

**IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

CHARITY HOHM-WHALEY

PLAINTIFF-APPELLANT

V.

CAUSE NUMBER: 2010-TS-00020

**FREDDIE PARSON DBA
PARSON CONSTRUCTION COMPANY**

DEFENDANT-APPELLEE

**Appeal From the Circuit Court of Warren
County, Mississippi**

**BRIEF OF PLAINTIFF-APPELLANT
CHARITY HOHM-WHALEY**

NO ORAL AGRUMENT

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PARSON CONSTRUCTION COMPANY**

DEFENDANT-APPELLEES

CERTIFICATE OF INTERESTED PERSONS

I, B. Ray Therrell, II, Attorney for Charity Hohm-Whaley, hereby certifies that
the following listed persons have an interest in the outcome of this case.

Charity Hohm Whaley.....Appellant
822 Main Street
Vicksburg, Mississippi 39183

Freddie Parson.....Appellee
Parson Construction Company
539 Hugo Street
Vicksburg, Mississippi 39183

B. Ray Therrell, II, (MSB No. 99958).....Attorney of Record for Appellant
Mississippi Employment Security Commission
Post Office Box 1699
Jackson, Mississippi 39215-1699

Wren Way.....Attorney of Record for Appellee
P.O. Box 1113
Vicksburg, Mississippi 39183

Honorable Isadore W. Patrick
Warren County Circuit Court Judge
P.O. Box 351
Vicksburg, Mississippi 39183

Dated this the 27th day of August, 2010.

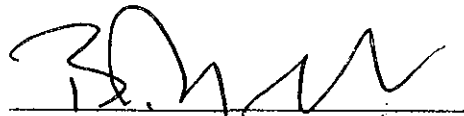

B. Ray Therrell, II
Attorney of Record for Appellant

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STATEMENT OF ISSUES

1.

Whether the Warren County Circuit Court erred in granting the Appellant a Judgment not Withstanding the Verdict or granting a new trial.

2.

Whether the County Court of Warren County erred in not considering the all the evidence presented regarding the breach of contract by the Appellee when awarded the judgment for the Appellant.

STATEMENT OF THE CASE

On November 12, 2003, Charity Hohm-Whaley (also hereafter referred to as "Appellant") entered into a contract with Freddie Parson d/b/a Parson Construction Company (also hereafter referred to as Appellee) to perform services to a historic guest house located at the Appellant's home. Under the terms of the contract, dated November 12, 2003, the Appellee was to perform three main tasks:

1. Renovation of the windows on the guest house;
2. Repair/replacement of the roof of the guest house along with cornice work matching the windows of the building; and
3. Brick and masonry work on the exterior and interior of the window facing. (Vol. 1, p. 8).

The original contract price was \$13,000.00. The Appellant was to tender a down payment of \$9,000.00 with an additional \$2,000.00 when the roof and cornice material were delivered and \$2,000.00 at the finish of the renovation. (Vol. 1, p. 8) (Vol. 2, p. 5). This renovation was required to be completed in order for the Appellant to retain her home owner's insurance. (Vol. 2, p. 7). The guest house

being renovated is approximately 170 years old. Therefore, certain specifications must be met in order to have the renovation approved. Vol. 2, p. 7-9, 67). The work was to be completed by December 20, 2003.

In fact, the Appellant refinanced her house in order to have the work done. (Vol. 2, p. 7). She paid a down payment of \$9,000.00 and an additional payment of \$2,000.00 of the contract price, totaling \$11,000.00. Appellee replaced the roof and performed some masonry work. However, the windows for the building were never bought or installed, and much of the work performed was defective and incomplete.

On October 5, 2006, the Appellant filed a Complaint against the Appellee for breach of contract, tortuous breach of contract, and a breach of duty of good faith and fair dealing under the terms of the contract, executed on November 12, 2003. (Vol. 1, p. 5-3).

A hearing was held on July 11, 2007, before Honorable John S. Price, Jr., County Court Judge for Warren County, Mississippi. (Vol. 2, p. 2-135). On July 18, 2007, the County Court awarded the Appellant the amount of \$1,500.00, plus interest. (Vol. 1, p. 13). Counsel for the Appellant, Eugene A. Perrier, filed a Motion for a judgment notwithstanding the verdict (J.N.O.V.), and/or new trial on July 26, 2007. (Vol. 1, p. 14-16). On January 23, 2008, this motion was denied. (Vol. 1, p. 29).

On February 22, 2008, present counsel for the Appellant, B. Ray Therrell, II, filed an appeal of the denial to motion to grant the Appellant a J.N.O.V. and /or new trial to the Warren County Circuit Court. (Vol. 1, p. 30-31). On November 23, 2009, Judge Isadore Patrick, Warren County Circuit Court Judge, affirmed the decision of

the County Court of Warren County and the denial of the Motion. (Vol. 1, p. 38-40).

On December 23, 2009, the Appellant filed an appeal to this Honorable Court.

SUMMMARY OF THE ARGUMENT

This appeal is taken on the Order of the Warren County Circuit Court denying the Appellant a J.N.O.V. and new trial in this matter. The Circuit Court's Order affirming the judgment of the County Court of Warren County awarding the Appellant may have ruled upon under the applicable law in this matter, but the Courts' application of the law to the facts of this matter are incorrect. In the present case, the testimony and evidence presented before the County Court showed a clear breach of duty and good faith on the part of the Appellee. At the hearing, the Appellant testified that although a roof was placed on the building, there still was rotten wood present and the roof leaked. In addition, while some masonry work was done, the testimony and evidence reveals that it was never completed. Most important, the windows were never installed on the building. In fact, they the windows were never purchased.

It is the contention of the Appellant that by affirming the Judgment of the County Court, the Circuit Court erred by failing to take in consideration the overwhelming evidence supporting the need for not only a new decision, but a new hearing to properly examine the facts to determine proper damages. Although the Courts found the Appellee had breached the contract., the Circuit Court Order and the County Court Judgment essentially sets off the \$2,000.00 of the initial contract price and gives credit to the Appellee without the Appellee asserting any such claim or

defense. In fact, the record tends to indicate that the County Court also essentially raised the defense of inability to perform the contract without the Appellee raising or pleading such defense. While it is understandable that the Courts want to place the Appellant in a position she would have been in before the breach, the application of the law does not remedy the Appellant's situation given the entire facts of this matter.

Furthermore, the Courts failed to consider the lack of evidence of how and where the \$11,000.00 paid on the contract was spent, or where the additional \$3,000.00 the Appellee testified he was holding for the windows calculated into the judgment, especially, given the fact that the windows were not purchased or installed.

Even if the Courts felt the Appellee had performed part of the contract, the fact remains that no windows were ever installed or even delivered to the Appellant's residence. The Appellant paid \$11,000.00 on the \$13,000.00 contract and had a reasonable expectation of having windows placed in the guest house, or at the very least, delivery of the windows to her property or a reasonable refund of the money she had already tendered pursuant to the contract.

ARGUMENT

1.

Whether the Warren County Circuit Court erred in granting the Appellant a Judgment not Withstanding the Verdict or granting a new trial.

2.

Whether the County Court of Warren County erred in not considering the all the evidence presented regarding the breach of contract by the Appellee when awarded the judgment for the Appellant.

(Since the Circuit Court Order mirrors the Judgment of the County Court of Warren County, Counsel for the Appellant has combined both issues into the Argument.)

In the present case, it is clear the Appellee breached the contract for renovation of the out building located on the Appellant's Vicksburg property. However, what is in dispute is the damages awarded to the Appellant in the amount of \$1,500.00. The Circuit Court cites Theobald v. Nosser, 752 So. 2d 1036 (Miss. 1999), stating its purpose is to place the injured party in the same position as if the breach had not occurred. In affirming the order and not granting a new trial, Circuit Court erred by failing to take in consideration the overwhelming evidence supporting the need for not only a new decision, but a new hearing to properly examine the facts to determine proper damages. The appellant paid \$11,000.00 of the contract price. (Vol. 2, p. 5, 68).

Under the terms of the contract, dated November 12, 2003, the Appellee was to perform three main tasks:

4. Renovation of the windows on the guest house;
5. Repair/replacement of the roof of the guest house along with cornice work matching the windows of the building; and
6. Brick and masonry work on the exterior and interior of the window facing. (Vol. 1, p. 8).

The roof was completed before the December 20, 2003 deadline. (Vol. 2, p. 9-10). The Appellee then did some work around the exterior windows frames, but never fully completed the work. (Vol. 2, p. 12, 17). The windows were never installed or purchased. (Vol. 2, p. 12, 14, 71).

The Appellee argued that he never installed the windows because he had received an initial quote of \$1,600.00 for the windows, but was later given a much higher quote of \$5,350.00 from Vicksburg Woodworks. (Vol. 2, p. 74). However, the Appellee made no attempt to find new windows or negotiate the price. He further testified that he had set aside \$3,000.00 of the \$11,000.00 to pay for the windows. (Vol. 2, p. 84).

Under Wright v. Stevens, 445 So. 2d 791 (Miss. 1984), the measure of damages is the difference in the contract price and the cost of completing or performing the contract. Moreover, the constructing of a building or renovation in “violation of the contract” is difference from damages for not completing the contract. Wright v. Stevens, 445 So. 2d 791 (Miss. 184). “The measure of damages for defective performance of a contract is generally the costs to the injured party in bringing the subject to the contract within contract’s specifications.” Gerodetti v. Broadacres, 363 So. 2d 265 (Miss. 1978). Based on these rulings, the Circuit Court

affirmed the County Court because they reasoned the Appellant could have the work completed for 3,500.00. (Vol. 1, p. 39). What the Courts fail to take into consideration is the lack of evidence of how and where the \$11,000.00 paid on the contract was spent, or where the additional \$3,000.00 the Appellee testified he was holding for the windows calculated into the judgment, especially, given the fact that the windows were not purchased or installed. It is the contention of the Appellant that the cited cases would properly apply to this matter, but would show that the Appellant would be unable to replace the windows based on the Courts' decisions.

Furthermore, the remaining \$2,000.00 under the contract was to be paid upon completion of the contract. The Circuit Court Order and the County Court Judgment essentially sets off this \$2,000.00 of the initial contract price and gives credit to the Appellee without questioning the giving any Appellee asserting any such claim or defense.

The issue is not whether the Appellee breached the contract, but what damages the Appellant is entitled to receive because of his breach. The Appellee failed to show he did everything in his power to complete the contract. The Appellant is entitled to recover from the Mr. Wren has the burden to show he was willing , yet nothing in the Record would indicates any such readiness or willingness to accept suitable work based on his experience and qualifications.

CONCLUSION

In the instant case, the Appellant is entitled to a judgment based on the measure of work performed by the Appellee and an amount sufficient to allow her to replace the windows that were not installed. The judgment for \$1,500.00 ignores the

testimony and evidence of this matter; and thus, this Honorable Court should reverse and the decision in this matter, and award proper damages to the Appellant.

Respectfully submitted this the 13th day of February 2002.

CHARITY HOHM-WHALEY


B. RAY THERRELL, II

CERTIFICATE OF SERVICE

I, B. Ray Therrell, II, Attorney for the Mississippi Employment Security Commission, hereby certify that I have this day mailed, postage prepaid, and a true and correct copy of the foregoing to the Honorable Wren Way, P.O. Box 1113, Vicksburg, Mississippi 39183, and Honorable Isadore W. Patrick, Warren County Circuit Court Judge, P.O. Box 351, Vicksburg, Mississippi 39183.

This the 27th day of August, 2010.


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