

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 APPELLANT STROUD CONSTRUCTION, INC.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Supreme Court and/or Court of Appeals may evaluate possible disqualification or recusal.

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



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

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34 of the Mississippi Rules of Appellate Procedure, Appellant Stroud Construction, Inc. requests oral argument. Even according to the undisputed evidence, there is no viable explanation for why the Walshes simply refused and failed to pay the final construction bill nor why that failure has been validated by the Court below. The verdict was in error on this basis alone and Stroud Construction, Inc. requests oral argument to detail the law and facts supporting its appeal.

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STATEMENT OF THE ISSUES

- (A) Whether the jury verdict in favor of the Walshes in the face of uncontradicted evidence that the Walshes had *not* paid the final construction invoice (yet had paid all others) was against the overwhelming weight of the evidence;
- (B) In light of (A), whether the trial court erred in denying Stroud Construction, Inc.'s motion for directed verdict and/or peremptory instruction declaring the contract to be a cost-plus contract, which would have necessitated a verdict for Stroud on the breach of contract claim due to the Walshes' failure to pay the last invoice; and
- (C) Whether the trial court committed error in refusing Stroud Construction, Inc.'s motion *in limine* to require that the contract be referred to and characterized as a cost-plus contract and simultaneously preclude references that attempted to mis-characterize the contract as something else, which if granted, would have necessitated a verdict in favor of Stroud on the breach of contract claim, particularly in light of (A).

STATEMENT OF THE CASE

A. Nature of the Case

On December 3, 2003, Stroud Construction, Inc. ("Stroud"), filed suit against Bill and Cindy Walsh for breach of contract. (R. 000012.)¹ Stroud sought damages because it had built the Walshes' luxury home at Lake Caroline, and they had failed to pay the final construction invoice. When Stroud sued to collect the final invoice, the Walshes counterclaimed. (R. 000025.) They asserted that certain construction defects existed and sought damages for alleged poor workmanship, primarily to the roof.

During the construction project, the Walshes had routinely and consistently paid each and every monthly invoice submitted by Stroud with one exception. At the end of the project and only then, the Walshes refused to pay the final job invoices and still owed \$127,321.81. (R. 250-268.) This evidence of failure to pay the last invoice is unrefuted, and this single fact necessitates a ruling in favor of Stroud.

B. Course of Proceedings and Disposition Below

The Honorable William Agin presided over a jury trial in the Madison County Court that commenced on June 5, 2007. The jury returned a verdict against Stroud on the breach of contract claim, concluding that *nothing was owed* under the contract even though the undisputed record evidence established that the Walshes had not paid the final \$127,321.81. Through a special verdict form, the jury simultaneously returned a verdict in favor of the Walshes on their counterclaim in the

¹The references to the clerk's file are referred to as R. 000001 - R. 000871, references to hearing and trial testimony are referred to as R. 1 - R. 901, references to trial exhibits are referred to as EX. 000001 - EX. 000690, and record excerpts are referred to as R.E. 1 - R.E. 5.

amount of \$90,000, which reflected a damages award for alleged poor workmanship on the roof. Final judgment was entered on this claim on December 19th, 2007, and that judgment was *not* appealed. (R. 000848.) Hence, the Walshes recovered for the alleged roof problems while Stroud's final invoice remained (and remains) unpaid.

On January 15, 2008, Stroud Construction filed a Notice of Appeal with the Madison County Circuit Court. Stroud Construction appealed the following issues: 1) Whether the trial court erred in denying Stroud Construction's request for a directed verdict and/or peremptory instruction declaring the construction contract to be a cost-plus contract; 2) Whether the trial court committed error in refusing Stroud Construction's motion *in limine* to require that the contract be referred to and characterized as a cost-plus contract and simultaneously preclude references that attempted to mis-characterize the contract as something else; and 3) Whether the jury verdict in favor of the Walshes was against the overwhelming weight of the evidence.

The Honorable Judge William E. Chapman, III, affirmed the trial court. Stroud Construction appeals Judge Chapman's decision because even conceding that parol evidence was properly admissible to interpret the contract between the parties (which the Circuit Court concluded), there is simply no record evidence to explain or justify the Walshes' failure to pay the last invoice for the home. The trial court, the Circuit Court, and the Appellees have all failed to explain how and why the contract price for the Walshes' luxury home was \$127,321.81 *less than what the construction company billed*. The Walshes ignore the issue and simply act as though the agreed upon price for the home was everything that Stroud billed *except the last invoice*.

C. Statement of Facts

a. The Construction Contract and Building Process

The Walshes and Stroud executed a written construction contract in July, 2001. The contract required that Stroud Construction, Inc. build a luxury home for Bill and Cindy Walsh on Lot 8 of Lake Caroline Subdivision. (R.E. 5; EX. 000004.) Pursuant to the contract, Stroud did construct a high-end, 4500 square foot waterfront home and separate boat house to the plans and specifications provided by the Walshes. (R. 000547.)

In turn, the contract obligated the buyers to pay the builder for the actual costs associated with the construction of the house, plus an agreed upon builder's fee of \$52,500, plus an agreed upon "overhead" percentage of 1.25%. (EX. 000548-000549.) During the construction process, and consistent with the standard practice for cost-plus contracts, Stroud regularly submitted detailed monthly billings to the Walshes. (EX. 000009, 000012, 000034, 000050, 000080, 000123, 000145, 000162, 000179, 000201, 000242, 000294, 000368.) The invoices detailed the work completed *and* the cost of the materials and labor. (R. 243-244.) The invoices further reflected the agreed-upon 1.25% overhead charge and a pro-rated contractor charge (based on the contractor fee of \$52,500.) *The Walshes paid each invoice throughout the project until they moved in.* (R. 250-268.)

The contract nowhere sets a "fixed" price for the home. Rather, the contract contains (in paragraph 2) an "estimate" for the price, which was \$752,145.00.² (R.E. 5; EX. 000004.) Notably, the contract's use of the term "estimate price" was in place of the term "contract price" *which was stricken through*. Again, the evidence is undisputed that the Walshes paid the invoices throughout

²A number of estimate worksheets supporting the estimate were completed by Stroud. (EX. 000545-000549.)

the project but "at closeout" refused to pay the "Balance of Cost and Builder's Fee," which was specifically required in paragraph 2 of the contract. (R.E. 5; EX. 000004.)

In support of their position that they were not obligated to pay the last invoices, the Walshes seemed to claim at trial either that the contract had a "cap" or that certain costs should have been "fixed" or alternatively that they were just plain "overcharged." But the record evidence for all of these positions is non-existent, which calls into question how the jury could have rendered a verdict simply relieving the Walshes of the final payment due under the contract.

In other words, there was no evidence that Stroud's documentation and detailed invoices were not a true reflection of the actual costs of building the home. In fact, all evidence was to the contrary,³ and even Bill Walsh⁴ specifically testified that he knew he was paying for construction costs, plus overhead, plus a builder's fee⁵ (which is precisely what the contract requires).⁶ (R. 243.) Effectively, the contract was "capped" by this jury verdict, and yet there is no legal or factual basis for refusing payment of the contract pursuant to its terms. The question is why the jury, the trial Court, and Circuit Court (on appeal) refused to award Stroud the final \$127,321.81 due under the

³Bill Walsh and Ken Lefoldt, the Walshes' expert, unequivocally conceded at trial that all amounts billed by Stroud were actually expended on their home. (R. 263, 273, 617, and 622.)

⁴Bill Walsh has owned a sheet metal contracting business since 1982 and Cindy Walsh has owned an interior decorating firm since 1991. (R. 233 and R. 379.) They obviously are both knowledgeable about the construction industry.

⁵Furthermore, both Bill and Cindy Walsh admitted at trial that the construction contract does not state that the total cost of the home would come within a budgeted cost. (R. 242 and R. 403.)

⁶These applications for payment reflected in detailed form the total costs completed and billed to date. Consistent with the agreement, each monthly application received by the Walshes also stated at the top "Contract for: All costs plus one and a quarter percent plus a set fee." (R. 244 and EX. 000009.)

contract as if there was a contract that simply allowed the Walshes to skip the last payment. Even accepting the Circuit Court's conclusion that parol evidence was properly considered, there is no parol evidence supporting an agreed upon contract price of every invoice Stroud submitted *except the last invoice!*

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. Some of the additions and changes included:

- Adding a "music room" in an unfinished space, which the Walshes ultimately requested to be finished all the way through sheetrock and priming the walls with paint (R. 398);
- Adding at least one arch to the interior of the house, requiring a change in some door positions (R. 381);
- Re-working the finish on the bricks because the Walshes were not satisfied with the color and requested that individual bricks be sanded to achieve a different color effect (R. 494);
- Re-framing the rear of the house after the Walshes requested the installation of a motorized screen for the porch (R. 382);
- Adding a door in the garage (R. 399); and
- Re-vamping many aspects of the boathouse (and the plans for the boat house were not even provided to Stroud until after the contract had been signed and construction had begun) (R. 384.)

This course of conduct in which the owners made changes, even when considered as parol evidence, was consistent with the understanding that the buyer was paying for the actual cost of the home, plus the 1.25% fee, plus the builder's fee. This course of conduct allowed the buyer to control the ultimate plan for the home, which is also consistent with a cost-plus contract, not a "capped" contract. Again, the unanswered question is why the final \$127,321.81 of the contract was simply forgiven? What record evidence – whether it be the terms of the contract or parol evidence – supports a contract price of everything Stroud billed except the last bill?⁷

What is absent in the trial record, factually and legally, is an explanation of how the Walshes, the buyers, could be entitled to "cap" or "fix" a construction contract price in the scenario in which (a) the contract nowhere allows it, (b) the house plans were evolving as the process moved forward, and (c) some plans were not even available at the time the contract was signed. *See supra* note 7.

b. The Refusal to Pay the Final Invoices

At trial, Lance Stroud testified that Mr. Walsh told him several times between September, 2002, and January, 2003, that the Walshes *would pay* the amount they believed was due, which they

⁷ Notably, some of the construction plans were not even provided to Stroud until *after* the contract was signed and after construction began. For example:

- Electrical plans were not provided to Stroud until after the budget had been prepared and construction had begun (R. 380); and
- The boathouse plans were prepared by Cindy Walsh and changed numerous times, but the original plans were not provided to Stroud until after the contract had been signed and construction had begun (R. 384.)

Were the contract "capped" or "fixed," all plans necessarily would have been prepared before the contract was finalized.

said was \$124,484.77.⁸ (R. 482-483.) Mr. Walsh did not deny at trial telling Lance Stroud that he would pay the final invoice and admitted that he never told Mr. Stroud that he was not going to pay him. (R. 268-69.) Even so, the Walshes never paid the amount due, resulting in Stroud's filing of this lawsuit. (R. 272.)

The Walshes' counterclaim against Stroud asserted various breach of contract and negligence claims. (R. 000025.) The counterclaim, under which the Walshes *did recover*, was essentially a claim of inadequate workmanship as to the roof and a few other items concerning the home. Because the Walshes recovered on the claim for poor workmanship, it is even more incumbent on this Court to ensure that Stroud be paid the final invoice.

SUMMARY OF THE ARGUMENT

The construction contract and the worksheet estimates provided that the price was to be cost of materials and labor, plus a 1.25% overhead fee, plus a flat builder's fee of \$52,500. The parties conduct during the course of the home construction confirmed the arrangement, to the extent it needed confirmation. That is, Stroud submitted monthly detailed billing reflecting the costs incurred during the prior period, plus the 1.25% fee, plus the pro-rated portion of the builder's fee of \$52,500.

Not until the project was completed did the Walshes ever fail to pay the monthly "cost-plus" invoices. Just as Stroud was obligated by the jury verdict to correct the workmanship issues (through the payment of damages in the amount of \$90,000), the Walshes must be required to fulfill the

⁸ Pursuant to the contract that required "balance of cost and builder's fee" to be paid "at closeout" (R.E. 5, EX. 000004), Stroud sent a final certificate for payment in September, 2002. On November 12, 2002, Cindy Walsh provided Stroud with a "reconciliation" of what she believed the correct balance to be. (R. 267.) She claimed that the outstanding balance was \$124,484.77. (R. 267.)

contract and pay the remaining \$127,321.81 due under the parties' construction contract as there is no dispute that the Walshes did not pay the final invoice. There is no basis in this record or in the law for refusing to award Stroud the money due under the contract. Moreover, there is no record support for a construction contract price that consisted of everything Stroud billed *except the final invoice*.

ARGUMENT

A. Standard of Review

Stroud contends that the jury verdict was against the overwhelming weight of the evidence. Because it was undisputed that the Walshes did *not* pay the final invoices, the jury could only have found against Stroud by concluding that the construction contract was "capped" or "fixed" at an amount certain. Such a finding was against the overwhelming weight of the evidence. In assessing Stroud's alternative position that the jury rendered an improper verdict, this Court must consider the evidence in the light most favorable to the non-movant. *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006). Under this standard, if the facts point overwhelmingly in favor of the movant *such that reasonable people could not have arrived at a contrary verdict*, this Court must reverse and render. *Id.*

Also, the trial court should have ruled peremptorily, as requested, that the construction contract was a cost-plus contract. This contract characterization would have required that Stroud be paid for the last invoice. The Court's refusal to direct its ruling on this issue must be reviewed *de novo*. In other words, denials of requests for peremptory instructions and motions for a directed verdict are reviewed *de novo*. *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006.)

Finally, the trial court should have granted Stroud's motion *in limine* to require that the contract be characterized and referred to as a cost-plus contract and to preclude references that attempted to mis-characterize the contract. An appellate court examines a trial court's decision to allow evidence, including motions *in limine*, under an "abuse of discretion" standard. *Fitch v. Valentine*, 959 So. 2d 1012, 1022 (Miss. 2007).

B. The trial court erred in refusing to rule that the contract was a cost-plus contract that the Walshes had failed to pay.

At the close of the Walsh's evidence, Stroud requested a directed verdict that the contract was cost-plus. (R. 758.) Stroud renewed this motion at the conclusion of it's own evidence as the counter-defendant. (R. 810.) The lower Court did not rule that the Walshes had breached the contract by their failure to pay the last invoice. (R. 771.) Rather, the trial court submitted the issue to the jury even in the face of unrefuted evidence that the Walshes had not paid the last invoice. On appeal, the Circuit Court found that the trial court properly allowed the jury to consider parol evidence to interpret the contract and yet did not attempt to explain how – even considering parol evidence – any fact finder could support a verdict that the contract price was everything Stroud billed *except the final invoice*.

There was no dispute that the Walshes had failed to pay the final invoice. Yet the contract did *not* state that the Walshes could forgo the final payment. It did not entitle the Walshes to a \$127,321.81 credit. The jury's decision, the trial court's decision, and the Circuit Court's decision remain unexplained as to this key issue.

Admittedly, the contract contained an “estimate” line. But it did not contain a “cap.” It had no “fixed” price. So factually and legally, Stroud was (and still is) owed the final invoice (shortfall) of \$127,321.81. There is simply no basis on this record to deny Stroud what is due under the contract terms regardless of whether parol evidence is considered or not considered.

In refusing to direct a verdict for Stroud or instruct the jury that the Stroud-Walsh contract was a cost-plus contract, the trial court may have relied on *Shaw v. Bula Cannon Shops*, 38 So. 2d 916 (Miss. 1949.) (R. 771.) In *Shaw*, the Court ruled that a contractor operating under a cost-plus contract has a duty to keep accurate and correct accounts of all material used and labor performed so that the owner may have sufficient information to assess whether the work claimed to be done was actually the work done. In *Shaw*, payment was *not* required because, “through needless extravagance, waste and negligence or lack of supervision a very large percentage of the materials charged against the work never found their way into the completed structure.” *Id.* at 918-19.

But *Shaw* plainly *supports* Stroud’s claim for payment. The record is undisputed that Stroud submitted detailed monthly invoices (as is typical in cost-plus contracts), all of which the Walshes paid until the end of the project. (R. 250-268.) Most importantly for purposes of the *Shaw* analysis, the record is undisputed that Stroud’s invoices adequately reflected charges for work on this project. The Walshes admitted as much. Bill Walsh testified that the amounts billed by Stroud were for amounts actually expended on their home. (R. 263 and 273.) Similarly, the Walshes’ expert accountant, Ken Lefoldt, specifically testified that Stroud’s monthly statements sufficiently documented how the money on the home was spent.⁹ (R. 617.) Neither of the Walshes testified that

⁹While Mrs. Walsh broadly complained that at times the labor cost seemed too high, she also testified that she had documented the labor hours charged for a six-week period and found

Stroud expended any money on materials or labor not specifically called for in the plans or requested by them. The trial record is devoid of any fact evidence of the type that drove the finding in *Shaw* that justified the buyer's non-payment of construction invoices. To the contrary, the record is undisputed that the invoices were well-documented and reflective of work performed on the construction project. (R. 273.)

The only way the jury, the trial court, and the Circuit Court could deprive Stroud of the final payment is by characterizing the contract as "fixed." But it was not. The contract itself nowhere says it is fixed. Also, considering parol evidence, the contract had to be a cost-plus contract without any "cap" or "fixed" guarantee because:

- Stroud documented his file and invoices and provided detailed bills to the Walshes which was only necessary if the Walshes were paying the costs of the construction and the labor. In other words, if the total price were fixed or capped, the Walshes did not need monthly invoices with all of the details as to the costs of the materials and labor.
- Bill Walsh admitted at trial he knew they were responsible for paying construction costs, overhead, and a builder's fee. (R. 243.)
- Cindy Walsh testified that in the very beginning stages of construction she became concerned about the cost of framing exceeding the amount estimated by Stroud, and

that the amount of time claimed was consistent with the amount of time the workers spent at the property. (R. 401; EX 000592.) Regardless, Mrs. Walsh had no expertise to conclude that the labor costs were inordinate, and no expert was produced to prove that point, if that is what was contended.

began to ask Stroud to provide time sheets for the framers. (R. 460.) If Mrs. Walsh thought she was not responsible for any amount over the estimate price in the contract, then the framing overages should have been of no concern to her.

- Cindy Walsh also testified that she began keeping a calendar of laborers present at the construction site because she thought she was being overcharged for labor. Mrs. Walsh found no discrepancy between her calendar and actual charges submitted by Stroud. (R. 401.) Again, if Mrs. Walsh believed they were paying no more than the estimated cost or some fixed cost then she would not have been worried about paying excess labor charges.
- Cindy Walsh admitted that nothing in the contracts says the estimated price is a ceiling or a cap on the final price of the house. (R. 403.)
- Bill and Cindy Walsh both testified that they went over Stroud's monthly payment applications very carefully. (R. 263 and R. 385-386.) If the contract was a fixed price contract, there would be no reason to even read the applications for payment because the price would have been fixed.
- Bill Walsh specifically agreed that all costs billed by Stroud were expended on his home. (R. 273.) The Walsh's financial expert, Ken Lefoldt, also testified that he was "very comfortable" with the amount billed by Stroud, as it pertains to the documentation of the expenditures. (R. 617.) Again, the detailed nature of the record keeping by Stroud, coupled with the "checking" by the Walshes and their experts, indicates that cost mattered, which dictates a contract that was "cost plus,"

not a contract that was fixed price.

- Ken Lefoldt stated that he was very impressed with Stroud's job cost system. (R. 622.) Stroud's providing detailed bills to the Walshes for their consideration is typical of a cost-plus contract. The Walshes would not have needed or cared to review any record of material and/or labor costs had the contract been one for a fixed price.
- Electrical plans were not provided to Stroud until after the budget had been prepared and construction had begun. (R. 380.) How could Stroud have fixed the price or agreed to cap any cost if the plans were not even completed?
- The boathouse plans were prepared by Cindy Walsh and changed numerous times, but the original plans were not provided to Stroud until after the contract had been signed and construction had begun. (R. 384.) Again, a fixed price could not have been provided if the plans were not completed before the contract was signed.
- A "music room" was added to an unfinished space, which the Walshes ultimately requested to be finished all the way through sheetrock and priming the walls with paint. (R. 398.) If the contract price was fixed upon signature of the contract, how could Stroud have added a music room and been paid for it? And why would Stroud add a music room to a home if he thought he was not going to be paid any more than the "fixed price" that was "fixed" at the time the contract was signed?
- The Walshes were not satisfied with the color of the brick and requested that individual bricks be sanded to achieve a different color effect. (R. 494.) Stroud could

not have made any changes, and certainly not significant changes if the contract had been for a fixed price.

- Stroud had to re-frame the rear of the house after the Walshes requested the installation of a motorized screen for the porch. (R. 382.) This change would have been preceded by a change order if the contract was one for fixed price. Because no change order exists, it evidences that the parties were working under a cost-plus arrangement.

Again, if the justification for denying Stroud the shortfall is that the contract price was “fixed” or “capped,” the question is: where does the contract reflect that cap? And as importantly, what is the cap?

It is true that the contract contains an “estimate” price of \$752,145. However, the contract clearly calls that number an “estimate.” Moreover, the record establishes that the Walshes paid *more than* \$752,145, so they cannot contend that the contract price was fixed at the estimated amount – otherwise, they would never have paid more than that amount. That is, the total payments by the Walshes were \$659,009.08 paid directly to Stroud and \$196,059 paid directly to vendors by the Walshes.¹⁰ (R. 620 - 622) The total payments were, therefore, \$855,068.08. (R. 620 - 622) So any conclusion that Stroud and the Walshes entered into a fixed price contract or a capped contract is patently inconsistent with the record evidence because the Walshes (a) cannot identify what the cap is; (b) cannot specify where the contract identifies the amount of the cap; and (c) cannot explain why they paid an amount different than the alleged cap (*i.e.*, the contract’s estimate). In short, the

¹⁰The items paid directly by the Walshes were included expenses in the contract estimate price. (R. 620 - 622.)

Walshes seem to have convinced the jury to rule for them on the vague theory they were “charged too much.” But there is no contractual justification nor legal justification for refusing Stroud his contract price merely because the Walshes now think they paid too much or were charged too much.

To explain why this contract was *not* a cost-plus contract at trial, the Walshes also seemed to rely on *Baylot v Habeeb*, 147 So. 2d 490 (Miss. 1962.) They argued that when parties disagree as to the meaning of “estimated costs,” it indicates the contract is ambiguous and its meaning should therefore be submitted to the jury. But the “mere fact that parties disagree about the meaning of a contract does not make the contract ambiguous as a matter of law.” *One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1162 (Miss. 2007), *Turner v. Terry*, 799 So. 2d 25, 32 (Miss. 2001), *Cherry v. Anthony*, 501 So. 2d 410, 419 (Miss. 1987.)

Moreover, the fact record does not evidence a genuine disagreement about the meaning of the contract. The Walshes at all times complied with the terms of the contract until the end of the project when they became dissatisfied on some workmanship issues (which they were compensated for through their counterclaim). The contract is a cost-plus contract, and even considering extrinsic evidence, it is clear the parties acted consistently with the contract terms during the course of the home’s construction by (a) submitting detailed cost-plus invoices (Stroud), and (b) paying the invoices (Walshes). There is no explanation in the record of any kind supporting a fixed price of \$855,068.08 or a fixed price of everything Stroud billed *except the final invoice*.

Cindy Walsh attempted to characterize the construction contract as a fixed price contract at trial (R. 396), but that testimony does not create an ambiguity in the plain language of the contract. *One South* at 1162. Even if it did, what was the fixed price? And where is this alleged “fixed” price

recorded or agreed to by the parties? The very first rule of contract interpretation is that the legal intent of the document should first be sought by an objective reading of the contract language. *Id.* 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 with this understanding. In short, the Court should have directed a verdict for Stroud on the breach of contract claim, and the jury verdict to the contrary was against the overwhelming weight of the evidence. This conclusion is inevitable regardless of whether this Court does or does not consider parol evidence.

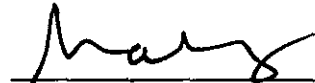
C. The Trial Court erred in denying the Motion *in Limine* about the manner in which the witnesses could characterize the contract.

Prior to trial, Stroud filed a motion *in limine* requesting that the trial court characterize the construction contract as a cost-plus contract and exclude any testimony attempting to characterize the contract as fixed price. (R. 191.) The trial court denied the motion. Stroud contends that for the reasons set for above (*Supra* B), that the Court should *not* have allowed testimony that misconstrued the plain language of the contract. Because the motion *in limine* was denied, Cindy Walsh and Ken Lefoldt attempted to vaguely characterize the contract as a “fixed price” contract but were never required to identify that “fixed” price. (R. 396 and R. 624.) This mis-characterization was obviously confusing to the jury as evidenced by its verdict. Therefore, the trial court abused its discretion by allowing this testimony, and the error had a clear effect on the verdict that precluded Stroud from recovering the last invoice of \$127, 321.81.

CONCLUSION

After the verdict, the trial court aptly explained the jury's rationale as follows: "it would appear the jury has concluded that the – either the payments were not otherwise properly credited that were made by the Walshes and also that the Walshes should not be held liable for any – any obligations above that which they have paid Mr. – Stroud Construction to this point." (R. 890.) Judge Agin accurately stated the only rationale that could have driven the verdict, but this rationale cannot support a verdict against Stroud, which is why Stroud has appealed. 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 already paid. The Walshes are not justified in refusing to pay the final invoice. 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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Phone: (601) 351-3333
Fax: (601) 956-2090

CERTIFICATE OF SERVICE

I, Susan S. Copeland, 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 US 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 39232

THIS, the 25 day of September, 2009.



C. MAISON HEIDELBERG