

IN THE MISSISSIPPI SUPREME COURT  
COURT OF APPEALS

STROUD CONSTRUCTION, INC.

APPELLANT

VS.

No. 2009-CA-00725 COA

BILL AND CINDY WALSH

APPELLEES

On appeal from the Circuit Court  
of Madison County, Mississippi

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REPLY BRIEF OF APPELLANT STROUD CONSTRUCTION, INC.

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C. Maison Heidelberg, MB [REDACTED]  
MAISON HEIDELBERG P.A.  
795 Woodlands Parkway  
Suite 220  
Ridgeland, MS 39157  
Phone: (601) 351-3333  
Fax: (601) 956-2090

## ARGUMENT

The Walsh's Appeal Brief does not answer this question: what facts or law fixed the contract price at everything Stroud billed *except the last invoice*? In other words, what facts or law set the agreed upon price for the home at \$127,321.81 *less than* what the construction company billed?

To allow the Walshes to withhold the last contract payment is to decide that there really was no enforceable contract<sup>1</sup> price at all. It is to authorize the Walshes to determine what they deem reasonable payment for the home, regardless of what the contract may require.

The contract says something. It defines the payment obligation in some way. Yet as it stands, the Walshes simply walked away from the last payment of \$127,321.81.

Practically speaking, the Walshes moved in and were upset because their roof leaked. They responded to the roof leak by refusing to pay the final invoice, obviously justifying withholding payment (in their minds) because Stroud owed them a better roof.

The Walshes roof has now been repaired through their counterclaim. In other words, the jury awarded the Walshes money damages (\$90,000) for the inadequate roofing work, which was paid by Stroud in coordination with the lawyers who represented Stroud at trial.<sup>2</sup> The counterclaim for roof damage is not the subject of this appeal as the Walshes have been paid for that.

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<sup>1</sup>The copy of the contract in Stroud's Record Excerpts was inadvertently inserted as an unsigned copy. The fully signed and executed contract is in the Walshes Record Excerpts at pages 0006 - 0008. The signed contract is contained in the Exhibits portion of the Record as document 000001 - 000003. The signed contract is also attached as an Addendum to this Reply Brief.

<sup>2</sup>There was also an indemnity claim pursued by Stroud's trial counsel against the roofing subcontractor.

In their Brief, the Walshes focus on numerous issues that are not the subject of the appeal and do not relate to the meaning of the contract. They argue that the home was constructed in a “slipshod manner.” (Walsh Appeal Brief, at 6-7.) They further contend that: “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 Washes.” (*Id.*) Arguing about these issues is a red herring. The issue on this appeal is defining the contract price and determining whether the Walshes paid it. The Walshes already asserted their counterclaim below and recovered \$90,000<sup>3</sup> on those “workmanship” counterclaims. So that aspect of the case is concluded.

The Walshes currently have a double recovery: they have the money damages from their counterclaim regarding the defective roof; plus they have the benefit of the withheld money (\$127,321.81), the money they owed Stroud pursuant to the last invoice of the contract. It would be one thing to credit damages for the roof problems against the last invoice amount, but that is not what has occurred. The Walshes have been fully compensated for the roof, *and* they are enjoying the benefit of the funds that were owed to Stroud for the last contract payment.

In their Appeal Brief, the Walshes utterly fail to reconcile numerous inconsistencies with respect to their position(s) as to the payment terms of the contract. On the one hand, the Walsh’s say they “understood” the house would be built for \$752,145, which is the “estimate” price written into the construction contract.<sup>4</sup> (Walsh Appeal Brief, at 3.) On the other hand, the Walshes admit that

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<sup>3</sup>The Walshes also repeatedly reference “fraud” or “cheating” in their Brief, but again there is no fraud claim present on this appeal. (See Walsh Appeal Brief, at 6, 8.)

<sup>4</sup>“Estimate price” was written into the contract, and where “contract price” was stricken through. (See Addendum, R. 000001.)

“[a]ltogether ... [they] paid more than \$80,000 in excess of the contract price.” (Walsh Appeal Brief, at 5.) If the contract price was set/fixed at the “estimate” number on the contract, why did the Walsh’s pay \$80,000 in excess of that price?

The Walshes similarly complain that Stroud did not complete the work efficiently,<sup>5</sup> yet efficiency is irrelevant to the home owner where the contract price is *fixed*. The Walshes should have no concern about how efficiently Stroud completed the task if they enjoyed a fixed price contract for the sum certain of \$752,145.<sup>6</sup>

Seeming to sense the inherent inconsistency in their position(s) as to the payment terms of the contract when measured against the undisputed record evidence, the Walshes eventually argue that “estimated cost” is by definition an ambiguous term. (Walsh Appeal Brief, at 10.) However, arguing that the payment terms are ambiguous seems to distill to a position that the jury’s reasoning (whatever it was) cannot be vacated, no matter what. Herein lies the fundamental problem with the Walshes position – they (or a jury) hold all authority to decide the contract’s payment terms, but they do not have to justify the contract’s meaning to anyone. They simultaneously say: (a) the contract price was fixed at \$752,145, (b) yet they paid \$80,000 more than the contract fixed price,<sup>7</sup> (c) and, moreover, the “estimate” term in the contract is ambiguous, and (d) so in the end we should simply

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<sup>5</sup>See Walsh Appeal Brief, at 5, saying Stroud failed to “reasonably supervise” and that Stroud failed to complete the job “within the budget.”

<sup>6</sup>The trial evidence was further undisputed that the Walshes required numerous and substantial changes to the home during the construction process, which necessitated changes to the house plans, increases in material costs, and increased labor and oversight time. (See Stroud Appeal Brief.)

<sup>7</sup>The record reflects that the total payments by the Walshes were \$659,009.08 paid directly to Stroud and \$196,059 paid directly to vendors by the Walshes. (R. 620 - 622.) The total payments were, therefore, \$855,068.08. (R. 620 - 622.)

defer to the jury's judgment when the jury agreed that it was adequate for the Walshes to simply withhold payment for the last invoice after having paid all of the prior payments.

There is a contract. It means something, and it has some payment term. In the end, the Walshes cannot explain – factually or legally – how the contract could possibly mean that they pay every invoice up until the last and final \$127,321.81 invoice.<sup>8</sup>

Stroud did what the jury said – he paid money damages for the roof, which the jury determined was defective. The other side of the coin is that the completed house must be paid for pursuant to the payment terms of the contract. The Walshes cannot define contract payment terms as they go. Considering parol evidence or ignoring parol evidence does not change the analysis – the contract sets a price that the Walshes are required to pay. That price is obviously a cost-plus price,<sup>9</sup> and the Walshes' payment history alone validates that conclusion.

### CONCLUSION

The Walshes paid each invoice throughout the project until they moved in. (R. 250-268.) These total payments exceeded the claimed fixed price (which was an “estimate” according to the plain words of the contract) in the amount of \$752,145.00.

The objective language of the contract between Stroud and the Walshes indicated that the Walshes would be responsible for all costs of construction, and indeed their conduct was consistent

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<sup>8</sup>The Walshes also argue that an “estimate” tends to “preclude[] accuracy” almost as if to say the contract was so vague or so incapable of interpretation that it simply did not quantify a price that can be enforced. See Appeal Brief, at 13.

<sup>9</sup>Some of the construction plans – electrical and boathouse – were not even provided to Stroud until *after* the contract was signed and after construction began. (R. 380, 384.) A “fixed” contract could not and would not have been entered without specifications for important items having been finalized.

with this understanding. There is simply no record evidence that Stroud billed for something he did not do, and there is no legal justification for "capping" this construction contract at exactly what the Walshes had paid before they moved in. The contract did not entitle the Walshes to a \$127,321.81 credit. For all of these reasons, the trial court should have directed the verdict for Stroud, and the jury's verdict not allowing Stroud's recovery was against the overwhelming weight of the evidence. Stroud Construction respectfully requests that this Court reverse and render.

Respectfully submitted,



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C. MAISON HEIDELBERG, MB [REDACTED]  
Attorney of record for Appellant  
Stroud Construction, Inc.

OF COUNSEL:

MAISON HEIDELBERG P.A.  
795 Woodlands Parkway  
Suite 220  
Ridgeland, MS 39157  
Phone: (601) 351-3333  
Fax: (601) 956-2090

**CERTIFICATE OF SERVICE**

I, C. Maison Heidelberg, attorney for Stroud Construction, Inc., do hereby certify that I have this day served a true and correct copy of the above and foregoing document via U.S. Mail, postage prepaid, on the following:

Honorable William E. Chapman, III  
Madison County Circuit Court Judge  
P.O. Box 1626  
Canton, MS 39046

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

Robert T. Higginbotham, Jr.  
Massey, Higginbotham, Vise & Phillips, P.A.  
P.O. Box 13664  
Jackson, MS 39236

THIS, the 12<sup>th</sup> day of January, 2010.

  
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C. MAISON HEIDELBERG

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ADDENDUM TO REPLY BRIEF OF APPELLANT STROUD CONSTRUCTION, INC.

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## CONTRACT FOR THE CONSTRUCTION OF A DWELLING

THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT. YOU MAY WANT LEGAL ADVICE BEFORE SIGNING.

In consideration of the mutual promises contained herein, the undersigned STROUD CONSTRUCTION, INC. (hereinafter "Builder") agrees to build a dwelling and convey to the undersigned Mr. & Mrs. Bill Walsh (hereinafter "Buyer"), who agrees to buy, the herein described property on the terms and conditions stated below.

1. DESCRIPTION OF WORK: Builder agrees to construct on Lot 8, Block/Section --, Lake Caroline subdivision, Part --, Madison County, Mississippi, fronting on Carolina Point Boulevard, a dwelling according to Architect Robert Moore hereinafter referred to as "Plans" and also according to the attached Description of Materials and/or List of Allowances, herein referred to as "Specifications". The Plans and Specifications are hereby made a part hereof by this reference.

2. PRICE: The <sup>estimate</sup> ~~contract~~ price for the construction is: \$752,145.00

	Payable as follows:	Balance of Cost and Builder's Fee
(a)	Certified or Cashiers Check at closeout, subject to adjustments and proration:	\$ <u>remaining</u>
(b)	This contract is contingent on property appraising for at least the "PRICE" and Buyer qualifying for a new ( ) Conventional ( ) FHA ( ) VA loan in the amount of:	\$ <u>N/A</u>
		\$ <u>N/A</u>

Should Buyer fail or refuse within five days of this contract to apply for such loan, or refuse to diligently pursue loan approval, or fail or refuse within seven days after the issuance of an unconditional loan commitment, to execute all documents necessary for said loan, Buyer shall be considered in default under the terms of this contract and Builder shall have such recourse as is delineated in paragraph 11 hereof.

(c) FHA/VA CLAUSE: It is expressly agreed that, notwithstanding any other provisions of this contract, the Buyer shall not be obligated to complete that purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the Builder has delivered to the Buyer a written statement issued by the Federal Housing Commissioner/Department of Veterans Affairs setting forth the appraised value of the property (excluding closing costs) of not less than the contract purchase price, which statement the Builder hereby agrees to deliver to the Buyer promptly after such appraised value statement is made available to the Builder. The Buyer shall however, have the privilege and option of proceeding with the consummation of the contract without regard to the amount of the appraised valuation made by the Federal Housing Commissioner/Department of Veterans Affairs. The appraised valuation is arrived at to determine the maximum mortgage the Department of Housing and Urban Development will insure or the Department of Veterans Affairs will guarantee. HUD does not warrant the value or the condition of the property. The Buyer should satisfy himself/herself that the price and the condition of the property are acceptable.

### 3. CERTAIN COSTS PAID BY:

(a) Builder shall pay all costs of construction, including, but not limited to: labor and materials to construct the house according to the Plans and Specifications, construction loan costs and all insurance prior to closing.

(b) At Permanent Loan Closing, the costs shall be paid as follows: (S for Builder; B for Buyer; N/A if not applicable)

Discount:	<u>B</u>	Origination Fee:	<u>B</u>	Appraisal:	<u>B</u>
Flood Certificate/Study:	<u>N/A</u>	Loan Title Insurance:	<u>B</u>		
Loan Transfer Fees:	<u>B</u>	Lease Transfer Fees:	<u>N/A</u>		
FBI/FHA MIP/VA Funding Fee:		Attorney Settlement Fee	<u>B</u>		
Certificate of Title and transfer instrument:	<u>B</u>				
Other Closing Costs:	<u>B</u>				

Walsh R.E. 0006

Prepaid and Escrow items by Buyer. Owner Title Insurance by Buyer, if desired. If VA, FHA or other government regulations require any different assessment of costs, the parties agree that such regulations supersede the terms of this paragraph and shall be binding on the parties.

4. DEPOSIT: Buyer has deposited with Builder the sum of \$ N/A cash/check as earnest money, which will be held in a non-bearing account. The same is to be applied to the cash down payment on closing of this transaction.

5. (a) CLOSING DATE: (1) if this sale is by new first loan, closing shall be within seven days after unconditional loan commitment or substantial completion as defined in paragraph 14 hereof, whichever occurs last. (2) if this sale is by cash, closing shall be within seven days after delivery of certificate of title and proposed warranty deed/lease assignment.

EXHIBIT  
PLAINTIFF

000001

6. **INSURANCE:** Builder shall maintain all insurance prior to closing. Buyer shall provide new policies at closing.

7. **PRORATION:** Ground rent, property taxes, interest, maintenance fees, and other expenses of the property, are to be prorated as of the closing date.

8. **SPECIAL PROVISIONS:** (a) Addendum ( ) is. ( ) is not attached; (b)

9. **TITLE AND CONVEYANCE:** If a sale of real property is involved on property now owned by Builder, Builder is to convey title by General Warranty Deed/Lease Assignment and provide Buyer with a Certificate of Title prepared by an attorney upon whose Certificate Title Insurance may be obtained from a title insurance company qualified to do and doing business in the state of Mississippi. Builder shall, prior to or at closing, satisfy all outstanding mortgages, deeds of trust and special liens affecting the subject property which are not specifically assumed by Buyer herein. Title shall be good and marketable, subject only to the following items recorded in the Chancery Clerk's office of said County: easements without encroachments, applicable zoning ordinances, protective covenants and prior mineral reservations; otherwise Buyer, at his option, may either (a) if defects cannot be cured by designated closing date, cancel this contract. In which case all earnest money deposited shall be returned, (b) accept title as is, or (c) if the defects are of such character that they can be remedied by legal action within a reasonable time, permit Builder such reasonable time to perform his curative work at Builder's expense. In the event that the curative work is performed by Builder, the time specified herein for closing of this sale shall be extended for a reasonable period necessary for such action. Builder represents that the property may be legally used as zoned and that no government agency has served any notice requiring repairs, alterations or corrections of any existing condition except as stated herein.

10. **BREACH OF CONTRACT:** Specific performance is the essence of this contract, except as otherwise specifically provided for in paragraphs 4, 10, and 16 hereof and as further delineated below:

(a) in the event of breach of this contract by Buyer, Builder at his option may either: (1) accept the earnest money deposit as liquidated damages and this contract shall then be null and void, or (2) enter suit in any court of competent jurisdiction for damages, giving credit on said damages for the said earnest money deposit, or (3) enter suit in any court of competent jurisdiction for specific performance, if Builder accepts the earnest money deposit as liquidated damages; or if Builder litigates for additional damages in any court of law.

(b) in the event of breach of contract by Builder, Buyer at his option may either: (1) accept the return of the earnest money deposit and cancel the contract, or (2) enter suit for damages in any court of competent jurisdiction, or (3) enter suit in any court of competent jurisdiction for specific performance in the event of breach of contract by Builder.

(c) if it becomes necessary to insure the performance of the conditions of this contract for either party to hire legal counsel then the defaulting party agrees to pay reasonable attorney's fees and court costs in connection therewith.

11. **SURVIVAL OF CONTRACT:** All express representations, warranties and covenants contained herein shall survive closing except where herein specified to the contrary. All other contractual obligations shall terminate with the closing.

12. **CHANGES IN THE WORK:** Changes in the work as agreed upon in writing by the parties shall be paid to Builder on the basis of the actual cost of materials and labor plus fifteen percent (15%). **CHANGES IN CONSTRUCTION:** Buyer acknowledges that Buyer has reviewed the plans and specifications attached hereto and agrees that construction shall be completed in accordance with the terms of such plans and specifications. Any changes in the work which Buyer may make shall be evidenced by a change order executed by Buyer and any additional payments due as a result of the change order will be paid by Buyer immediately upon execution of the change order. Builder shall have no responsibility for making changes in the work unless Buyer has executed a change order on forms acceptable to Builder and made any payments which Builder may reasonably require as a result of the change order. Extensions of time may be applicable with each change order and any delays beyond the time specified for completion in Paragraph 13 as a result of change orders shall not constitute a default on the part of Builder.

13. **TIME:** Builder shall begin project within ten (10) days of contract or mortgage approval, whichever is later, and commence construction within ten (10) days after the issuance of the building permit and proceed with due diligence. Builder agrees to exercise its best efforts to cause construction to be substantially complete within One year (365) days from the issuance of the building permit. However, such time shall be extended for a reasonable period of time as a result of any act or neglect of Buyer or any employee, agent, contractor, or licensee of Buyer, or by changes in the work ordered by Buyer or by labor or materials delivery problems, adverse weather conditions or any other cause beyond Builder's control. Builder shall notify Buyer in writing of such delay within 48 hours of the end of such delay. For all purposes of this contract, the term "substantial completion" shall mean completion of construction to the stage that the Buyer may safely occupy, and utilize the improvements for residential purposes. Such items as final touch-up, finishing, landscaping, and minor installations shall not prevent improvements from being substantially complete.

14. **TERMITE WARRANTY:** Builder shall furnish Buyer, prior to or at closing, a certification from a licensed reputable termite control company, that subject property has been treated against termites or other wood destroying insect infestation.

15. **RISK OF LOSS:** This contract is further conditioned upon delivery of the improvements as contracted for and in the event of material damage by fire or otherwise, before closing, Buyer may declare this contract void and shall be entitled to the return of his earnest money, or Buyer may elect to complete the transaction in accordance with this contract provided the property is restored by Builder at Builder's expense prior to closing. Builder agrees to keep the subject property insured against fire and extended coverage risks until closing.

16. **SUPERVISION:** All supervision of construction and work on the property shall be under the exclusive control of Builder. Builder may employ such subcontractors, employees, laborers, materialmen and other parties as Builder may deem necessary or appropriate for completion, of construction. Buyer may make such inspections and entries on the property as Buyer may desire provided that all such inspections and entries shall be at Buyer's sole risk. Builder shall not be responsible for the safety or welfare of Buyer, its employees, agents, licensees, family members or guests and Buyer releases Builder from all such responsibility or liability.

17. **AGREEMENT OF PARTIES:** This contract incorporates all prior agreements between the parties, contains the entire and final agreement of the parties, and cannot be changed except by their written consent. Neither party has relied upon or shall be bound by any terms, conditions, statements or representations made by the other party or the agents bringing the parties together not contained herein. Each party acknowledges that he has read and understands this contract. This contract shall be governed by the laws of the state of Mississippi. If any provision of this contract is invalid or unenforceable, the other provisions herein shall remain in full force and effect and shall be liberally construed in order to effectuate the purpose and intent of this contract. The provisions of this contract shall apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto. Gender and number, as herein used, shall be changed as the context may require. Each party acknowledges receipt of a duplicate original hereof. Agents assume no responsibility for the performance of this contract by either party hereto or for the condition of the property. Handwritten provisions inserted in this form shall supersede any and all typewritten provisions in conflict therewith, and typewritten provisions shall supersede conflicting printed provisions. The facsimile transmission of a signed copy hereof to the other party, followed by an acknowledgement of receipt sent by facsimile transmission, shall constitute delivery of a signed document. The parties agree to confirm such delivery by immediately mailing a signed copy to the other party. 402

18. **BUYER'S STATEMENT:** Buyer understands that expansive soils/clays caused foundation problems in certain areas of Mississippi. [ ] Buyer/ [ ] Builder assumes the responsibility of having the subject property tested and/or inspected to determine if expansive soils/clays are present. Buyer agrees to hold harmless Builder and all agents or brokers from any and all liability on account of expansive soils or clays.

BUILDER:

BUYER:

STROUD CONSTRUCTION, INC.

BY: T. LANCE STROUD  
T. LANCE STROUD, President

William A. Walsh  
NAME

242 OVERLOOK PLACE  
ADDRESS

NAME

Jackson, MS 39212

P.O. Box 1631  
ADDRESS

501-372-2549  
TELEPHONE

Jackson, MS 39216  
981-9605 (H) 355-6542 (W)  
TELEPHONE

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