost-plus contract. This is amazing, because the term "cost-plus" appears nowhere in the Stroud, Inc., drafted contract. The trial court, therefore, correctly denied Stroud, Inc.'s motion.

"The denial of a motion *in limine* is reviewed for an abuse of discretion." *McDowell v. State,* 807 So.2d 413, 421 (Miss. 2001). "A motion in limine should be granted only when the trial court finds two factors are present: (1) the material or evidence in question will be inadmissible at a trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury." *Brawner v. State,* 872 So.2d 1, 13 (Miss. 2004) (citations omitted).

"The standard of review for the admission or exclusion of evidence gives the trial judge a great deal of discretion as to the relevancy and admissibility of evidence. Unless a judge abuses this discretion so as to be prejudicial . . . , this Court will not reverse the ruling." *Shaw v. State,* 915 So.2d 442, 445 (¶¶ 8) (Miss. 2005) (citations omitted).

The Mississippi Supreme Court has held that even a contractor who works on a cost-plus basis has a "duty to keep accurate and correct accounts of all materials used and performed." *Shaw v. Bula Cannon Shops, Inc.,* 205 Miss. 470-71, 38 So. 2d 916 (1949). However, that is not enough. If the total cost of a project is "so excessive and unreasonable as to suggest gross negligence or fraud, the law will impose upon the contractor a duty of establishing the bona fides of his performance of the work. The contractor does not have the right to expend any amount of money he may see fit upon the work, regardless of the propriety, necessity, or honesty of the expenditure, and then compel repayment by the other party who has confided in his integrity, ability, and industry." *Id.* at 471.

The evidence that Stroud, Inc. sought to exclude was relevant to both the claims and defenses raised by the Walshes, and it was admissible under the Mississippi Rules of Evidence. Stroud, Inc. wants to ignore this. For the reasons stated above, "estimate price" is by definition an ambiguous and inaccurate term. When Mr. Stroud drafted the contract he did not define this term. The negotiations between the parties clearly reflect that both parties believed this project would be completed for a total of $752,154.00. Mr. Stroud's application for a building permit reflects and confirms that he understood that his contribution to the project would cost $525,000.00. (Ex. D-5; R.E. 0009). Bill and Cindy Walsh testified that they understood that Mr. Stroud would complete the entire project for 752,154.00, including the items Bill and Cindy Walsh paid for directly. (R. 298; R. 292). Consistent with his understanding of the contract, which incorporated their negotiated and agreed-upon-price-to-build budget, Bill Walsh struck out that portion of the contract which said that everything before then is incorporated into this one document. (R. 300; Ex. D-4, D-15, P-1; R.E. 0003-0008). The parties expressly contemplated the inclusion of the negotiated and agreed-upon-price-to-build budget. Bill Walsh testified that he and Cindy Walsh gave Mr. Stroud a list of items that they would paying for directly. (R. 292). Thus, it is clear that Mr. Stroud also understood that the negotiated price would include the items paid for directly by the Walshes. Cindy Walsh also testified that the Walshes paid $241,778.84 directly for certain items, and that six weeks before the home was supposed to be completed, the Walshes had already paid $544,779.16 to Mr. Stroud. (R. 406-08).

The facts of this case also demonstrated that Mr. Stroud misrepresented to the Walshes the original cost of the work and materials for some of his subcontractors. Stroud, Inc. grossly overcharged the Walshes for the framing and the roof, and failed to stop the leakage. Mr.

Sistrunk testified that these excessive charges were the proximate result of Mr. Stroud's failure to reasonably supervise the project. (R. 706). Further, Mr. Stroud never obtained one change order as he was required to by the contract. (R. 295-96).

Mr. Sistrunk's testimony accords with the Mississippi's Supreme Court's holding in *Shaw*. Mr. Stroud's expenditures were grossly negligent and may even have been fraudulent. Mr. Stroud did not have the right to expend any amount of money he sought fit, regardless of the "propriety, necessity, or honesty" of the expenditures. *Shaw*, 205 Miss. at 471. The Walshes confided in Mr. Stroud's integrity and ability. Accordingly, the Courts and jury reasoned and concluded that Mr. Stroud did not have the right to compel the Walshes to repay him for his excessive expenditures, regardless of his record-keeping.

All of this evidence was admissible as a matter of law. Both sides had their say in Court. The jury in this case was neither prejudiced nor confused. Indeed, the jury heard all of the testimony and arguments (including Mr. Stroud's), reviewed all of the documents, and correctly concluded that the Walshes were wronged and that the evidence they presented was more credible and reliable than that of Mr. Stroud. The trial court did not abuse its discretion in allowing the evidence to be considered. Stroud, Inc. failed to meet its burden, then and now. Accordingly, Judge Agin's decision to deny the motion *in limine*, along with the verdict of the jury and subsequent review by Judge Chapman, should all be preserved and sustained.

III. THE EVIDENCE POINTED OVERWHELMINGLY IN FAVOR OF THE WALSHES.

Lastly, Stroud, Inc. contends that the facts point overwhelmingly that the contract was cost-plus such that reasonable people could not disagree. (Stroud's Brief, 9). In its Brief, Stroud, Inc. does not cite one case or any other authority to support this contention.

In fact, Stroud, Inc.'s argument flies in the face of the facts, logic, and common sense. Bill and Cindy Walsh's testimony and other evidence reflect that this was a fixed price, negotiated, and budgeted contract. The building permit that Mr. Stroud obtained from Madison County confirms, in context, his understanding that this was a negotiated and agreed upon fixed price contract. That is, until he realized that his subcontractors would not perform the work for the amount that he misrepresented to the Walshes, and that he had mismanaged his project. Both Judge Agin and the jury concluded that this was a negotiated and agreed upon fixed price contract after listening to three days of testimony from Mr. Stroud, the Walshes, and their expert witnesses. The jury also had the opportunity to review all of the documents and other evidence presented in this case and found against Stroud, Inc. on all of its claims. Accordingly, Judge Agin concluded, and Judge Chapman agreed, that reasonable Madison County jurors could conclude that all of the evidence pointed overwhelmingly in favor of the Walshes.

Finally, in its Brief, Stroud, Inc., characterizes the contract as "cost-plus" no less than eighteen times. However, the parties to the contract themselves never referred to the contract as "cost-plus." In fact, the term "cost-plus" appears **nowhere** in the contract. Therefore, the jury's verdict should be sustained.

CONCLUSION

For the foregoing reasons, Bill and Cindy Walsh respectfully submit that the facts in this case demonstrate that Mr. Stroud directly participated in the misrepresentation of the contract price. The Walshes relied on Mr. Stroud's expertise and integrity and suffered damages as the proximate result of their reliance.

The testimony and other evidence of this case also reflect that the parties negotiated and

agreed upon a price. Therefore, Judge Agin's decision to deny Stroud, Inc.'s motion for a directed verdict and motion *in limine*, including Judge Chapman's affirmation, should be sustained.

Lastly, the testimony and other evidence in the case pointed overwhelmingly in favor of the Walshes. Accordingly, Judge Agin concluded, and Judge Chapman agreed, that reasonable Madison County jurors could conclude that all of the evidence pointed overwhelmingly in favor of the Walshes. Therefore, the jury's verdict should be sustained.

CERTIFICATE OF SERVICE

I, Robert T. Higginbotham, Jr., the attorney of record for Appellees Bill and Cindy Walsh, do hereby certify that I have this day caused to be delivered via U.S. Mail, sufficient postage prepaid, a true and correct copy of the foregoing document to the following:

Honorable William E. Chapman
Madison County Circuit Court Judge
Post Office Box 1626
Canton, Mississippi 39046-1626

Honorable William S. Agin
Madison County Court Judge
P.O. Box 1626
Canton, Mississippi 39046

C. Maison Heidelberg, Esq.
Susan S. Copeland, Esq.
Maison Heidelberg, P.A.
795 Woodlands Parkway
Suite 200
Ridgeland, Mississippi 39157

This the 25th day of November, 2009.

ROBERT T. HIGGINBOTHAM, JR., MSB #[redacted]
Attorney of Record for Appellees
Bill Walsh and Cindy Walsh

OF COUNSEL:

Robert T. Higginbotham, Jr. (MSB #[redacted]
J. Wilbourn Vise (MSB #[redacted]
MASSEY, HIGGINBOTHAM, VISE & PHILLIPS, P.A.
3003 Lakeland Cove, Suite E
P.O. Box 13664
Jackson, Mississippi 39236-3664
Telephone: (601) 420-2200
Facsimile: (601) 420-2202